

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2013-0373, State of New Hampshire v. James Dylan Benninghove, the court on July 15, 2014, issued the following order:**

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The defendant, James Dylan Benninghove, appeals his conviction for felony criminal threatening, see RSA 631:4, I(a), II(a)(2) (2007), arguing that: (1) he was charged with a misdemeanor, not a felony; (2) the evidence was insufficient to support the conviction; and (3) the verdict was contrary to the weight of the evidence.

The defendant first argues that the indictment charged him with a misdemeanor, not a felony, because it alleged that he committed the offense by “brandishing” the firearm, rather than “using” it. Therefore, he argues, the trial court erred in denying his motion to sentence him for a misdemeanor.

To sufficiently charge the variant of felony criminal threatening involved here, the indictment must allege that by physical conduct, the defendant purposely placed or attempted to place another in fear of imminent bodily injury or physical contact while using a deadly weapon as defined in RSA 625:11, V. State v. Bird, 161 N.H. 31, 37 (2010); RSA 631:4, I(a), II(a)(2). The term “deadly weapon” includes “any firearm . . . 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).

In State v. Bird, we held that an indictment sufficiently alleged the elements of felony criminal threatening by asserting that the defendant purposely attempted to place the victim in fear of imminent bodily injury or physical contact “by waving [a] forty-five caliber handgun, a firearm and deadly weapon pursuant to RSA 625:11, V, at [the victim] while telling [the victim] to get off of his property.” See State v. Bird, 161 N.H. at 37-38. In this case, the indictment alleged that the defendant “placed or attempted to place [the victim] in fear of imminent bodily injury with a handgun, which is a deadly weapon, by brandishing the firearm at him while driving a car in front of the truck [the victim] was driving,” and that he committed these acts purposely. We conclude that this indictment, like the indictment in State v. Bird, sufficiently alleged

each of the elements of felony criminal threatening. See RSA 631:4, I(a), II(a)(2); State v. Bird, 161 N.H. at 38. We conclude, therefore, that the trial court did not err in denying the defendant's motion to sentence him for a misdemeanor.

The defendant next argues that the evidence was insufficient to support the conviction because it showed, at most, that he pointed the gun at the roof of his car, not toward the victim's truck, and that the victim was not placed in fear of imminent bodily injury or physical contact. To preserve a challenge to the sufficiency of the evidence, the defendant must raise the issue in the trial court. See State v. Wood, 150 N.H. 233, 236 (2003). The record fails to show that the defendant raised a sufficiency of the evidence argument in the trial court. Accordingly, we will not consider the issue on appeal. See id.

Finally, the defendant argues that the trial court erred in denying his motion to set aside the verdict as against the weight of the evidence. "[T]he jury verdict must be an unreasonable one before the trial court may set it aside" as against the weight of the evidence. State v. Spinale, 156 N.H. 456, 466 (2007) (quotation and brackets omitted). "Thus, the trial court should exercise its discretion with caution and invoke its power to grant a new trial only in exceptional cases in which the evidence preponderates heavily against the verdict and where a miscarriage of justice may have resulted." Id. (quotations omitted). "We will uphold the trial court's decision unless it was made without evidence or constituted an unsustainable exercise of discretion." Id.

In this case, the evidence does not preponderate heavily against the verdict. The defendant concedes that the evidence showed that he had a gun in his car, that he engaged in "road-rage," and that he became "unreasonably angry" at the victim. Although there were inconsistencies in the victim's description of the events, he testified that once he calmed down, he wrote an accurate account of what happened in his statement to the police, which was that the defendant threatened him with a gun. "This is not one of those exceptional cases where the jury failed to give the evidence its proper weight. Rather, this was a classic jury case, in which the jury examined and properly weighed the conflicting evidence" to conclude that the defendant committed felony criminal threatening. Id. at 468. Based upon this record, we conclude that the trial court sustainably exercised its discretion in denying the motion to set aside the verdict. See id. at 466.

Affirmed.

Dalianis, C.J., and Hicks, Lynn, and Bassett, JJ., concurred.

**Eileen Fox,  
Clerk**