THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0387

The State of New Hampshire

v.

Foad Afshar

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

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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Cases

ISSUE PRESENTED

Whether the trial court erred when it concluded that two jurors had been biased against the defendant because they were victims of sexual assault as children instead of considering whether the jurors had given false answers during *voir dire* and their motivations for providing any allegedly false answers.

Issue preserved by: the defendant's motion for a new trial, App.[1] 1-29, the State's objection, App. 56-94, the hearing on the motion for a new trial, MHT 1-87, the trial court's order granting the defendant's motion, Supp. 3-15, the State's motion for reconsideration, App. 95-114, and the trial court's order on the motion for reconsideration, Supp. 1-2.

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[1] Supp. refers to the supplement attached at the end of the State's opening brief.
App. refers to the separately bound appendix filed with the State's opening brief.
MHT refers to the transcript of the February 22, 2017 motion for new trial hearing transcript.
JTT refers to the "designation of record" transcript from day seven of the June 2016 jury trial.
DB refers to the defendant's brief.

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and the Facts set forth in its opening brief. It files this reply brief to address the defendant's claims that the State's arguments are unpreserved and to respond to some of the arguments the defendant raised on appeal.

ARGUMENT

I. THE DEFENDANT'S MOTION AND STATE'S OBJECTION PRESERVED ITS APPELLATE ARGUMENTS REGARDING THE APPLICATION OF THE *MCDONOUGH* STANDARD.

In his brief, the defendant contends that the State has not preserved or, alternatively, waived its argument regarding the applicability of *McDonough* to this case because of statements prosecutors made during argument. This contention misconstrues the preservation requirement and is without merit.

"[T]he purpose of [this Court's] preservation rule is to insure that trial forums have an opportunity to rule on issues and to correct errors before parties seek appellate review." *State v. Gross-Santos*, 169 N.H. 593, 598 (2017). Both the defendant and the State argued the application of *McDonough* in their motions to the trial court, App. 27-29, 65. The State summarized the argument it raises on appeal "The [d]efendant's reliance on the *McDonough* standard is misplaced. *McDonough* requires that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." App. 65 (quotation and citation omitted). These arguments placed the question of *McDonough*'s application—and whether New Hampshire should apply a similar standard—before the trial court and provided that court with the opportunity to consider those arguments. Accordingly, the argument was preserved for appellate review.

II. THE TRIAL COURT'S CONCLUSION THAT ONE JUROR WAS HAD A "CLEAR BIAS" WAS UNFOUNDED AND THE RECORD DOES NOT SUPPORT CONCLUDING THAT EITHER JUROR WAS ACTUALLY BIASED AS THE DEFENDANT NOW ASSERTS.

In his brief, the defendant asserts that the trial court found that Juror 6 was "actually biased" and that that conclusion alone is sufficient to support the trial court's decision granting a new trial. DB 14-19. The trial court reached this conclusion *sua sponte* as neither party raised or addressed the issue of "actual bias" in their motions or at the hearing. MHT 81-82. Through the end of the hearing, the defendant maintained that the *McDonough* standard applied and that he had satisfied his burden. MHT 85. Given the framing of the issue and the defendant's arguments to the trial court, the State maintains that *McDonough* provides the appropriate analysis that this Court should adopt. Yet, even if "actual bias" applied the trial court, as detailed in the State's opening brief, unsustainably exercised its discretion when it concluded that Juror 6 had a "clear bias." Accordingly, this Court must reverse.

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 218 (1982). As the United States Court of Appeals for the First Circuit has explained, "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *DeBurgo v. St. Amand*, 587 F.3d 61, 70 (1st Cir. 2009) (quotation and citation omitted). "The defendant must meet two showings in order to obtain a new trial: [a] party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct

response would have provided a valid basis for a challenge for cause." *Id.* at 70-71 (quotation and citation omitted). Then, "the defendant has the burden of showing that the juror was not impartial and must do so by a preponderance of the evidence." *Id.* at 71 (quotation and citation omitted).

Although this Court has not recently addressed a situation where a juror had given what was later discovered to be incorrect information during *voir dire*, the Supreme Judicial Court of Massachusetts has. In *Commonwealth v. Amirault*, 506 N.E.2d 129 (Mass. 1937), a third party alerted defense counsel after trial that one of the jurors had accused a family member of sexual assault decades ago and that family member had been convicted. *Id.* at 131. That juror had advised the trial court and counsel through the juror questionnaire that she had never been involved with a criminal case. *Id.* at 132. The trial court held a hearing in camera and allowed the juror to review the pleadings before appearing. *Id.* The trial court inquired about the sexual assault and the juror explained that she had no memory of the assault or the criminal trial. *Id.* at 132-33. The trial court concluded that the juror had honestly answered the pre-trial questions and the defendant appealed. *Id.* at 134.

On appeal, the Supreme Judicial Court addressed two issues whether bias could be imputed to the juror and the standard articulated in *McDonough*. *Id.* It noted that it is incumbent upon the defendant to prove "actual bias." *Id.* The court concluded that "the due process requirement is satisfied by a hearing conducted by the trial judge in which the defendant has the opportunity to show that a juror was actually biased because the juror dishonestly answered a material question on *voir dire* and that prejudice resulted

from the dishonesty." *Id.* at 135. The court emphasized that "*McDonough* makes clear, the crucial inquiry is whether the juror's answer was honest; that is, whether the juror was aware that the answer was false." *Id.* The court concluded that honest mistakes where a juror provides information without the intent of misleading defense counsel does not give rise to actual or imputed bias. *Id.*

This conclusion is consistent with other jurisdictions addressing similar issues. *See, e.g.*, *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992); *United States v. Claxton*, 766 F.3d 280, 301 (3d Cir. 2014) (concluding that new trial was not necessary where the juror failed to disclose a prior relationship with a witness due to an honest mistake); *United States v. Fulks*, 454 F.3d 410, 431-32 (4th Cir. 2006) (concluding that evidence that a juror's husband had been murdered did not warrant a new trial in a capital murder case because there was no evidence that it affected deliberations and the nondisclosure was an honest mistake); *Cannon v. Lockhart*, 850 F.2d 437, 440-41 (8th Cir. 1988); *United States v. Brooks*, 727 F.3d 1291, 1308 (10th Cir. 2013) (holding that a new trial was not warranted where a juror failed to disclose that he was under IRS investigation because his answers during *voir dire* "were the truth as far as [he] was concerned"); *United States v. Brown*, 26 F.3d 1124, 1127 (D.C. Cir. 1994) (holding that no new trial was warranted where a juror detailed his law enforcement history on the questionnaire but did not raise his hand during *voir dire* and misled the judge during an interview in chambers); *People v. Dunoyair*, 660 P.2d 890, 895 (Colo. 1983) ("Under these circumstances we cannot say that a merely inadvertent nondisclosure is presumptively prejudicial and sufficient by itself to warrant a new trial."); *Lopez v. State*,

769 P.2d 1276, 1290 (Nev. 1989) ("This court has held that where it is claimed that a juror has answered falsely on *voir dire* about a matter of potential bias or prejudice, In the final analysis, the determination turns upon whether or not he was guilty of intentional concealment." (Quotation and ellipsis omitted.)).

Here, the trial court never found that Juror 6 or Juror 14 had answered dishonestly or willfully concealed their status as victims of a crime. Thus, no need existed for further inquiry.

Moreover, the trial court relied upon irrelevant information in reaching its conclusion. It penalized Juror 6 for, among other things, his involvement with efforts to prevent passage of a new law after this trial had occurred.

To the extent that the impact on other jurors is a relevant factor, no other jurors testified or provided evidence at the hearing. The State did, however, provide the trial court with a report from one other juror in which no reference to Juror 6 and Juror 14's disclosures was discussed—despite spending a paragraph discussing another juror's experience with a similar therapy technique. App. 71-78.

Given these considerations and the details discussed in the State's opening brief, the trial court unsustainably exercised its discretion when it concluded that Juror 6 had a "clear bias." Accordingly, this Court must reverse.

III. THE DEFENDANT'S CHALLENGED THE VERDICT UNDER THE STATE AND FEDERAL CONSTITUTIONS; THUS, HE WAIVED CHALLENGES GROUNDED IN HIS STATUTORY RIGHTS.

In his brief, the defendant relies upon *Shulinsky v. Boston & Me. R.R.*, 83 N.H. 86 (1927), as an alternative basis upon which the trial court could have granted relief. DB

22-27. As the moving party before the trial court, the defendant bears the burden of proving that a new trial is warranted and presenting arguments for the trial court's consideration. The defendant, in a post-conviction setting, must present his objections to the trial court and preserve them for further review. Similar to a party seeking to admit evidence or raise arguments, *see, e.g.*, *See Halifax-American Energy Co., LLC v. Provider Power, LLC*, ___ N.H. ___, ___, slip op. at *2 (decided Feb. 9, 2018) ("[This Court] decline[s] to review any argument that the defendants did not raise before the trial court."); *State v. Blackmer*, 149 N.H. 47, 49 (2003), the defendant cannot for the first time on appeal raise new challenges to the verdict in his case because the State may have responded to these new arguments with different evidence or in a different manner at the hearing in the trial court. The defendant's failure to raise his statutory rights waived any challenge he could bring based upon those rights. Accordingly, he must rest his case upon his constitutional arguments.

In *Shulinsky*, this Court concluded that when a defendant receives false information from a prospective juror, whether provided intentional or mistakenly, that is sufficient to warrant a new trial. *Id.* at 89-90. This decision was grounded in the statutory right in civil cases to exercise preemptory challenges. *Id.* at 87. It is not based on principles of constitutional law. *Id.* The defendant's challenges to his conviction were ground in the state and federal constitutions. App. 26-27. He never references any statutory rights or protections. His failure to do and waiting until responding in the appeal prejudiced the State because it deprived the State and the trial court of opportunities to challenge or review the continued vitality of *Shulinsky* or reconcile

Shulinsky with constitutional analyses that came afterward. With this opportunity, the hearing before the trial court would have proceeded differently. The defendant cannot profit from his oversight on appeal. Accordingly, this Court must decline to address the issues and reverse the trial court's decision.

CONCLUSION

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

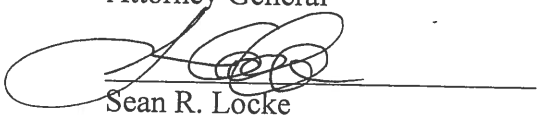
The State requests a fifteen-minute oral argument before the full Court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General



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CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Theodore Lothstein, Esquire, by first-class mail postage prepaid, at the following address:

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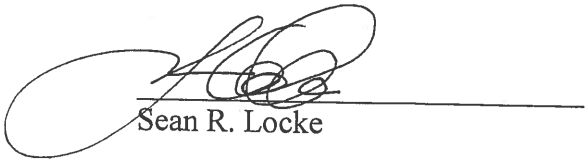
May 14, 2018



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