THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0512

State of New Hampshire

v.

Jason Wilbur

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

BRIEF FOR THE DEFENDANT

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(Fifteen minute oral argument)

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QUESTION PRESENTED

1. Whether Wilbur is entitled to a new trial based on counsel's deficient performance and its resultant prejudice.

Issue preserved by Defendant's Motion for a New Trial, App.* 1-31; Affidavit of Alan J. Cronheim, App. 32-46; Objection to Motion for a New Trial, App. 47-60; and Order, Supp. 1-28.

* Citations to the record are as follows:
"App." refers to the Appendix to this brief;
"Supp." refers to the Supplement to this brief;
"NOA" refers to the Notice of Appeal;
"T-I" refers to the transcript of the first day of trial;
"T-II" refers to the transcript of the second day of trial;
"T-III" refers to the transcript of the third day of trial.
"H-I" refers to the transcript of the first day of the hearing on the motion for new trial;
"H-II" refers to the transcript of the second day of the hearing on the motion for new trial.

STATEMENT OF THE CASE

This is an appeal from the denial of a motion for a new trial based on ineffective assistance of counsel.

T.M. was born in October of 1997. T-I 32. In 2007, T.M. accused Jason Wilbur ("Wilbur"), her stepfather, of sexual assault. T-I 53, 114. He was charged, but the State entered a nolle prosequi. App. 3.

The charges were renewed in 2010. App. 3. The State indicted him with two single-act charges of aggravated felonious sexual assault (digital penetration and intercourse), and two pattern charges (digital penetration and intercourse). T-I 3-5. The pattern assaults were alleged to have occurred between 2002 and 2007, in Jaffrey and Swanzey. T-I 3-5. After trial, a Cheshire County jury acquitted Wilbur of the charges alleging intercourse, and convicted him of those alleging digital penetration. T-III 190-91. The trial court (Arnold, J.) sentenced him to serve twenty to forty years in prison. App. 3; NOA 2. This Court affirmed Wilbur's convictions on direct appeal. App. 2; see State v. Wilbur, No. 2011-0627 (N.H. December 14, 2012).

Wilbur filed a motion for a new trial, alleging ineffective assistance of counsel. App. 1-31. The court (Ruoff, J.), denied the motion. Supp. 1-28. This Court accepted Wilbur's discretionary appeal.

STATEMENT OF THE FACTS

T.M. was born on October 5, 1997 to Angela Wilbur ("Angela") and William Mitchell. T-I 32, 34, 89. In 2002, Angela met Wilbur. T-I 139. They married in 2003. T-I 141.

The marriage was tumultuous. T-I 142. Angela and Wilbur often argued and occasionally separated between 2003 and 2007. T-I 142-44. During one period of separation, in 2004-05, Angela lived with Mitchell in Marlborough and did not have contact with Wilbur. T-I 93, 147. At other times, Angela lived with Wilbur and his father in Jaffrey. T-I 140. She also lived in Swanzey, occasionally with Wilbur. T-I 103, 109, 143. Because Mitchell had custody of T.M., she visited Angela in Swanzey every other weekend. T-I 140-41.

T.M.'s Allegations Against Wilbur

T.M. claimed that Wilbur sexually assaulted her in Jaffrey and Swanzey. T-I 35-44, 45-53. The first assaults, in Jaffrey, allegedly occurred when Angela left T.M. in Wilbur's care while Angela took her siblings on shopping trips. T-I 35. The incidents allegedly occurred in the bathroom after Wilbur suggested that he and T.M. play a game. T-I 38. She claimed the first assault happened after she had fallen into the toilet while going to the bathroom. T-I 38. T.M. testified that Wilbur told her not to tell her mother. T-I 40.

Other assaults allegedly occurred in Swanzey, where Angela lived in a larger house in which T.M. had her own bedroom. T-I 42. These assaults, like the ones in Jaffrey, allegedly began with Wilbur's invitation to play a game, and included the caution that T.M. not tell her mother. T-I 48, 51. Unlike the

Jaffrey incidents, however, Angela and T.M.'s younger half-siblings were in another part of the house when they occurred, and Wilbur covered T.M.'s eyes with a towel or other object during the assaults. T-I 43, 50. Finally, T.M. claimed that Wilbur sometimes woke her up to assault her, after first asking if she wanted to play a game. T-I 52-53.

T.M. disclosed to a neighbor in 2007 that Wilbur had assaulted her. T-I 53. She accused Wilbur during an interview in June of 2007, but no prosecution ensued until after another interview in 2010. T-I 117, 120.

Through cross-examinations of T.M. and Jessica Walker, the Division of Children, Youth and Families ("DCYF") social worker who interviewed T.M., trial counsel established that (1) T.M. told Walker that she did not remember the first time she was assaulted by Wilbur, T-I 123; (2) T.M. did not tell Walker that Wilbur told T.M. not to tell her mother, T-I 123; (3) T.M. never said anything about Wilbur asking her to play a game before the assaults, T-I 124; and (4) T.M. did not say that assaults occurred when Angela left T.M. in Wilbur's care while Angela went shopping. T-I 129. Counsel also established that T.M. had been caught stealing and faced a theft charge in Swanzey. T-I 109.

James Dixon; T.M.'s Sexualized Behavior

The State's redirect examination of T.M. focused largely on her claim that Wilbur covered her eyes with an object during some assaults. T-I 79-81. After redirect, trial counsel argued that the State had "opened the door" to evidence of an assault against T.M. by a different person. T-I 83. During her direct

examination, T.M. had briefly alluded to being in counseling. T-I 55. Counsel argued that evidence explained why T.M. was in counseling. T-I 83. The State argued that it did not open the door, and said the parties had a pretrial agreement not to discuss the other case during trial. T-I 83. The court allowed counsel to ask T.M. about the other assault. T-I 85.

During re-cross, T.M. testified she was molested by a man other than Wilbur, and she talked to Walker and her counselor about that incident. T-I 85-86. T.M. said she was two to four years old at the time of that assault. T-I 86. On redirect, T.M. said that the other perpetrator was James Dixon, that he admitted to the assault, and that he went to jail. T-I 87.

T.M.'s father, William Mitchell, then testified that the assault by Dixon occurred when T.M. was two or three years old. T-I 104. He testified that after Angela met Wilbur, but before T.M. alleged that Wilbur assaulted her, T.M. rubbed and touched the private areas of her siblings and cousins. T-I 96-98. Mitchell sought counseling for T.M., put alarms on bedroom doors to protect T.M.'s siblings from her, and received in-home services from DCYF. T-I 96-98. Defense counsel attempted to link T.M.'s behaviors and the need for intervention to Dixon's conduct, but Mitchell stressed that T.M. was about three years old when the Dixon incident occurred, and that he did not notice T.M.'s behavior until after Angela met Wilbur. T-I 104, 110.

Jessica Walker

Walker was a DCYF child protective service worker and forensic interviewer. T-I 113. T.M. reported during an interview in 2007 that Dixon

assaulted her when T.M was three or four years old. T-I 115-16. In 2007, Walker separately interviewed T.M. about allegations that Wilbur assaulted her. T-I 117. At the time, T.M. was acting out sexually toward other children. T-I 117-19. Walker opened a case so the family could receive voluntary services. T-I 117. With respect to T.M.'s sexualized behavior, Walker testified, "[The assaults] had been going on for so long that [T.M.] started to identify with the perpetrators, with the people who she alleged abused her. And [sexualized behaviors] are typical of children who have been abused." T-I 118-19.

Angela Wilbur

Trial counsel called Angela to testify about the places she lived between 2002 and 2007. T-I 140-48. Angela confirmed that she and Wilbur had a "love/hate relationship" and "broke up a lot." T-I 142. Counsel asked Angela what she did when she learned of T.M.'s allegations against Wilbur. T-I 144. Angela testified that she "[f]reaked out." T-I 144. She added that she "went to court the next morning . . . so that [Wilbur] couldn't take the other kids." T-I 144. Referring to Dixon and Wilbur, Angela testified that T.M. was "violated twice." T-I 146.

Detective Scott Stevens

Stevens was the investigating detective for the Jaffrey Police. T-I 21. He testified that after T.M.'s interview in 2007, Wilbur agreed to come to the police department. T-I 25. According to Stevens, "[Wilbur] told me that his dad had been accused of sexual assault about ten years ago and he beat that. . . . [Wilbur] said he was going to fight [this case] in court." T-I 27. On cross-

examination, trial counsel asked Stevens whether Wilbur denied T.M.'s allegations four or five times. T-I 29. Stevens said that Wilbur denied them "a number" of times, but did not recall how many. T-I 29.

The State's Opening and Closing Arguments

In its opening, the State characterized Wilbur's statement to Stevens as follows: "My father got away with it so I'm going to fight it." T-I 13. Without mentioning evidence of T.M.'s sexualized behaviors, the State told the jury that Mitchell would describe how Wilbur's assaults affected T.M., including that she went to counseling. T-I 14. The State informed the jury that in 2010, after having been in counseling, Walker thought T.M. might be strong enough to testify against Wilbur. T-I 15.

In its closing argument, the State discussed Wilbur's interaction with Stevens, the lack of a connection between the Dixon assault and T.M.'s sexualized behavior, and Angela's reaction to learning of T.M.'s allegations against Wilbur. With respect to Stevens, the State claimed that Wilbur told him, "You know what, my father got away with this so I'm going to fight it in court." T-II 170. The State also argued that Wilbur did not make a "real denial" to Stevens. T-II 170. With respect to Dixon, the State argued because that assault occurred when T.M. was four, and T.M. did not act out sexually until she was between six and eight, Wilbur must have been the "source of [T.M.'s] problems." T-II 171. It reminded the jury that upon learning that T.M. had accused Wilbur, Angela obtained an order to protect her other children from him. T-I 174.

Ineffective Assistance of Counsel

After the trial and his direct appeal, Wilbur filed a motion for a new trial alleging ineffective assistance of trial counsel. App. 1-31. Wilbur alleged that his attorney's performance was deficient in that, among other claims, she (1) failed to object to improper opening and closing arguments; (2) failed to object to improper vouching testimony by Walker; (3) introduced improper vouching testimony by Angela; (4) failed to correct the State's mischaracterization of Wilbur's interaction with Stevens; and (5) introduced evidence of the Dixon assault and T.M.'s sexualized behaviors without an effective strategy. App. 9-20, 27-28, 37-41. With respect to point (4), Wilbur established the existence of a transcript of his interview with Stevens that counsel did not use at trial. App. 5; H-II 113. The transcript revealed that (a) Wilbur denied having assaulted T.M. at least nine times during the brief interview; and (b) instead of saying that his father had "beat" or "gotten away with" a charge of sexual assault, Wilbur told Stevens that his father went to court, proved that the allegation against him was not true, and that Wilbur would prove his innocence in court. App. 61-69. Wilbur argued that each incident of deficient performance was sufficiently prejudicial to warrant relief, or in the alternative, that the cumulative effect of the deficient performance entitled him to a new trial. Supp. 16; App. 1-2, 6-7, 44-46.

The State objected, arguing that there was no deficient performance and no prejudice. App. 47-60. At the hearing on the motion, Wilbur called Alan Cronheim, a Portsmouth criminal defense attorney of over thirty-five years'

experience. H-I 8-78. Cronheim reviewed the discovery, the trial transcripts, and other materials, and concluded that the guilty verdicts were the product of ineffective assistance of counsel. H-I 11-12, 48; App. 44-46. The State called trial counsel. H-II 86-127. She testified that she did not intend to elicit Angela's testimony that after learning of the allegations, she feared for the safety of her other children. H-II 103-04. Counsel also testified that her use of the Dixon evidence, and her failure to object to evidence of T.M.'s sexualized behaviors, was part of her trial strategy. H-II 90-95, 119-127.

The court found that the State mischaracterized Wilbur's interview with Stevens and agreed that Angela's testimony was harmful to the defense. Supp. 21, 26. However, it denied Wilbur's motion for a new trial, finding no deficient performance and no prejudice.

SUMMARY OF THE ARGUMENT

The lower court erred when it denied Wilbur's motion for a new trial based on ineffective assistance of counsel.

Trial counsel's performance was deficient in four respects: (1) she failed to rebut the State's portrayal of Wilbur's statements to Stevens, thus allowing the jury to believe he had effectively admitted the crimes; (2) she failed to prepare Angela for her testimony, which resulted in damaging opinion evidence; (3) she failed to object to damaging opinion testimony by Walker; and (4) she introduced evidence of the Dixon assault without a reasonable strategy.

Without these errors, this case was about T.M.'s credibility. Counsel's deficient performance, however, armed the State with Wilbur's quasi-admission of guilt, opinions from his wife and a social worker that he was guilty, and evidence from which the jury could only have concluded that Wilbur, and not Dixon, caused T.M. to exhibit behaviors consistent with having been sexually assaulted.

Because trial counsel's deficient performance caused prejudice, Wilbur is entitled to a new trial.

I. WILBUR IS ENTITLED TO A NEW TRIAL BASED ON HIS COUNSEL'S DEFICIENT PERFORMANCE AND THE RESULTANT PREJUDICE.

Under Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the Federal Constitution, a defendant is entitled to rely on counsel to formulate and execute an effective trial strategy, and to possess and demonstrate the skill needed to ameliorate the impact of adverse evidence. Here, counsel performed deficiently when she failed to effectively confront the State's presentation of Wilbur's statements to the police. Counsel performed deficiently when she introduced evidence corroborative of T.M.'s claims against Wilbur. She performed deficiently when she failed to object to inadmissible opinion evidence that bolstered T.M.'s credibility. Finally, counsel performed deficiently when she introduced evidence T.M. had once been assaulted by James Dixon. In conjunction with the admission of evidence of T.M.'s sexualized behavior, the Dixon evidence bolstered the State's case for Wilbur's guilt. These incidents of deficient performance, individually and cumulatively, created such prejudice that Wilbur is entitled to a new trial.

A. The Ineffective Assistance of Counsel Standard.

Under the State and Federal Constitutions, a criminal defendant is guaranteed the right to effective assistance of counsel. State v. Candello, Nos. 2014-0370 & 2016-0096, slip op. at 4 (N.H. July 7, 2017). To demonstrate a violation of that right, the defendant must show that trial counsel's performance was constitutionally deficient, and the deficient performance was prejudicial. Id. Each prong presents a mixed question of law and fact, and is subject to de novo review. Id. at 5.

"Deficient performance" means that "'counsel's representation fell below an objective standard of reasonableness.'" State v. Thompson, 161 N.H. 507, 528 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). The Court affords a high degree of deference to the strategic and tactical decisions made by counsel, and avoids "the distorting effects of hindsight" in evaluating counsel's performance. State v. Cable, 168 N.H. 673, 680 (2016) (quotation omitted). "'Defense counsel's errors or omissions must reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent criminal defense attorney[.] [T]hey must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made. . . .'" Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (quoting Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978)). "[The Court] will find deficiency only 'where, given the facts known [to counsel] at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it.'" Rivera v. Thompson, 858 F.3d 708, 715 (1st Cir. 2017) (quoting Knight v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006)); see also Cable, 168 N.H. at 680-81 ("[T]he defendant has to show that no competent lawyer would have engaged in the conduct of which he accuses his trial counsel.").

As to the second prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Candello, slip op. at 5 (quotation omitted). However, "although the possibility of a different

outcome must be substantial in order to establish prejudice, it may be less than fifty percent." Ouber v. Guarino, 293 F.3d 19, 25-26 (1st Cir. 2002) (citing Strickland, 466 U.S. at 693).

"The prejudice analysis considers the totality of the evidence presented at trial." Cable, 168 N.H. at 681. In making the prejudice determination, the Court may consider the cumulative effect of multiple incidents of deficient performance. Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005) ("Strickland clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.") (Citation omitted); see also State v. Collins, 166 N.H. 201, 214-15 (2014) (citing effect of counsel's several failures to object); Thompson, 161 N.H. at 532 (citing counsel's several failures to object).

B. Deficient Performance.

The brief will address four categories of deficient performance in separate sections below. Each incident of deficient performance, alone and in combination with the others, caused prejudice sufficient to entitle Wilbur to a new trial.

1. Trial counsel performed deficiently in handling of Wilbur's statements to the police.

After T.M. accused Wilbur of sexual assault in 2007, Stevens asked Wilbur to come to the Jaffrey Police Department for an interview. T-I 25. In its opening, the State said that "[Wilbur] told [Stevens], '[y]eah, my father was accused of [sexual assault] but he was found – he was – got away with it, so I'm going to fight it.' That's the end of the conversation." T-I 13. During her

opening, trial counsel said that Wilbur repeatedly told Stevens that he did not assault T.M. T-I 20.

Stevens was the State's first witness. According to Stevens, Wilbur said "his dad had been accused of sexual assault about ten years ago and he beat that." T-I 27 (emphasis added). Stevens added that Wilbur said he was going to fight the charges in court. T-I 27. On cross-examination, trial counsel asked Stevens about the interview:

> Q And he denies ever touching her, not once, not twice, but probably four or five times in the course of that interview --
>
> A Again --
>
> Q -- has never touched her?
>
> A Again, I would say that I -- I testified that he denied it. I'm not going to sit here and tell you how many times because I don't remember.
>
> Q And in fact, he denies the allegations before ever mentioning anything about his dad?
>
> A Correct.
>
> Q And it didn't take you too long to realize during the course of this interview that Mr. Wilbur was going to stand on his denial and you weren't going to get any further information? Do you recall --
>
> A I --
>
> Q -- putting that in your --
>
> A I would --
>
> Q -- report?

A I would agree with that.

T-I 29-30 (emphasis added). Though she had a transcript of the interview, T-I 27, trial counsel did not use it to refresh Stevens's recollection, impeach him, or establish how many times Wilbur denied any wrongdoing. H-II 113.

Counsel devoted one line of her closing argument to Stevens's interview of Wilbur. T-II 158 ("In fact, you did hear from Detective Stevens that when Mr. Wilbur was interrogated about these charges he denied that he'd ever touched Tiffany."). In its closing, the State characterized the exchange between Stevens and Wilbur as follows:

> Defendant, Defense attorney points out to you, he denied it. Yeah, he denied it for about four minutes, ended the interview, and said, "You know what, my father got away with this so I'm going to fight it in court." So here we are. That's not a real denial.
>
> And consider that, if you're accused of this, you're going to do this for three minutes and then leave, or are you going to explain your story? Defense attorney wanted to point out how he denied it. You consider if that's a real denial or that's a go down and, "I'm not saying anything," and going away.

T-II 170 (emphasis added).

The transcript of the interview is included in the Appendix to the brief. App. 61-69. Contrary to the State's characterization, Wilbur never told Stevens that his father had "beaten" or "gotten away with" a sexual assault, and that he intended to "beat" or "get away with" the charges against him. What Wilbur said is that a "[l]ong, long time ago [his] dad had a case that was happening but it weren't (sic) true. He proved it. It weren't (sic) true." App. 62; see also App. 63 ([I]t got proved . . . [t]hat it didn't happen."). Wilbur then asserted that he

would "just have to bring [T.M.] to court and fight [her allegation] . . . [a]nd prove that I didn't do it." App. 65.

The State's insinuation that Wilbur expressed an intention to "beat it," or to "get away" with a sexual assault like his father did, T-I 13 (State's opening), is, thus, false and improper. Not only did trial counsel fail to clarify that Wilbur said he intended to prove he was innocent, but she hardly addressed the interview in her closing, and she failed to object when the State mischaracterized Wilbur's statements. Cf. Cable, 168 N.H. at 687 (counsel not ineffective where failed to object to prejudicial evidence because counsel neutralized the evidence). The lower court expressed concern about the State's misleading presentation of Wilbur's statements, Supp. 21, but erred when it failed to find that trial counsel performed deficiently when she allowed that mischaracterization to stand.

The transcript also shows that Wilbur vehemently denied any misconduct. When asked how many denials Wilbur made, Stevens said he did not remember. T-I 29. Trial counsel did not challenge that answer. In closing, the State mocked Wilbur's denial to Stevens, characterizing it as insignificant, not a "real denial," and inconsistent with the conduct of an innocent man. T-II 170. The jury never knew that Wilbur adamantly and repeatedly denied the allegations during his brief exchange with Stevens. See App. 64 ("I've never touched her. I've never touched her in my life. Honestly and truly. Never."); App. 64 ("I haven't done nothing to her. Honest and truly."); App. 65 ("I don't know if you're gonna believe me or not, it's not true."); App. 65 ("I'm not that

type of person Dude."); App. 65 ("I didn't do it. If I did do it I'd tell you but I didn't do it."); App. 65 ("I'd just have to bring it to court and fight it . . . [a]nd prove that I didn't do it."); App. 66 ("I've never touched her."); App. 66 ("If I didn't do it, then there's no sense me thinking about it."); App. 66 ("I've never touched her. No. I've had nothing to do with anything."); App. 67 ("I am not that kind of person."); App. 67 ("[I]f I did do it, I would own up to it but I didn't."); App. 67 ("That never happened.").

No reasonably competent trial attorney would have permitted the State to assert that her client intended to "beat" the charge, or "get away" with it, when what he said is that he would prove his innocence. Counsel's failure to introduce Wilbur's denials, and to correct the State's mischaracterization of Wilbur's statements, did not further any strategy. Competent counsel would have established during the cross-examination of Stevens that Wilbur denied T.M.'s claims more than a dozen times. Had counsel performed effectively, the State would have abandoned its argument that Wilbur did not make a "real denial," T-I 170, or the claim would have fallen on deaf ears. Trial counsel's performance fell below the level constitutionally guaranteed a defendant charged with crimes that could result in decades of incarceration upon conviction. See Silva v. Woodford, 279 F.3d 825, 833 (9th Cir. 2002) ("An attorney's failure to prepare for and challenge the testimony of a critical witness may be so unreasonable as to violate both prongs of the Strickland test.").

2. Trial counsel performed deficiently when she elicited damaging evidence from Angela Wilbur.

Counsel called Angela to establish where she and T.M. lived from 2002-07. T-I 140-48. Wilbur does not challenge the decision to call her for that purpose. However, during Angela's testimony, the following exchange occurred:

> Q And at -- and in June of '07, did you -- when did you first -- when did you first learn of the allegations concerning Mr. Wilbur raised by [T.M.]?
>
> A When Felicia called me.
>
> Q So Felicia called you --
>
> A Yeah.
>
> Q -- and as a result of that conversation what did you do?
>
> A Freaked out.
>
> Q And after freaking out, did you speak --
>
> A The next morning --
>
> Q -- to anyone?
>
> A Oh, I went to this court the next morning and got stuff so he couldn't take the other kids.

T-I 144 (emphasis added). Two pages later, when counsel asked Angela about forensic interviews of T.M., Angela's testified that T.M. "was violated twice." T-I 146. In its closing argument, the State highlighted Angela's damaging testimony:

> Look at the reaction that happened with people in her life. You saw Angela on the stand. Defense attorney asked her what she did once she heard that. What did she say? She said, "I immediately went down to court to get an order to protect my other children from the Defendant." That is not the action of someone that's surprised by these allegations. That is someone that maybe doesn't want to know, but when they hear it, can't deny it anymore. They know -- she knows what she was told was the truth. She doesn't even confront the Defendant about it. She doesn't question [T.M.] about it. She doesn't ask extra questions because she knows that's what happened. Because she's been in that house and has seen them together and knows how the Defendant acts. So immediately she goes to protect her other kids.

T-I 174 (emphasis added).

At the hearing on Wilbur's motion for a new trial, counsel said that, during a phone conversation, she prepared Angela to testify. H-II 102-03. Counsel knew that Angela obtained a protective order against Wilbur after T.M. accused him of sexual assault, but she did not prepare Angela to field a question about that, or about the forensic interviews, at trial. T-II 108. Based on her prior interactions with Angela, counsel thought that Angela did not believe T.M.'s allegations against Wilbur. H-II 103.

Counsel admitted the question she asked had nothing to do with the planned subject matter of Angela's testimony, i.e., locations and time frames. H-II 111. Moreover, the question was not calculated to elicit admissible evidence. Trial counsel testified that she expected Angela to say that she did not believe T.M. H-II 103-04, 111. A reasonably competent defense attorney would have known that this is inadmissible opinion testimony. State v. McDonald, 163 N.H. 115, 121 (2011) (holding that lay opinion regarding

credibility of witnesses is inadmissible) (citing State v. Reynolds, 136 N.H. 325, 328-29 (1992)). In her ill-conceived effort to elicit inadmissible testimony that favored Wilbur, which stemmed from her failure to prepare the witness to answer the questions she intended to ask, counsel instead elicited damaging testimony that the State capitalized on. Accordingly, counsel performed deficiently when she failed to adequately prepare her witness to testify, endeavored to introduce inadmissible testimony, and allowed Angela to tell the jury that her first thought when she heard T.M.'s allegations against Wilbur was to protect her other children from him.

3. Trial counsel performed deficiently when she failed to object to inadmissible opinion testimony from Jessica Walker.

Walker was a DCYF child protective service worker and forensic interviewer. T-I 113. She interviewed T.M. three times: once about Dixon in 2007, once about Wilbur in 2007, and again about Wilbur in 2010. T-I 114-17, 119. By the time Walker testified, the jury knew Dixon assaulted T.M. when she was between two and four years old, and that she had acted out sexually against siblings and cousins. T-I 96-99, 104, 110 (Mitchell testimony). During her direct examination, Walker testified:

Q In this particular case, what was the concern for DCYF?

A Well, there was concerns (sic) for [T.M.'s] behavior as a result of the sexual abuse.

Q And what type[s] of behaviors were those?

A Yeah. She was sexually reactive, and she acted out on other children when she had an opportunity. She had a really hard time

mentally just dealing with this. It had been going on for so long that she started to identify with the perpetrators, with the people who she alleged abused her. And those are typical of children that have been abused.

T-I 118-19 (emphasis added). Trial counsel did not object.

A reasonably competent defense attorney would have recognized that this testimony was inadmissible. In State v. Cressey, 137 N.H. 402, 412 (1993), the Court held that an expert witness can educate the jury on behaviors of sexual assault victims to rebut any inference from those behaviors that the alleged victim is lying. See also State v. Gonzalez, 150 N.H. 74, 78 (2003) ("Because of its counterintuitive nature, expert testimony may be permitted to educate the jury about apparent inconsistent behavior by a victim following an assault and to provide useful information that is beyond the common experience of an average juror.") (Quotation omitted).

Here, Walker was not proffered or qualified as an expert witness, and thus, was not competent to testify about behavior or render any opinion that Wilbur abused T.M. See State v. Lemieux, 136 N.H. 329, 331 (1992) (error where DCYF worker testified that victim was abused). In addition, a witness cannot "diagnose" abuse; she cannot draw a causal connection between alleged sexual assaults and observed behavior. See Cressey, 137 N.H. at 408 ("There are no symptoms or behaviors that occur in every case of child abuse, nor are there symptoms or behaviors that are found exclusively in child abuse cases."); see also Collins, 166 N.H. at 214 (2014) ("[T]estimony of a child sexual abuse victim's specific behavior is inadmissible . . . if its purpose is to prove that

abuse occurred, or if the expert testifies that the particular victim's behaviors were consistent with one who had been abused.") (Emphasis added) (quotation omitted).

In some instances, such as with a recantation, a juror may infer that the alleged victim's allegations were not credible. Cf. State v. Chamberlain, 137 N.H. 414, 418 (1993) (holding expert testimony admissible if it would rebut the implication that the victim's specific behavior means she is lying). T.M.'s sexualized behavior did not tend to imply that her allegations were less credible; no comment on its significance was permissible. Walker, however, opined that Wilbur's abuse caused T.M.'s behavior. She testified that T.M.'s behavior was caused by abuse "that had been going on so long." T-I 118. The only person alleged to have been engaging in such conduct against T.M. for "so long" was Wilbur.

4. Trial counsel performed deficiently when she informed the jury that T.M. had been assaulted by Dixon.

Trial counsel filed no pretrial motions. She did not initially seek to introduce evidence of Dixon's assault of T.M. This evidence would not have been admissible absent a showing that Dixon's conduct was similar to Wilbur's, and that its admission was not unduly prejudicial or misleading. State v. Ellsworth, 142 N.H. 710, 720-21 (1998). Instead of seeking to admit the Dixon evidence in advance of trial to ensure its availability, counsel agreed with the State that it would not be admitted. T-I 83.

Consistent with this agreement, neither party mentioned the Dixon assault in its opening statements. In its opening, the State briefly mentioned

that T.M. had been in counseling, to explain her ability to accuse Wilbur in 2010. T-I 14-15. It did not mention T.M.'s sexualized behavior, or the in-home interventions that responded to the behavior. Neither party asked the State's first witness, Stevens, about Dixon. Trial counsel did not do so even though Stevens had asked Wilbur if he knew about Dixon during the 2007 interview. App. 64 (Stevens asked Wilbur, "Well, are you familiar with James Dixon?"). Neither party asked T.M. about Dixon. In its direct examination, the State only briefly alluded to the fact that T.M. had been in counseling. T-I 55.

After the State's redirect of T.M., which did not address Dixon, counseling, or T.M.'s sexualized behavior, trial counsel sought to establish that T.M. had been sexually assaulted by another person. T-I 83. After stating that she was not intending to elicit this evidence at trial, T-I 83 (counsel states, "I wasn't going to go down that road"), counsel argued that the State had "opened the door" to this evidence, and that it was necessary to explain why T.M. was in counseling, i.e., "she could have been molested by someone else." T-I 83. The State argued that it had not opened the door, and cited the agreement it had with counsel to avoid any discussion of the Dixon allegation at trial. T-I 83. The court ruled that trial counsel could ask T.M. about the other incident. T-I 85. On re-cross, T.M. testified that another man molested her when was between two and four years old, and that she saw a counselor. T-I 85-86. The State established that the other man was Dixon, that he admitted the crime, and that he went to jail. T-I 87.

After the Dixon assault was admitted, the State asked witnesses about T.M.'s sexualized behavior. Mitchell testified about the behavior, and said that it did not surface until after Angela met Wilbur. T-I 96-99, 104, 110. Because the Dixon assault occurred when T.M. was between two and four years old, and T.M.'s sexualized behavior did not manifest until after Angela met Wilbur, the State argued that Wilbur's conduct caused her behavior. The argument was bolstered by the fact that Dixon's assault was an isolated incident, Wilbur's alleged assaults were not, and Walker testified that T.M.'s behavior was caused by conduct that occurred over a long period of time. T-I 118-19. The State addressed this evidence in its closing:

> But the real problem with Mr. Dixon and why they try to say all these problems stem from him is [T.M.] doesn't act out with these problems until she is six, seven or eight. That's four or five years after she's been molested. They --
>
> and it's the time that she's spending time around the Defendant. They want you to believe that Dixon, who did touch her once and confessed, that's what really is causing it. But for some reason she waited five years to act out and it's just a coincidence that it happens to be around the Defendant. Mr. Dixon is not the source of [T.M.'s] problems. The Defendant is.

T-II 170-71.

At the hearing on Wilbur's motion for a new trial, counsel testified that she had always planned to introduce evidence of the Dixon assault as part of a strategy. H-II 90; see also H-II 92 (counsel states, "[W]e knew we would use it.") Counsel stated that "it would help explain how a child would describe things," and tend to show that the behaviors T.M. exhibited were caused by

Dixon instead of Wilbur. H-II 90-91. Though she did not mention T.M.'s behaviors in opening or in her cross of T.M., trial counsel said she also intended to introduce "some of T.M.'s behaviors" for the same strategic purpose. H-II 91.

Under questioning from the court and Wilbur's counsel, trial counsel retracted her assertion that she had always intended to introduce the Dixon evidence as part of trial strategy. After the State noted that the evidence was mentioned in openings, the court asked, "So I'm just curious when the decision was made that it was going to become part of the fabric of your defense . . . if you don't mention it in your opening." H-II 93-94. Trial counsel said, "it was a part of the strategy from the beginning." H-II 94 (emphasis added). However, trial counsel later admitted that, at a deposition, she agreed that "Mr. Dixon pleading guilty didn't advance the defense theory at all." H-II 123. Counsel then stated it may not have been "her strategy from the beginning" to bring in the Dixon evidence. H-II 124 ("I don't remember specifically, but I know we had discussed whether or not we should or shouldn't bring it in and if it didn't come in initially then it may have been strategy I made at that time not to bring it up and then to bring it up later when we thought it was going to be helpful to us. . . .").

In response to another question from the court, counsel indicated that she made the decision to introduce the Dixon evidence in the middle of trial. H-II 125 ("I'm imagining that that's what I would have been doing in the heat of the moment and I would have been saying, okay, this is going fine so far let's

not put things in that we don't need to put in, but then when something arose that I thought needed to be explained and needed a way to explain it was that was, was to bring it in."). Finally, when the court opined that counsel did not seem to have planned to use the Dixon evidence at all, because the parties had agreed not to introduce the evidence, and counsel had argued it was admissible under an "opening the door" rationale, she admitted, "I don't know that I made a specific decision not to use it or a specific decision to use it." H-II 127.

Strategic decisions of trial counsel are generally entitled to "a high degree of deference." Candello, slip op. at 5. A court cannot not defer to a strategy that does not exist. The record does not support trial counsel's claim that she intended to introduce the Dixon evidence "from the beginning" of her trial preparation. She filed no motion for leave to use the evidence, did not mention it in opening, and did not elicit it from Stevens or from T.M. on cross-examination. To the contrary, trial counsel agreed with the State, before trial, that the evidence should not be admitted. T-I 83. Despite trial counsel's claimed lack of recollection of this agreement, H-II 124, the court had no doubt that it existed. H-II 127.

Even viewed from a mid-trial perspective, no strategic consideration justified the decision to inform the jury that (1) T.M. accused another person of assaulting her; (2) her accusation was true; and (3) this assault, as opposed to the several allegedly perpetrated by Wilbur, caused her sexualized behavior and explained why she was in counseling. Indeed, because trial counsel never elicited evidence of what act Dixon committed, the jury could have no idea

whether his conduct was a viable explanation. Moreover, in offering the evidence, counsel failed to consider that (1) the Dixon assault occurred when T.M. was as young as two or three; (2) Dixon assaulted T.M. only once; and (3) the Dixon assault occurred as many as three years before Angela met Wilbur. A reasonably competent defense attorney would have recognized that, due to these factors, the Dixon evidence, in combination with the sexualized behavior evidence, only damaged the defense by supporting the claim that Wilbur's more recent and protracted conduct caused T.M.'s behavior. These circumstances rendered trial counsel's strategy – if she had a strategy at all – "manifestly unreasonable," and not entitled to deference. See Thompson, 161 N.H. at 530 (quoting Commonwealth v. Whyte, 684 N.E.2d 625, 626 (Mass. App. 1997)); see also Pierce v. State, 463 A.2d 756, 759-60 (Me. 1983) (defining "manifestly unreasonable" strategy as one "which resulted in a loss of substantial ground of defense") (citation omitted).

C. Prejudice.

Trial counsel's deficient performance entitles Wilbur to a new trial. Each incident of deficient performance, in isolation, leads to that conclusion. In the alternative, the combined effect of the multiple incidents of deficient performance rendered the trial unfair.

Without trial counsel's errors, there would have been no evidence or argument that Wilbur wanted to "beat" or "get away with" the assaults. There would have been evidence that he adamantly denied the allegations. There would have been no evidence or argument that Wilbur's wife believed him

guilty of assaulting T.M. There would have been no evidence that T.M. credibly accused another man of assaulting her, and potentially, no evidence of her sexualized behaviors, but certainly, no evidence that in the opinion of a social worker, the behaviors were caused by Wilbur.

Each incident of deficient performance, however, strengthened a prosecution case that was otherwise unremarkable.[1] First, Stevens's interview of Wilbur, as portrayed by the State, nearly amounted to a confession. The assertion that Wilbur intended to "beat" the charge implied that he assaulted T.M. but felt he would "get away" with it. See, e.g., State v. Gomez, 172 P.3d 1140, 1145 (Idaho 2007) (defendant's statement that he "beat the charge" was an implicit admission of guilt); Franco v. Commonwealth, 2004 Va. App. LEXIS 73 *13 (decided February 10, 2004) (unpublished decision) (court considers defendant's assertion that he would "beat the charge" as evidence of guilt). If the statement was ambiguous in the abstract, the State made clear that "beating the charge" meant "getting away with it." T-II 170 (State's closing). In addition, the State's assertion that Wilbur did not make a "real denial" to Stevens implied his guilt. The jury never heard that Wilbur said he intended to prove his innocence, and denied wrongdoing over a dozen times. Instead, trial

[1] In its order, the lower court characterized T.M.'s testimony as "graphic," "detailed," and "powerful." Because the court did not observe T.M., its conclusion is entitled to no special deference. See State v. Reid, 161 N.H. 569, 574 (2011) ("[T]o the extent the finding reflects the court's firsthand observations of the witness's demeanor, it is deserving of considerable deference.") (Quotation omitted). Moreover, the conclusion is not supported by the record. The State's case, without the errors, was legally sufficient, but T.M.'s testimony was not so graphic or detailed as to render the deficient performance and its prejudice insignificant. See State v. Silk, 138 N.H. 290, 292 (1994) ("[I]t is not a question whether the evidence, apart from that erroneously admitted, would support a finding of guilt, but whether it can be said beyond a reasonable doubt that the inadmissible evidence did not affect the verdict.") (Quotation omitted).

counsel allowed the State to portray Wilbur as a guilty man who planned to pull the wool over the jurors' eyes.

Angela's testimony armed the State with additional evidence of Wilbur's guilt. By asking Angela questions she was unprepared to answer, and which were not calculated to yield admissible evidence, trial counsel elicited that Angela believed T.M. was "violated" by Wilbur, and feared so greatly for the safety of her other children that she invoked the court's power to protect them. Angela's opinion, given her long connection with Wilbur, could only have impressed the jury as powerful evidence of his guilt. The State, in closing, stressed Angela's testimony, explaining that one of the people who knew Wilbur best believed that he sexually assaulted her daughter. T-II 174 (State's closing). This Court has reversed based on the erroneous admission of similar or less damaging opinion-based evidence. See, e.g., State v. Huard, 138 N.H. 256, 259 (1994) (social worker's testimony about alleged victim's credibility inadmissible as expert or lay testimony); Reynolds, 136 N.H. at 327-28 (conviction reversed based on trooper's improper lay opinion testimony).

For similar reasons, Walker's testimony caused prejudice sufficient to warrant a new trial. To the improper "confession" and intimate partner opinion evidence, Walker added, in effect, opinion of guilt evidence from a seemingly objective professional. While her testimony was less extensive than that in Collins, it was, like Angela's testimony, similar to that considered in Huard and Reynolds. Moreover, Walker's testimony was nearly identical to the erroneous opinion evidence discussed in Lemieux, where a DCYF social worker testified

that she concluded the victim was abused, and she made efforts to protect her from further abuse. Lemieux, 136 N.H. at 131. Here, Walker said that T.M.'s behavior was caused by a long course of abuse, and she testified about the home intervention needed to help T.M. and protect her siblings. T-I 117-19. This Court did not reverse in Lemieux because the victim's testimony was especially strong. Id. at 332. As discussed above, that is not the case here.

Finally, trial counsel's impulsive decision to use the Dixon evidence caused prejudice sufficient to warrant a new trial. No mention was made of T.M.'s sexualized behavior before trial counsel admitted the Dixon evidence. In combination, the two pieces of evidence were damaging to Wilbur. Whatever Dixon did to T.M. constituted an isolated incident that occurred when T.M. was very young, before Angela met Wilbur. After the introduction of the Dixon evidence, the State elicited Mitchell's and Walker's testimony about T.M.'s behavior, linking it to abuse that occurred over a long period of time. The State wove these facts and inferences together to argue that Wilbur must be guilty if he, not Dixon, caused T.M.'s behavior. On the record that counsel allowed to be created, no rational juror would have disagreed.

If none of these incidents of deficient performance are sufficient alone to warrant relief, their cumulative impact is. Wilbur is entitled to a new trial if there is a reasonable probability of a different result. Cable, 168 N.H. at 681. He need not demonstrate with certainty that the result would have been different. See State v. Graham, 142 N.H. 357, 363 (1997) (showing of "reasonable probability" does not require "mathematical certainty"). As courts

have recognized, the task of predicting what would have happened but for the errors necessarily involves speculation. United States v. Roy, 855 F.3d 1133, 1166 (11th Cir. 2017) ("[A]ssessing whether the prejudice prong of an ineffective assistance of counsel claim has been met, whether there is a reasonable probability of a different result but for the error, 'will necessarily require a court to 'speculate' about the effect of the deficiency or error.") (Quoting Sears v. Upton, 561 U.S. 945, 945-46 (2010)). Rather, the question is whether counsel's errors "undermine confidence" in the verdict. Cable, 168 N.H. at 681. Wilbur has met that standard.

In this case, without the errors, the State would not have been able to argue that (1) Wilbur hoped to "beat" or "get away with" the charges, like his father did; (2) Wilbur did not make a "real denial"; (3) Angela believed her daughter was violated by her husband; (4) if Wilbur, and not Dixon, caused T.M.'s behavior, Wilbur is guilty. With reasonably competent counsel, this case would have been what each party said in opening it was supposed to be: a referendum on T.M.'s credibility. T-I 15 (State says in opening that the case turns on T.M.'s statements); T-I 20 (defense says in opening that case is "she said/he denies"). In similarly close cases, where there was one error, this Court has reversed. See, e.g., State v. White, 155 N.H. 119, 127-28 (2007) (convictions reversed where there was one trial error and the case was a "credibility contest"); State v. Sargent, 144 N.H. 103, 106 (1999) (same); Huard, 138 N.H. at 258-59 (same); Reynolds, 136 N.H. at 328-29 (same). Here, there were multiple errors. This Court should grant Wilbur's motion for a new trial.

CONCLUSION

WHEREFORE, Mr. Wilbur request that this Court reverse the lower court's decision and remand his case for a new trial.

Undersigned counsel requests fifteen minutes of oral argument.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,

By _____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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_____
David M. Rothstein

DATED: February 20, 2018

SUPPLEMENT

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. **No. 213-2010-CR-00870**

STATE OF NEW HAMPSHIRE

v.

JASON WILBUR

ORDER

The Defendant, Jason Wilbur, moves for a new trial and, in the alternative, resentencing, claiming ineffective assistance of trial counsel. The State objects. A hearing on the motion was held on March 7, 2017 and May 5, 2017. After consideration of the parties' arguments and pleadings and the applicable law, the motion is DENIED.

Background

The Defendant is the ex-husband of the mother of the complaining witness ("TM"). The Defendant was originally indicted in 2008 on charges of aggravated felonious sexual assault (AFSA) against TM, but those charges were *nol prossed* in April 2009. He was subsequently re-indicted in November 2010 on two counts of AFSA alleging digital penetration and two counts of AFSA alleging penile penetration. In May 2011, a jury convicted the Defendant on the two counts of AFSA alleging digital penetration.

A. The trial

The Defendant's trial lasted about five hours. Trial counsel's strategy was to discredit the complaining witness ("TM"). In the opening statements, both parties acknowledged that the State's case turned on the credibility of the alleged victim ["TM"].

The State remarked that the trial "turns on [TM]'s statements . . . . you've got to listen to her, you've got to evaluate her, and see if what she says makes sense." (Trial Tr. at 15.) Trial counsel remarked that "it couldn't have happened the way [TM] said it happened because it didn't happen . . . . it's going to be the Defense's position that her stories are inconsistent, that it's a lie, that she made it up." Id. at 19. Because the Defendant's claims of ineffective representation involve the testimony of five witnesses as well as remarks in the State's opening and closing, the trial record must be set out in some detail.

The State began its opening statement by summarizing TM's allegations against Wilbur. It then moved on to introducing the State's four witnesses to the jury: 1) Officer Scott Stevens of the Jaffrey Police Department; 2) TM, the complaining witness; 3) William Mitchell, TM's father; and 4) Jessica Walker of the Department of Children, Youth and Family Services (DCYF). While describing the anticipated testimony of Officer Stevens, the State made the following comment regarding hearsay:

> Now this is important. [Officer Stevens] can't tell you what [TM] said. Throughout this case you're going to hear that [TM] told a bunch of people, but those people can't come in and tell you, "Tiffany told me this," because that's hearsay. The only person you're allowed to hear it from is Tiffany, and you will.

Id. at 13. While discussing Officer Stevens' anticipated testimony, the State also remarked:

> [F]rom [Officer Stevens] you're going to hear how he called the Defendant down after watching the video to get his side of the story. And the Defendant comes down to the police station, spends a total of four or five minutes before he ends the conversation and moves on. He's going to tell you how the Defendant told him, "Yeah, my father was accused of this but he was found – he was – got away with it, so I'm going to fight it." That's the end of the conversation.

Id. The State further commented that the jury would hear Ms. Walker testify about the consistency between two "forensic interviews" that TM had undergone. Id. at 15. Trial counsel did not make any objections to the State's opening statement.

The State first called Officer Stevens. Officer Stevens testified that TM's allegations against the Defendant first came to his attention in 2007 when Mr. Mitchell, TM's father, came into the Jaffrey Police Department and spoke with him. Id. at 22. After Mr. Mitchell's report, Officer Stevens arranged through DCYF for a "forensic interview" of TM. Id. at 22–23. Following the forensic interview, Officer Stevens determined that he needed to interrogate the Defendant. Id. at 25. The Defendant agreed to go to the Jaffrey police station and meet with Officer Stevens. Id. With respect to the interrogation, Officer Stevens testified that:

> [a]ctually the [interrogation] didn't last very long . . . . Basically I confronted him with the allegations. He denied the allegations. And . . . I asked him if he had ever been, you know, sexually assaulted or anything like that as a kid, and what he told me was – he went on to say – I'm going to read this right off of my report so that I am not paraphrasing—

Id. at 25–26. At this point, trial counsel objected to Officer Stevens reading from his transcript and the court sustained the objection. Id. at 26. The State refreshed Officer Stevens' memory with the transcript of the interrogation and then elicited the following testimony:

> Q: Okay. Now, do you remember – what do you recall the Defendant stating about his father?
>
> A: He told me that his dad had been accused of sexual assault about ten years ago and he beat that.
>
> Q: Okay. And as a result of that what did he say he was going to do?
>
> A: That he was going to fight it in court.

Q: Altogether, you said it's a relatively short interview, how long did it last?

A: I could estimate five minutes.

Q: And did you end the interview or did he end the interview?

A: My recollection is that he did.

Id. at 27. On cross-examination, trial counsel pressed Officer Stevens on the number of times that the Defendant professed his innocence during the brief interrogation:

Q: And he denies ever touching her, not once, not twice, but probably four or five times in the course of that interview—

A: Again—

Q: —has never touched her?

A: Again, I would say that I – I testified that he denied it. I'm not going to sit here and tell you how many times because I don't remember.

Q: And in fact, he denies the allegations before ever mentioning anything about his dad?

A: Correct.

Q: And it didn't take you too long to realize during the course of this interview that Mr. Wilbur was going to stand on his denial and you weren't going to get any further information? Do you recall—

A: I—

Q: —putting that in your—

A: I would—

Q: —report?

A: I would agree with that.

Q: And that's – and so the interview ended shortly thereafter, and Mr. Wilbur was allowed to leave?

A: I did ask him another question, but yes.

> Q: And when you interviewed him he was not in custody. It was a voluntary interview. He drove himself down to the – or got a ride down to the police station?
>
> A: yes

Id. at 29–30. At no point in the cross-examination did trial counsel utilize the transcript of the interrogation. In her closing, trial counsel noted Officer Stevens' testimony about the Defendant's denials of the allegations: "you did hear from Detective Stevens that when [the Defendant] was interrogated about these charges he denied he'd ever touched [TM]. So you do have at least that denial on the record so that you know that has happened." Id. at 158. In contrast, in its closing the State characterized the Defendant's denials of the allegations as "not a real denial:"

> "Defendant, Defense attorney points out to you, he denied it. Yeah, he denied it for about four minutes, ended the interview, and said, "You know what, my father got away with this so I'm going to fight it in court."

Id. at 170. Trial counsel did not object to the State's closing argument even though the State's characterization of the interrogation departed substantially its actual contents. The transcript of the interrogation reveals that in the beginning of the interrogation, after first being confronted with the allegations, the Defendant stated:

> "Long, long time ago my dad had a case that was happening but it weren't true. He proved it. It weren't true. I went into the courts with him and doing the same thing I am now. I sat down and told him everything . . . . but it got proved . . . [t]hat it didn't happen."

(Tr. of Wilbur Interrogation at 2–3.) He then proceeded to assert his innocence about a dozen times throughout the rest of the interrogation. The interrogation ended with Officer Stevens referencing the administration of lie detector and the Defendant replying that he would not do anything until he talked to his lawyer. Id. at 9.

The State next called TM. (Trial Tr. at 31.) On cross-examination, trial counsel spent considerable time attempting to highlight inconsistencies between the 2007 forensic interview of TM and a subsequent forensic interview conducted in 2010. For example:

> Q: Okay. And you – at that time in 2007 when you're talking to [Jessica Walker], do you remember telling her that [the Defendant] never hurt you?
>
> A: I never said that.
>
> Q: You don't remember saying that he didn't hurt you because he loved you?
>
> A: I didn't—
>
> Q: Do you remember telling—
>
> A: —say that.
>
> Q: —[Jessica Walker] that? You don't remember telling—
>
> A: I never said that.
>
> Q: And do you remember telling Jessica that you didn't remember the first time it happened because it was a long time ago?
>
> A: No.
>
> Q: And you don't remember telling her that you didn't remember what the house looked like?
>
> A: No.
>
> Q: So you don't remember any of that from your 2007 interview?
>
> A: That was never in my interview.
>
> Q: So you don't say—you don't remember telling her you couldn't remember the first time?
>
> A: I remember I told her the first time.
>
> Q: And you said he didn't hurt you. Do you remember telling her that?

A: I never said —

Q: Do you remember telling Jessica that it happened mostly in your bedroom?

A: I said it was in the bathroom and in the bedroom.

Q: And you remember in the 2007 interview telling Jessica that you barely remembered anything and it happened a long time ago?

A: I never said that.

. . . .

Q: And do you remember what you told her at that time that Jason had

done to you?

A: I remember I told her what he done – had done to me

Q: And you said you don't remember telling her that you really didn't want to talk about it?

A: I told her I didn't want to talk about it.

Q: You do remember telling her that. And do you remember – but you don't remember telling her that you couldn't really remember what had happened?

A: I didn't ever tell her that.

. . . .

Q: And do you remember [telling] her . . . that [the Defendant] didn't hurt you because he wouldn't hurt you because he loved?

A: That is a lie.

Q: So you did say Jason didn't hurt me because he loves me?

A: I said that he did hurt me.

Q: Well, you said that today, but you didn't say that in 2007, did you?

A: I said that in 2007.

Id. at 65–66, 69, 71. At no point did trial counsel utilize transcripts of the 2007 and 2010 forensic interviews in order to expose inconsistencies. Then, near the end of the cross-examination, the following exchange occurred:

> Q: And you've said it happened in different ways at different times, and I already got you to admit that you have problem with telling the truth. So I'm just I'm just trying to figure out when you were lying?
>
> A: Look at the tests.
>
> Q: Were you lying in 2007, were you lying in 2010, or are you lying today?
>
> A: Look at the tests, and you'll see that I've been touched.
>
> Q: What tests?
>
> A: Doctor tests. Look at the tests for [two of TM's younger siblings].
>
> The court: Wait a minute. There's no question in front of you, [TM], so just wait a minute.

Id. at 76–77. In the evidence the parties have submitted to the Court, there is no reference to any kind of forensic test inculpating the Defendant. On redirect, TM testified that "[the Defendant]'s the reason I hurt my sister." Id. at 79. She further testified that "when [the Defendant] was touching me at the time and I didn't know it was bad until I hurt my sister and then I got – had to get kicked out of my house because I found out that it was bad." Id. at 80. Following redirect, trial counsel made a request at sidebar to question TM about a sexual assault committed by a different person:

> Trial counsel: "She has made statements about this happening before, and he's asking her questions about counseling.[1] And I think there's going to be testimony from other witnesses about things or behaviors or things have that have happened as a result. And I think now he's opened the door for me to inquire as to whether or not she's ever said that this has

[1] It should be noted that on redirect, the State did not ask TM any questions about counseling, nor did TM make any remarks about prior sexual abuse. During cross-examination TM testified that her stepmother "signed me up for [counseling] a while before the whole [Defendant] thing because I've already had this happen before." Id. at 64.

ever happened to her before. And I wasn't going to go down that road, but I think now he's going to bring up this whole thing about, you know, because of my client, all this stuff happened that it could very well have been as a result of the fact that she was molested by somebody else before.[2]

The State: My concern before this trial started was specifically over this incident.

The court: What incident?

The State: She has – a person confessed to doing this and went to prison. And we had an agreement to discuss this, and I don't believe I opened the door to that. It will be my position at this point—

Trial counsel: Well she's said first of all, "I have been seeing [a counselor] before because it happened to me before," and then something about she then said that she did something to her sister as a result of [the Defendant]. Actually, it could have been as a result of the fact that this had happened to her before. Like I said I didn't intend to bring it up, but they brought it up, and now if he's going to go through it a little bit more and delve into all of these issues and problems and stuff she's had as a result of being molested, I think—

The court: I don't think the State brought it up. I think she inadvertently said something.

Trial counsel: But in his opening, he indicated that he's going to have her father testify that, you know, she had all of these psychological issues as a result of what happened with [the Defendant], and I think events – if he's going to bring that testimony out, then I have the right to ask about incidences in which she's been molested. Because it's very well that she's got psychological issues, it's not because of [the Defendant]. It's because of this other guy.

Id. at 83–84. The trial court granted trial counsel's request as well as the State's request for a subsequent redirect. On re-cross, TM testified that she "got molested by another man" prior to being assaulted by the Defendant. Id. at 85–86. On redirect, TM

[2] Trial counsel testified during the evidentiary hearing for this motion, that she concluded prior to trial that she would use evidence of the Dixon assault to explain TM's sexual behaviors. (Evidentiary Hrg, Apr. 5, 2017 at 2:21 PM.)

testified that the name of the previous assailant was James Dixon, that he assaulted her on one occasion, and that he went to prison because of that assault. Id. at 87.

The State's next witness was William Mitchell. Part of Mr. Mitchell's testimony regarded problematic behaviors exhibited by TM. He testified that "[TM] was acting out. She was having behavior problems. She was also having sexual problems towards other children." Id. at 96. He also testified in some detail about sexual behaviors he witnessed TM exhibiting on her siblings and cousins: "I saw, a lot of touching, rubbing, kissing . . . ." Id. at 97. He testified about measures he took to prevent these behaviors:

> We had to put her on pretty much 25-hour watch. We had other children in the house, obviously, so we ended up putting alarms on our door so we could protect the other children. She had to have 24-hour supervision. She wasn't allowed out of our sight. She had aides in school that followed her from class to class, sat with her. She – again, she had alarms on the door and seeked (sic) like heavy counseling.

Id. at 98. On redirect, Mr. Mitchell testified that TM did not start exhibiting the sexual behaviors until after TM's mother started dating the Defendant. Id. at 110.

The State's last witness was Jessica Walker, a child protective service worker at DCYF. Id. at 113. She testified that she was trained to conduct "forensic interviews" through completion of a week-long certification course and later an advanced course. Id. at 113–14. She further testified that:

> there was concerns for [TM]'s behavior as a result of the sexual abuse . . . . She was sexually reactive, and she acted out on other children when she had an opportunity. She had a really hard time mentally just dealing with this. It had been going on for so long that she started to identify with the perpetrators, with the people alleged abused her. And those are typical of children that have been abused.

Id. at 118–19. She also testified that she conducted both the 2007 and the 2010 forensic interviews. Id. at 119. In addition, the State questioned Ms. Walker about differences between the 2007 and 2010 interviews:

> Q: Were the interviews similar in what they – in what the allegations were coming from Tiffany?
>
> A: They were.
>
> Q: Okay. Did you notice any changes between when – '07 and '10?
>
> A: The changes were, you know, in her wording. When she was younger she used good terms. And when she was older she used more adult terms for body parts. But they were generally the same in nature, the same disclosure.

Id. at 119–20. On cross-examination, trial counsel had some success eliciting testimony tending to suggest inconsistencies between the two interviews:

> Q: And she said [in the 2007 interview] that – do you recall [TM] telling you that [the Defendant] wouldn't hurt her because he loved her?
>
> A: Yes.
>
> Q: And that he didn't hurt her and he wouldn't hurt her?
>
> A: It was something to that nature, right.
>
> . . . .
>
> Q: And in 2007 Tiffany indicated to you that she didn't really remember the first time, is that correct, and it happened a long time ago?
>
> A: Yes. She said she didn't remember the exact first time. Yeah.

Id. at 122–23. On redirect examination, the State noted that trial counsel pointed out that "[TM] didn't have a lot of details" in the first interview and asked, "Is that unusual the first time a child discloses?" Id. at 134. Ms. Walker testified that "it does happen where kids are reluctant to talk. I'm a complete stranger, and sometimes they don't feel

comfortable talking with strangers. But – and sometimes they have fears which holds them back from talking about it." Id. At this point, trial counsel objected and a sidebar commenced:

> Trial counsel: I think we're getting to the realms of expert testimony here, which she's not been presented as an expert or qualified as an expert. You know, this isn't just, "This is what Tiffany said," or whatever. This is like it was – some sort of opinion as to whether this was normal, and I don't think that's appropriate.
>
> The State: I can ask her experience. But she's the one who brought up there were no details. Obviously that summation is right in line. I can—
>
> The court: Well, I'll let you inquire a little. But be careful of that line.

Id. at 134–35. The redirect concluded with the following:

> Q: So you in your experience it's not unusual to have vague details in the first interview; is that correct?
>
> A: Right.
>
> . . . .
>
> Q: And you testified before that you thought that – what she told you in the first one matched what she told you in the second interview; is that correct?
>
> A: Yes.

Id. at 135–36. In the State's closing, it referenced Ms. Walker's testimony:

> Jessica Walker, DCYF, does this. Specially trained to do this. Does this for a living. Told you that the two interviews were incredibly consistent except the differences in ages. You know if you talk to a 10-year-old and you talk to a 13-year-old you're going to get different vocabulary, you're going to get different details.

Id. at 175. As noted above, trial counsel did not object to the State's closing argument.

The Defense's only witness was Angela Wilbur, TM's mother. Trial counsel testified at the evidentiary hearing for this motion that she had spoken to Ms. Wilbur on

the phone prior to trial in order to determine how she would testify if called as a witness. (Evidentiary Hr'g, Apr. 5, 2017 at 2:32 PM.) Based on her phone conversations, trial counsel believed that Ms. Wilbur thought that the Defendant was innocent and that her testimony would be favorable for the Defendant. Id. at 2:33 PM. However, at the trial, when the subject of TM's allegations was broached, Ms. Wilbur testified in a manner not conducive to the Defendant's case:

> Q: [A]s a result of [learning about the allegations] what did you do?
>
> A: Freaked out.
>
> Q: And after freaking out, did you speak—
>
> A: The next morning—
>
> Q: —to anyone?
>
> A: Oh, I went to this court the next morning and got stuff so he couldn't take the other kids.

Id. at 144. Later in the direct examination, Ms. Wilbur testified that TM "was violated twice." Id. at 146. The State did not cross-examine Ms. Wilbur. Id. at 148–49. In its closing, the State drew a connection between Ms. Wilbur's testimony and TM's credibility:

> You saw [Ms. Wilbur] on the stand. Defense attorney asked her what she did once she heard that. What did she say? She said, "I immediately went down to court to get an order to protect my other children from the Defendant." That is not the action of someone that's surprised by the allegations. That is someone that maybe doesn't want to know, but when they hear it, can't deny it anymore. They know – she knows what she was told was the truth.

Id. at 174.

B. The sentencing hearing

At the sentencing hearing, the State made the following two arguments, in addition to other arguments:

> Defense attorney may argue that [the Defendant] is not guilty on some of the counts. That was due to the allegations as was made clear from discussions with the jury. The jury had no doubt that the incidents that the victim alleged were basically her face was covered and she was penetrated with something occurred. They are just unsure if they could say it was a penis as was alleged in the indictment . . . . [A]s your Honor is also aware from pretrial discussions, there have been two other children that have made allegations against Mr. Wilbur. All of that, especially these actions here, demand that he receive the maximum penalty for this.

(Sentencing Hr'g Tr. at 5.) The State presented no evidence regarding the allegations of the "two other children." Trial counsel did not object to either of these arguments. The sentencing judge subsequently sentenced the Defendant to the maximum sentence. He stated that "for the reasons that the State has articulated . . . I think the State's recommended sentences are appropriate." Id. at 14. The sentencing judge did not comment further about his sentencing determination.

Standard of Review

"A new trial may be granted in any case when through accident, mistake or misfortune, justice has not been done and a further hearing would be equitable." RSA 526:1. Part I, Article 15 of the State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant reasonably competent assistance of counsel. State v. Whittaker, 158 N.H. 762, 768 (2009); see Strickland v. Washington, 466 U.S. 668, 686 (1984). The Court addresses the Defendant's claims of ineffective assistance of counsel under the State Constitution, citing federal opinions for guidance only. State v. Brown, 160 N.H. 408, 412, 418 (2010) ("Because the standard for determining whether a defendant has received ineffective

assistance of counsel is the same under both the State and Federal Constitutions we reach the same result under the Federal Constitution as we do under the State Constitution").

To prevail on a claim of ineffective assistance of counsel, the Defendant must demonstrate (1) that trial counsel's representation was constitutionally deficient; and (2) that the performance actually prejudiced the outcome of the case. Brown, 160 N.H. at 412. If the Defendant fails to establish either prong, counsel's performance was not constitutionally defective. Id.

The defendant must show that counsel's representation fell below an objective standard of reasonableness. Id.; Strickland, 466 U.S. at 688. There is a rebuttable presumption that counsel acted reasonably and the Court therefore affords trial counsel a high degree of deference. State v. Collins, 166 N.H. 210, 212–13 (2014); Strickland, 466 U.S. at 689. The defendant must show that "counsel made such egregious errors that [he] failed to function as the counsel the State Constitution guarantees." Collins, 166 N.H. at 212–13. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003). The Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." State v. Thompson, 161 N.H. 507, 529 (2011).

The Defendant must also show that trial counsel's errors actually prejudiced the Defendant's case. Brown, 160 N.H. at 417. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Collins, 166 N.H. at 213. The Court considers "the totality of the evidence presented at trial" when examining the errors and reasonable probability. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Brown, 160 N.H. at 413 (quotation omitted). If the defendant cannot demonstrate prejudice, the Court need not decide if counsel's performance fell below the standard of reasonable competence. State v. Breed, 159 N.H. 61, 71 (2009).

Analysis

The Defendant avers that trial counsel's performance was constitutionally defective for several reasons. Since the Defendant argues that the cumulative effect of these errors denied him the right to effective assistance of counsel, the Court "find[s] it helpful to address the merits of each claim of error, and consider the issue of prejudice only if there is a legitimate question as to whether counsel's conduct was indeed deficient." State v. Wisowaty, 137 N.H. 298, 302 (1993). In support of his arguments, the defendant proffered expert testimony from a renowned defense attorney. The State objected to the Court's consideration of any such evidence and argued that the Court itself is in a position to assess trial counsel's performance based on the record. In reaching its decision, the Court has carefully considered all the points discussed in great detail by the defendant's expert witness. However, ultimately, whether a particular trial counsel's decisions or performance during trial are reasonable or deficient is for the Court to determine. The Court agrees that there were better ways to handle certain portions of the trial, but that is not the test for whether the defendant was denied effective assistance of counsel.

I. The trial

A. Failure to file motions for *in camera* review of TM's counseling records

The Defendant argues that trial counsel provided ineffective representation when she failed to file motions for *in camera* review of TM's counseling records, because she was aware of the following evidence: TM received counseling from 2006 to 2007, during which time Doctor Burt Hollenbeck evaluated her and determined her to be a risk of sexually offending others. In 2007, TM was also prescribed anti-depressant medication and diagnosed with ADHD. Then, in 2010 TM received counseling from Doctor Robert Fusco, who specialized in treating abused children. TM and Dr. Fusco discussed her allegations against Wilbur, and in a letter dated June 11, 2010, Dr. Fusco wrote in a letter to the County Attorney's office that "at this time, [TM] is ready to reveal [the allegations]." The State contends that trial counsel made a strategic decision to not file such motions, because the counseling records may have contained information detrimental to the Defendant's case.

The Court finds that trial counsel's decision to not file motions for *in camera* review of the counseling records was reasonable. Such records often pose a risk to both parties. On one hand, the defense may obtain extra ammunition for cross examination. On the other, the records may provide the State with further inculpatory evidence. Based on a sound assessment of the risk, trial counsel may have made a reasonable tactical decision to forgo attempts to review TM's counseling records.

B. Failure to address the Dixon assault during the pretrial phase

The Defendant next argues that trial counsel provided ineffective representation by failing to preclude evidence of Dixon's during the pretrial phase. Somewhat

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confusingly, however, he concedes that evidence of the Dixon assault was "a double-edged sword" in that it had the potential to either bolster or undercut TM's credibility. In essence, the Defendant argues that because trial counsel did not try to admit evidence of the Dixon assault in a motion in limine or reference the evidence in her opening, her elicitation of the evidence on cross-examination could not have been based on a strategic decision. The State counters that trial counsel made a rational strategic choice to introduce evidence of the Dixon assault.

Once TM testified that she had exhibited sexual behaviors and it became apparent that the State planned on eliciting further testimony regarding these behaviors, trial counsel made a rational decision to elicit evidence of the Dixon assault in order to deter the jury from drawing a connection between TM's need for counseling and the Defendant's alleged conduct. Trial counsel's failure to pursue this strategy from the beginning does not fall below an objective standard of reasonableness. Nor was it unreasonable for trial counsel to change tack mid-trial. Unlike a case where a defense attorney chooses to argue just one of two available defense because pursuing both may lead to the admission of contradictory evidence, see Pina v. Maloney, 565 F.3d 48, 56 (1st Cir. 2009), the import of the Dixon assault was not inapposite to trial counsel's initial strategy of impeaching TM's credibility. Moreover, as the State points out, the delay in referencing the Dixon assault may have helped the Defendant's cause by creating the impression that the State did not want the jury to hear about the Dixon assault. Even if reasonable minds disagree about what defense strategy would have been best in this case—avoiding all mention of the Dixon assault, bringing the jury's attention to it during the opening statement, or withholding such evidence until its usefulness became

apparent—"the proper standard for measuring attorney performance is that of reasonably effective assistance, as guided by prevailing professional norms and consideration of all the circumstances relevant to counsel's performance." Pina, 565 F.3d at 56 (citing Strickland, 466 U.S. at 688) (quotations and brackets omitted). "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. In this case, either course would have been reasonable.

C. Failure to attempt to preclude testimony of TM's sexual behaviors both before and during trial

The Defendant next argues that trial counsel provided ineffective representation by failing to file motions in limine to preclude evidence of TM's sexual behaviors. He asserts that such evidence was inadmissible under State v. MacRae, 141 N.H. 106 (1996) and State v. Chamberlain, 137 N.H. 414 (1993). Additionally, the Defendant that trial counsel should have objected to Ms. Walker's testimony about behaviors typical of sexually abused children because it constituted improper expert testimony. The State counters that evidence of sexual behavior is not per se inadmissible.

The Defendant's argument fails for a number of reasons. First, the Defendant misreads MacRae, Chamberlain, and other like cases. Those cases pertain to expert testimony. MacRae, 141 N.H. 106 at 109; Chamberlain, 137 N.H. at 418. The New Hampshire Supreme Court has never held that evidence about an alleged victim's sexual behaviors, in and of themselves, are inadmissible. Second, such evidence was arguably relevant to whether TM was in fact abused. "Absent an alternative explanation for their appearance, such as the victim's involvement in other sexually oriented activities, [evidence of age-inappropriate sexual behavior and knowledge] may be quite

probative of whether a child has been sexually abused." State v. Cressey, 137 N.H. 402, 410 (1993).

Finally, Ms. Walker's comment about behaviors typical of sexually abused children appears to have crossed into the realm of expert testimony. Lay witnesses may only testify to opinions that are rationally based on their perceptions. N.H. R. Ev. 701. However, that part of her testimony consisted of just one brief comment which Ms. Walker offered without any apparent prompting from the State. The State (perhaps wisely) did not ask any follow-up questions regarding the comment.[3] Since the statement occurred in such a brief and unprompted manner, trial counsel could have made a reasonable tactical decision to not object so as to avoid bringing further attention to the brief comment. The same can be said about the State's remark in its closing argument that Ms. Walker was "specially trained to do this." See United States v. Jackson, 918 F.2d 236, 243 (1st Cir. 1990) ("defense counsel's failure to object to the prosecutor's remark . . . seems consistent with a reasonable tactical decision to minimize any harm the prosecutor's remark may have caused, by not inviting further attention to it"). Additionally, any possible prejudiced that accrued against the defendant based on this evidence is ameliorated by the fact that at this point in the trial (after the victim testified) trial counsel had already decided to admit evidence of the Dixon sexual assaults. Thus, the defense was adopting the notion that the victim was, in fact, the victim of sexual abuse. Therefore, Ms. Walkers testimony about this topic somewhat supported that tenet of the defense.

D. Allowing the State to mischaracterize the Defendant's police interrogation

[3] The State also did not mention this comment in its closing argument.

The Defendant next argues that trial counsel provided ineffective representation by allowing the State to misrepresent the police interrogation both during the testimony of Officer Stevens and during the State's opening and closing remarks. The State counters that Officer Stevens testimony made it clear that the Defendant denied the charges several times. It also avers that the distinction in meanings between the Defendant's verbatim statements and Officer Steven's recollection of the Defendant stating that he would "beat" the charges was merely semantic

This issue presents a closer call than the above issues. The manner in which the State elicited and characterized the interview of the defendant – given that an exact transcript was available to both sides – is very troubling to the Court. The difference between what was actually said in the transcript of the interview by the defendant and how the same comments by the defendant were relayed to the jury by Officer Stevens is stark. It was also arguably foreseeable to defense counsel. Counsel probably should have been made aware by the State's opening statement that it planned on mischaracterizing the Defendant's objectively innocuous statements as inculpatory. The ideal defense attorney would have painted a clearer picture that the Defendant vociferously asserted his innocence during the police interrogation by using the interrogation transcript during cross-examination of Officer Stevens in order to demonstrate that the Defendant proclaimed that his father had been falsely accused and rightfully exonerated, as well as the substantial number of times the Defendant professed his innocence. Trial counsel did, however, at least succeed in eliciting on cross-examination that the Defendant professed his innocence multiple times. While this was not a perfect performance, "[t]he Constitution does not guarantee a defendant

a letter-perfect defense or a successful defense; rather, the performance standard is that of reasonably effective assistance under the circumstances then obtaining." United States v. Natanel, 938 F.2d 302, 309–10 (1st Cir. 1991). It is also worth noting that there are specific details in the transcript - details that the State might have elicited after a meticulous cross examination with the transcript – that the jury could have construed against the defendant.[4]

As for the closing arguments, the State's characterization of the police interrogation was undoubtedly misleading. Moreover, the State seemingly prepared in advance of trial to present this mischaracterization to the jury, as evidenced by its opening statement. The State's choice of words was not a "distinction without a difference" as it asserts, but rather a calculated effort to mislead the jury. That said, the Court cannot conclude that trial counsel was unreasonable in the manner in which she rebutted the State's mischaracterization of the evidence or that the State's comments actually prejudiced the defendant. In her closing argument, trial counsel succeeded in highlighting for the jury the fact that the Defendant professed his innocence to Officer Stevens multiple times. The State's mischaracterization of the evidence, while objectionable, was not so egregious that it undoubtedly necessitated an objection. Trial counsel may have made the reasonable tactical decision that her closing argument sufficiently counterbalanced the misrepresentation in the State's closing statement, and that an objection might have an unintended negative effect upon the jury. See Jackson, 918 F.2d at 243 ("defense counsel's failure to object to the prosecutor's remark . . .

[4] For example, the defendant's comment that he "went into courts" with his father to defend against rape charges and "doing the same thing I am now." See Cronheim Affidavit at 9. It is possible to interpret the defendant's comments to show his awareness that these cases are difficult to prosecute, that acquittals are quite possible and that he is accustomed to testifying about them in Court. Trial counsel could have reasonably made the decision to avoid this argument by letting the state of the evidence about the interview remain rather general and vague.

seems consistent with a reasonable tactical decision to minimize any harm the prosecutor's remark may have caused, by not inviting further attention to it"); see also Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013) (absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct"); Meis v. Wyoming Dep't of Corr., 9 F.3d 695, 697 (8th Cir. 1993) ("Whether to object during closing argument to a slight mischaracterization of evidence is a strategic decision that deserves deference"); Sasser v. State, 338 Ark. 375, 391 (1999) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the wide range of permissible professional legal conduct").

E. Failure to object to inadmissible opinion testimony vouching for TM's credibility

The Defendant next argues that trial counsel provided ineffective representation because she failed to object to inadmissible opinion testimony that bolstered TM's credibility. The Defendant avers that Ms. Walker's opinion testimony relating to the consistency between the 2007 and 2010 CAC interviews, as well as her opinion testimony that about the manners in which sexually abused children divulge information during CAC interviews, amounted to vouching for TM's credibility. The State argues that such testimony was not tantamount to vouching for TM's credibility because it was offered as a rebuttal to trial counsel's attempt to expose a lack of consistency between the two interviews. Additionally, the Defendant argues that Ms. Walker's testimony that TM had been abused and exhibited behaviors typical of sexually abused children amounted to vouching for TM's credibility. The State contends that Ms. Walker's

testimony about the behaviors of sexually abused children related to victims generally as opposed to TM specifically, and that her testimony about TM being abused could have related to Mr. Dixon alone.

First, the Court finds that Ms. Walker's testimony about the consistency between the 2007 and 2010 CAC interviews and how abused children tend to divulge information was admissible.[5] In different circumstances, such testimony might be tantamount to a comment on credibility. Here, however, trial counsel reasonably attempted to highlight inconsistencies in between the two interviews. Although TM mostly denied any inconsistencies, trial counsel did elicit testimony of inconsistencies from Ms. Walker. Consequently, the State was allowed to ask further questions regarding the consistency of the interviews on redirect of Ms. Walker in order to rebut trial counsel's cross-examination.[6] See MacRae, 141 N.H. at 108 (holding that the State may offer evidence in order to preempt or rebut inferences that a child victim witness is lying).

Second, Ms. Walker's testimony that TM had been sexually abused and exhibited behavior typical of sexually abused children did not amount to vouching for TM's credibility. As noted previously, infra Part I(C), Ms. Walker's testimony about behaviors exhibited by sexually abused children, while improper, was made in passing. As for her testimony about TM being the victim of abuse, it is unclear if Ms. Walker was referring to Mr. Dixon, the Defendant, or both. None of these remarks were solicited by the State. Trial counsel could have made a reasonable tactical decision to not object in

[5] The Defendant suggests that this strategy was not reasonable because the two interviews were *in fact* largely consistent. Since he has not submitted into evidence transcripts of the interviews, the Court cannot address such an argument.

[6] The Court also notes that Ms. Walker's testimony about the language children tend to use when they first divulge information of sexual abuse did not fall into the realm of expert opinion. See N.H. R. Ev. 701. Such testimony was rationally based on her experience conducting forensic interviews of sexually abused children. Moreover, the Court notes that trial counsel *did* object to this line of questioning on the grounds that it was expert opinion and the presiding judge overruled the objection. (Trial Tr. at 134–35.)

order to avoid bringing further attention to the troublesome testimony. As noted above, by this point in the trial, evidence of the Dixon sexual assaults had already been admitted. Therefore, to some extent, the defense was suggesting that the victim had been abused – but it was at the hands of Dixon.[7]

F. Elicitation of inadmissible testimony suggesting that the Defendant had sexually assaulted other children and bolstering TM's credibility

The Defendant next argues that trial counsel provided ineffective representation by eliciting inadmissible testimony from both TM and Ms. Wilbur tending to suggest that Wilbur had also sexually assaulted TM's siblings. The Defendant also argues that this testimony bolstered TM's credibility. The Defendant avers that this testimony should have been anticipated because it was referenced in a letter from Doctor Robert Fusco to the County Attorney's office. Furthermore, he avers that trial counsel was aware through discovery that Ms. Wilbur had expressed concerns to DCYF that the Defendant had also abused TM's sister. The State contends that this testimony could not have been anticipated.

The Dr. Fusco letter referenced by the Defendant makes no mention of tests. Trial counsel therefore could not have reasonably anticipated any such testimony from TM. The Defendant also does not submit to the Court any discovery showing that Ms. Wilbur expressed concerns to DCYF about the Defendant abusing TM's sister. Even if trial counsel was aware that Ms. Wilbur did express such concerns, Ms. Wilbur "made it clear to [her] that she did not believe" the charges against the Defendant. (Evidentiary Hr'g, Apr. 5, 2017 at 2:32 PM.) It also appears that trial counsel put some effort into preparing Ms. Wilbur as a witness for trial by speaking to her on the phone. Id. at

[7] The Court finds this fact is what sets this case entirely apart from the facts in State v. Collins, 166 N.H. 210 (2014).

2:38 PM. Trial counsel could not have reasonably anticipated the harmful testimony from Ms. Wilbur. That said, as she admitted during the evidentiary hearing, trial counsel could have done a better job of questioning Ms. Wilbur. Id. at 2:34 PM. In particular, trial counsel was aware that Ms. Wilbur went to get a restraining order against the Defendant not necessarily because she believed the allegations but that DCYF threatened to remove her children from the home if she did not obtain one. Id. at 2:35 PM. Trial counsel might have done a better job parsing Ms. Wilbur's motivations for seeking the restraining order. In sum, however, trial counsel's questioning of TM and Ms. Wilbur did not fall below an objective reasonable standard.

G. Failure to object to the State's reference in the opening statement to inadmissible hearsay

The Defendant's expert also averred that trial counsel should have objected to the following references to inadmissible hearsay in the State's opening: 1) the State's remark "those people can't come in and tell you, "Tiffany told me this," because that's hearsay"' and 2) State's remark that Ms. Walker would testify that the 2010 interview was consistent with the 2007 interview. First, the latter remark was not a reference to inadmissible hearsay. The State likely made an accurate prediction that trial counsel planned on attacking TM's credibility by exposing inconsistencies between the two interviews. See N. H. R. Ev. 801(d)(1). Second, even if the latter remark was hearsay, trial counsel could have made a reasonable tactic decision, as discussed above, infra Part 1(D), in not objecting to either remark because she did not want to bring further attention to them.

H. The probability of prejudice

Since the Defendant has failed to demonstrate that trial counsel's representation was constitutionally deficient, the Court need not address the second prong of the ineffective assistance of counsel standard. The Court notes, however, that even if the first prong had been satisfied, the Defendant has not demonstrated the existence of a reasonable probability that the result of the proceeding would have been different in the absence of the errors. TM's testimony was powerful in that it was both detailed and graphic. See RSA 632-A:6 ("The testimony of the victim shall not be required to be corroborated in prosecutions under this chapter"). In contrast, there were only fleeting instances of inadmissible testimony and the evidence mischaracterized by the State regarding the interrogation had minimal inculpatory potential.

II. The sentencing hearing

Finally, the Defendant argues that trial counsel provided ineffective representation at the sentencing hearing by failing to object to the State's arguments referencing both charges on which the Defendant was acquitted and uncharged conduct. The State contends that there was no prejudice to the Defendant because there is no evidence that the sentencing judge relied on either argument. The State also contends that information about the allegations about the "two other children" was discussed with the sentencing judge in several chambers conferences. Finally, the State notes that, regarding the acquittals, the jury informed the judge after the deliberations that it would have voted to convict on those charges if the State had alleged an object instead of a penis.

As to the first prong, the Court finds that trial counsel's representation at the sentencing hearing was not constitutionally deficient. Neither party discussed this issue

at the hearing on the merits, and no evidence was submitted other than what is contained in the pleadings. There is nothing in the transcript of the hearing which the Court can construe as improperly or adversely affecting the decision of the sentencing judge. The sentence imposed in the case is not out line with sentences imposed in other cases by this Court. Therefore, the Court cannot discern any prejudice caused by any alleged omission by defense counsel at the sentencing hearing.

Conclusion

For the foregoing reasons, the motion is DENIED.

SO ORDERED.

7-28-17
Date

David W. Ruoff
Presiding Justice