THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0512

The State of New Hampshire

v.

Jason Wilbur

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

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# BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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## ISSUE PRESENTED

Whether the trial court erred when it found that defense counsel's representation of the defendant was reasonable even though she (1) did not impeach Officer Scott Stevens with the transcript of his pre-trial interview with the defendant to establish the extent of the defendant's denial of the charges or object to mischaracterizations of the evidence during the prosecutor's closing; (2) consistent with pre-trial preparation, asked T.M.'s mother how she reacted to T.M.'s allegations against the defendant and yielded unexpected, harmful testimony; (3) did not object to a lay witness's passing statement that arguably waded into expert testimony; (4) questioned T.M. about prior abuse to establish that someone other than the defendant caused her need for counseling and her sexualized behavior.

## STATEMENT OF THE CASE

The defendant was charged with two counts of aggravated felonious sexual assault alleging digital penetration—one pattern and one single-act charge—and two counts of aggravated felonious sexual assault alleging penile penetration—one pattern and one single-act charge. T 3-5[1]; RSA 632-A:1, I-c (2016); RSA 632-A:2 (2016); RSA 632-A:3 (2016). The Cheshire County Superior Court (*Arnold*, J.) held a trial on the charges on May 11-12, 2011. The jury convicted the defendant of the two counts alleging digital penetration, but acquitted him of the two counts alleging penile penetration. T 189-92. The trial court sentenced the defendant to two consecutive, stand-committed terms of 10 to 20 years in the New Hampshire State Prison. DBA 2. The defendant appealed his conviction, which this Court affirmed. *State v. Wilbur*, No. 2011-0627 (N.H. Dec.14, 2012).

On June 2, 2014, the defendant filed a motion for a new trial, citing ineffective assistance of counsel. DBA 1-30. The court (*Ruoff*, J.) held a two-day evidentiary hearing on March 7, 2017, and April 5, 2017. Following the hearing, the court denied the defendant's motion after it found that defense counsel's representation was not constitutionally deficient. Supp. 1-28.

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[1] Citations to the record are as follows:
"DB" refers to the defendant's brief;
"DBA" refers to the appendix filed with the defendant's brief;
"Supp." refers to the supplement filed with the defendant's brief;
"T" refers to the transcript of the defendant's jury trial, held May 11-12, 2011; and
"TH" refers to the transcript of the evidentiary hearing held on March 7, 2017 and April 5, 2017, to address defendant's motion for a new trial.

## STATEMENT OF THE FACTS

T.M.'s mother met the defendant in 2002. T 139. At the time, T.M. was four or five years old. *Id.* at 32, 34, 89. T.M.'s mother and the defendant married in 2003. *Id.* at 141.

The defendant and T.M.'s mother had an erratic and unstable relationship, and often separated only to subsequently reunite. *Id.* at 142-44. At times, T.M.'s mother and the defendant resided together, while at other times, T.M.'s mother lived with her former husband, William Mitchell. Mitchell, T.M.'s father, had primary custody over T.M., who saw T.M.'s mother every other weekend. *Id.* at 140-41.

T.M. alleged that the defendant began sexually assaulting her when she was five or six while he was babysitting her in his apartment in Jaffrey. *Id.* at 34-36, 38. T.M. testified that she was watching Teletubbies and had to go to the bathroom. *Id.* at 37. The defendant followed T.M. to the bathroom, which was unusual. *Id.* at 38. Once in the bathroom, the defendant asked T.M. if she "wanted to play a game." *Id.* at 39. When T.M. responded, "yes," the defendant warned her, "Don't tell Mama." *Id.* at 40. The defendant then "put[] his finger and rubb[ed] around [T.M.'s] private area," which T.M. later clarified was her vagina. *Id.* at 40-41. The assault ended when T.M.'s mother returned to the apartment. *Id.* at 41.

T.M. testified that the defendant subsequently assaulted her in this manner "multiple times." *Id.* at 40. She also testified that the defendant "practically did it to me every time I came over." *Id.* at 36.

The defendant later escalated the abuse by digitally penetrating T.M. *Id.* at 42. T.M. testified that the defendant first assaulted her in this manner after she took a shower. *Id.* at 41-42. The defendant began touching T.M.'s vagina and then pushed his finger inside her. *Id.*

The defendant continued to assault T.M. after he and T.M.'s mother moved to Swanzey. *Id.* at 43. T.M. recounted one occasion when she went to her bedroom to play, and the defendant followed, leaving T.M.'s mother and T.M.'s young siblings downstairs. *Id.* at 47. The defendant again asked T.M. if she wanted to play a game. *Id.* She said that she did. *Id.* The defendant again assaulted T.M. by touching and penetrating her vagina with his finger. *Id.* at 46. T.M. testified that the assault made her feel "weird," and that she told the defendant to stop. *Id.*

T.M. then testified that the defendant further escalated the assaults. One day, after T.M. took a bath, the defendant asked her if she wanted to play a "different game." *Id.* at 49. T.M. responded, "yes, of course." *Id.* The defendant then told T.M. to lie down. *Id.* The defendant then got on top of her and covered her eyes with a towel. *Id.* at 49-50. T.M. then felt the defendant put his penis into her vagina. *Id.* at 50. Though she could not see, she testified that she knew it was his "private" because "it felt different from a finger." *Id.* "It hurt," she testified. *Id.* T.M. told the defendant to stop, but he refused, saying that she would "get used to it." *Id.* at 50-51. After the defendant finished, but before he left the room, he again told T.M. "not to tell Mama." *Id.* at 51.

These assaults continued for months to "maybe a few years." *Id.* at 52. At the time, T.M. was with the defendant and T.M.'s mother in Swanzey every other weekend.

*Id.* at 51-52. T.M. testified that every night when the defendant and T.M.'s mother were not fighting, in which case the defendant would go stay with his father, the defendant would assault T.M. *Id.* Sometimes the defendant would creep into T.M.'s room at night and ask her to play a game. *Id.* at 52-53. When she said yes, he would assault her. *Id.*

T.M. eventually disclosed the abuse to a neighbor when she was eight or nine years old. *Id.* at 54. The neighbor then alerted T.M.'s father and her stepmother, Felicia. *Id.*

T.M. was first interviewed about the assaults by the Division of Children Youth & Families ("DCYF") in 2007. The State subsequently charged the defendant with aggravated felonious sexual assault in 2008, but entered a *nolle prosequi* on those charges in April 2009. Supp. 1. DCYF again interviewed T.M. in 2010. *Id.* In November 2010, the State re-indicted the defendant on two counts of aggravated felonious sexual assault alleging digital penetration and two counts of aggravated felonious sexual assault alleging penile penetration. *Id.*

The Cheshire County Superior Court (*Arnold*, J.) held a trial on the charges on May 11-12, 2011. In addition to the testimony cited above, the parties made the following arguments and elicited the following evidence at trial:

### A. Opening Arguments

During its opening the State referenced the defendant's pre-trial interview with Detective Scott Stevens. The prosecutor asserted that Detective Stevens was "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 am going to fight it,'" *id.* at 13, arguably implying that the defendant did not really deny the allegation against him.

Counsel for the defendant responded to the implication that the defendant did not fully deny the allegations by directly addressing the defendant's express denials from his pre-trial interview in her opening. She stated:

> And when you hear from Detective Stevens, you're going to hear how after he witnesses the CAC interview with [T.M.] he talks to Mr. Wilbur. He in fact misleads Mr. Wilbur in his statement by making observations or statements regarding things that he said happened during the interview, which on cross-examination you'll see didn't happen, in order to try to get Mr. Wilbur to confess as to what happened saying, "I know what happened because we heard it from [T.M.], so why don't you just go ahead and tell me the truth." *And despite all of that, Mr. Wilbur continues to say, "I never touched her. I didn't do it." There is no admissions, there's no implied admissions. "I didn't do it." He says it over and over. And in fact, after five or six minutes of Mr. Wilbur's denial, the detective stops questioning him and there's no further interviews or further statements made by Mr. Wilbur.*

*Id.* at 21 (emphasis added).

### B. Testimony of Detective Scott Stevens

Detective Scott Stevens testified that he confronted the defendant with T.M.'s allegations during an interview, and that the defendant denied them. *Id.* at 25. However, Detective Stevens also testified that the defendant "told me that his dad had been accused of sexual assault about ten years ago and he beat that," so the defendant "was going to fight it in court." *Id.* at 27.

On cross-examination, counsel for the defendant homed in on Detective Steven's testimony that the defendant claimed he would "beat" the charges, and elicited clear

testimony that the defendant had categorically denied T.M.'s allegations during his pre-trial interview.

> **Q** So notwithstanding that, you tell Mr. Wilbur, "I've got all this information. [T.M.]'s told me this stuff, and, you know, own up to it and be a man," the crux of it.
> **A** Okay.
> **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.*
> 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.*

*Id.* at 28-30 (emphasis added). Defense counsel did not attempt to cross-examine or impeach Detective Stevens with the transcript of the defendant's pre-trial interview.

### C. Evidence of assaults by James Dixon

Prior to trial, the parties agreed not to admit evidence of the Dixon assault at trial. *Id.* at 83. However, T.M. testified during trial that her stepmother signed her up for counseling "before the whole Jason thing came up *because I've already had this happen before*." *Id.* at 64 (emphasis added). The prosecutor then elicited testimony from T.M. on redirect regarding her past sexualized behavior toward her siblings. *Id.* at 79-80. T.M. blamed the defendant for causing this behavior. *Id.* at 79 ("He's the reason why I accidentally hurt my sister.").

Once the jury heard this testimony, defense counsel sought to examine T.M. regarding prior assaults perpetrated against her by Dixon to establish that T.M.'s need for counseling and her prior sexualized behavior "could very well have been as a result of the fact that she was molested by somebody else before." *Id.* at 83.

On re-cross, T.M. testified that she "got molested by another man" when she was around two to four years old. *Id.* at 85-86. She further testified that she started seeing a counselor as a result of this abuse. *Id.* at 86.

On redirect, T.M. identified her former abuser as James Dixon. *Id.* at 87. She testified that he admitted to assaulting her "once" and "went to jail." *Id.*

### D. Testimony of Jessica Walker

Jessica Walker was DCYF child protective service worker and forensic interviewer who interviewed T.M. on several occasions. *Id.* at 113. Walker testified at trial that she first interviewed T.M. in 2007 related to sexual abuse inflicted upon her by James Dixon when she was three or four years old. *Id.* at 116. Walker testified that

Dixon ultimately pleaded guilty to abusing T.M. and was "sentenced to prison." *Id.* Walker testified that she spoke with T.M. again on June 8, 2007, related to the alleged assaults perpetrated against her by the defendant. *Id.* at 115-16. On direct examination, Walker testified that following the June 2007 interview, DCYF opened a voluntary case for services to support T.M. and her family. *Id.* at 118. When asked by the prosecutor about DCYF's concerns for T.M. that motivated its decision to provide services, Walker responded:

> [T.M.] 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.

*Id.* Defense counsel did not object to or move to strike Walker's testimony. The State did not ask any follow-up question, other than whether Walker would categorize the provided services as "preventative." *Id.* at 118-19. The prosecutor also did not mention Walker's testimony during his closing argument.

### E. Testimony of the victim's mother

The defense called T.M.'s mother as a witness at trial to testify about where she and T.M. lived from 2002 to 2007. *Id.* at 142. During direct examination, defense counsel also asked T.M.'s mother what she did when she learned about T.M.'s allegations against the defendant. *Id.* at 144. T.M.'s mother responded that she "freaked out" and "went to this court the next morning and got stuff so he couldn't take the other kids." *Id.*

### F. Closing argument

In her closing, defense counsel anticipated the State's eventual argument that the defendant did not offer a "real denial" of the allegations against him and highlighted Detective Stevens's testimony that confirmed the defendant had made a clear denial.

> In fact, you did hear from Detective Stevens that when Mr. Wilbur was interrogated about these charges he denied that he'd ever touched [T.M.].

T 158.

Contrary to the evidentiary record, the prosecutor argued during his closing:

> 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.

*Id.* at 170. Counsel for the defendant did not object to the State's closing.

### G. Jury Instructions

Following closing arguments, the trial court read instructions to the jury. Relevant here, the trial court instructed:

> You have heard the lawyers discuss the facts and the law in their arguments to you. *These arguments are not evidence*. Their purpose is to help you understand the evidence and the law. If the lawyers have stated the law differently from the law as I explain it to you in these instructions, then you must follow these instructions and ignore the statements of the lawyers. *If the lawyers have stated the evidence differently from how you recall it, then you should follow your own memory of what the evidence is.*

*Id.* at 178-79. It also instructed:

> In deciding whether the State has proved the charges against the Defendant beyond a reasonable doubt, you must weigh the credibility of the witnesses; that is, it is up to you to decide who to believe. If there is any conflict between the witnesses, then you must resolve the conflict and decide what the truth is. Simply because a witness has taken an oath to tell the truth does not mean you have to accept the testimony as true. You are the sole and exclusive judges of the facts of the credibility of all of the witnesses who have testified in the trial of this case and of the weight to be given to the testimony of each witness.

*Id.* at 182.

The jury ultimately acquitted the defendant of the charges related to intercourse, but convicted him on the charges alleging digital penetration. *Id.* at 189-192.

On June 2, 2014, the defendant filed a motion for a new trial, citing ineffective assistance of counsel. DBA 1-30. The court (*Ruoff*, J.) held a two-day evidentiary on March 7, 2017, and April 5, 2017. Following the hearing, the court denied the defendant's motion after it found that defense counsel's representation was not constitutionally deficient. Supp. 1-28.

This appeal followed.

## SUMMARY OF THE ARGUMENT

The defendant was charged with four felonies. The State had uncontroverted evidence that the defendant sexually assaulted T.M., his five-or-six-year-old stepdaughter, in multiple ways in multiple locations for a period of months to years. The defendant dissuaded T.M. from reporting the assaults to her parents by convincing her that the assaults were a "game." He also repeatedly instructed T.M. not to tell her "Mama." The fact that the defendant was convicted of two of the aggravated felonious sexual assault charges is no reflection on the effectiveness of defense counsel.

The defendant claims trial counsel failed him in four regards. First, she did not impeach Officer Stevens with the transcript of his pre-trial interview with the defendant to establish the extent of the defendant's denial of the charges or object to mischaracterizations of the evidence during the prosecutor's closing. Second, consistent with her pre-trial preparation, she asked T.M.'s mother how she reacted to T.M.'s allegations against the defendant and yielded unexpected, harmful testimony. Third, She did not object to a lay witness's passing statement that arguably waded into expert testimony. Fourth, she questioned T.M. about prior abuse to establish that someone other than the defendant caused her need for counseling and her sexualized behavior.

The defendant's claim fails because he cannot establish that trial counsel's performance was deficient or that there is a reasonable probability the verdict would have been different if counsel had performed differently. Defense counsel's decisions not to object during the prosecutor's opening and during Walker's direct-examination, and to question T.M. about prior abuse to establish that someone other than the defendant

caused her need for counseling and her sexualized behavior were strategic decisions that fell within the wide range of reasonable professional assistance. Moreover, the simple fact that T.M.'s mother gave an unanticipated answer at trial, especially given that defense counsel prepared T.M.'s mother for trial and discussed with her the subject matter at issue, does not render counsel's line of questioning constitutionally deficient. Thus, this Court should affirm the trial court's denial of the defendant's motion for a new trial.

## ARGUMENT

**THE DEFENDANT'S CONVICTION OF TWO COUNTS OF AGGRAVATED FELONIOUS SEXUAL ASSAULT WAS THE PRODUCT OF EVIDENCE OF GUILT AND WAS NO REFLECTION ON THE EFFECTIVENESS OF DEFENSE COUNSEL.**

"Both the State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel." *State v. Cable*, 168 N.H. 673, 680 (2016). *See* N.H. Const., pt. I, art. 15; U.S. Const. amends. VI, XIV. The defendant claims his counsel four times fell short of the constitutional minimum standard: first, when she did not impeach Officer Stevens with the transcript of his pre-trial interview with the defendant to establish the extent of the defendant's denial of the charges or object to mischaracterizations of the evidence during the prosecutor's closing; second, when defense counsel, consistent with pre-trial preparation, asked T.M.'s mother how she reacted to T.M.'s allegations against the defendant and yielded unexpected, harmful testimony; third, when she did not object to a lay witness's passing statement that arguably waded into expert testimony; and fourth, when she questioned T.M. about prior abuse to establish that someone other than the defendant caused her need for counseling and her sexualized behavior. However, none of these instances constitute a constitutional defect. Moreover, in none of these cases would an opposite tack have produced a more favorable verdict for the defendant.

An appellate court assessing an ineffective assistance of counsel claim "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington,* 466 U.S. 668, 689 (1984). To overcome that presumption, the defendant must prove that counsel's representation

was constitutionally deficient and that counsel's deficient performance actually prejudiced the outcome of the case. *See, e.g., State v. Kepple,* 155 N.H. 267, 270 (2007).

> To meet the first prong of this test, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." To meet 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."

*State v. Whittaker,* 158 N.H. 762, 768 (2009) (quoting *Strickland*, 466 U.S. at 688) (internal citations omitted). This Court "afford[s] a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." *State v. Dewitt*, 143 N.H. 24, 29 (1998). "Criminal defendants are entitled to reasonably competent assistance of counsel, but not perfection in trial tactics, or success." *Id.* (internal citations and quotations omitted).

The two-prong test for ineffective assistance of counsel raises mixed questions of law and fact. *Strickland,* 466 U.S. at 698. This Court will not disturb the trial court's factual findings unless they are unsupported by the evidence or erroneous as a matter of law. *Kepple,* 155 N.H. at 270. It conducts *de novo* review to determine whether both test prongs are met. *State v. Jennings*, 155 N.H. 768, 772 (2007). If the defendant fails to establish either prong of the test, the Court need not consider the other. *See State v. Roy,* 148 N.H. 662, 665 (2002); *State v. Walton,* 146 N.H. 316, 318 (2001). The standard is the same under both the state and federal constitutions. *Kepple*, 155 N.H. at 269.

### A. Defense counsel provided the defendant with reasonably competent assistance of counsel.

#### 1. Defense counsel's decision not to object to the prosecutor's mischaracterizations of evidence was not constitutionally deficient because the misrepresentation was not egregious and counsel previously addressed the mischaracterized evidence in her opening and closing argument, and elicited clarifying testimony on cross-examination.

Following T.M.'s report of abuse, the Jaffrey Police Department interviewed the defendant. As detailed above, the prosecutor mischaracterized the defendant's statements to the police during his closing argument and implied that that the defendant made inculpatory statements and a tacit admission of guilt to police. While defense counsel did not object during the prosecutor's closing, she nonetheless rebutted the prosecutor's mischaracterizations during her opening and closing argument, and elicited testimony from Officer Stevens that the defendant denied the charged conduct multiple times during his interview. The defendant now claims that his attorney rendered ineffective assistance because she "hardly addressed" the prosecutor's mischaracterizations and failed to object during his closing. DB 16.

The trial court denied the defendant's motion for new trial because it found that he failed to establish the first prong of the ineffective assistance test—namely, that counsel's performance was constitutionally deficient. Supp. 22-23; *see Whittaker,* 158 N.H. at 768. Although "[t]he right to effective assistance extends to closing arguments," *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003), "failure to object during a closing summation generally does not constitute deficient performance." *Zapata v. Vasquez*, 788 F.3d 1106, 1115 (9th Cir. 2015). Instead, "absent egregious misstatements, the failure to

object during closing argument and opening statement is within the wide range of permissible professional legal conduct." *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013); *see Bennett v. New Hampshire*, 2011 U.S. Dist. LEXIS 9651, at *19-20 (D.N.H. June 6, 2001) (unpublished) (citing *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993)) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the decision not to object is not ineffective assistance of counsel."). This Court has similarly held that a defendant must prove that his counsel made "egregious errors" in order to establish that counsel failed to function as the State Constitution guarantees, and thereby, was ineffective. *Whittaker,* 158 N.H. at 768.

Here, the trial court found that while the prosecutor mischaracterized the evidence during closing, the mischaracterization was "not so egregious that it undoubtedly necessitated an objection." Supp. 22. This holding is consistent with decisions rendered in other jurisdictions. For example, in *Zapata*, the Ninth Circuit found that portions of the deputy district attorney's closing rebuttal argument constituted an egregious mischaracterization where he "wove out of whole cloth, with no evidentiary support, a fictional and highly emotional account of the last words" the victim heard the defendant say before he shot him. *Zapata*, 788 F.3d at 1110, 1115-16 ("Picture, if you will, the last words that Juan Trigueros heard before the defendant shot him in the back and to make sure he was dead shot him in the chest . . . Fuckin' scrap. You fuckin' wetback. Can you imagine the terror and the fear Juan Trigueros must have felt as he's cowering into the phone. . . . Fuckin' scrap. Wetback."). The egregiousness of this fictional account was

compounded by the fact that the deputy district attorney waited until closing argument to present it to the jury, when the defense had no opportunity, other than to object, to rebut it.

That was not the case here. First, while the prosecutor mischaracterized the defendant's statements to police, he did not weave them from whole cloth. DBA 62-63 (evidence that the defendant stating that he, like his father, would contest the allegations against him in court). Second, the prosecutor introduced his tacit-admission theme during his opening argument, T 13, which permitted defense counsel ample opportunity for rebuttal. As the trial court aptly noted, by the time the prosecutor delivered his closing argument, defense counsel had already countered the prosecutor's mischaracterization during her cross-examination of Officer Stevens, T 28-30 (Officer Stevens admitted the defendant denied the allegations), and during her closing, T 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 [T.M.]."). Further, defense counsel also made clear during her opening that the defendant denied ever touching T.M. *See* T 21 ("Mr. Wilbur continues to say, 'I never touched her. I didn't do it.' *There is no admissions, there's no implied admissions*. 'I didn't do it.' He says it over and over. And in fact, after five or six minutes of Mr. Wilbur's denial, the detective stops questioning him and there's no further interviews or further statements made by Mr. Wilbur.") (emphasis added). While the "ideal defense attorney" may have painted a clearer picture of the defendant's denial, Supp. 21, the trial court properly found that

defense counsel's efforts fell within the wide range of constitutionally sound representation.

**2. Defense counsel's decision to ask certain questions on direct examination is not rendered constitutionally deficient simply because the questions yield unanticipated testimony that may damage the defense.**

At trial, the defense called T.M.'s mother as a witness to testify regarding T.M.'s living arrangements from 2002 to 2007. T 142. During the course of examination, defense counsel also asked T.M.'s mother what she did when she learned T.M. accused the defendant of assaulting her and whether she spoke with anyone after "freaking out" over the allegations. T.M.'s mother unexpectedly testified that she "freaked out" after she learned of T.M.'s allegations, and that she "went to th[e] court the next morning and got stuff so . . . [the defendant] couldn't take the other kids." T 145. The prosecutor used this testimony during closing to argue that T.M.'s mother believed T.M.'s allegations and immediately sought to protect her other children. T 174. The defendant now alleges defense counsel's line of questioning was constitutionally deficient because T.M.'s mother's unanticipated testimony was the result of defense counsel's failure to prepare T.M.'s mother "to answer the questions she intended to ask." DB 18, 20.

However, defense counsel testified that she did prepare T.M.'s mother for trial by speaking to her by telephone to discuss anticipated trial questions and answers. TH 102-03. She also testified that another member of her office, Violet, met with T.M.'s mother in person. *Id.* at 102. During their call, T.M.'s mother indicated that she did not believe T.M.'s allegations, *id.* at 103, and that she only sought a restraining order against the

defendant because DCYF threatened to take her other children away if she did not, *id.* at 105. Accordingly, when defense counsel asked T.M.'s mother what she did when she learned of the allegations against the defendant, defense counsel not only expected T.M.'s mother "to tell me that she did not believe [T.M.] and that she was—supported her husband . . . [,]" but also that DCYF forced her to seek restraining order against the defendant, stating that if she did not, they would take the other children away from her. *Id.* at 105 (Q: So when you asked that question that's the answer you expected; is that correct? A: Correct.).

The fact that T.M.'s mother gave an unanticipated answer at trial, which defense counsel admittedly did not masterfully rehabilitate, does not render counsel's line of questioning constitutionally deficient.

**3. Defense counsel's decision not to object to Walker's testimony was not constitutionally deficient because the record supports that it was a strategic decision not to draw additional attention to an otherwise inadmissible statement.**

Jessica Walker made a passing statement during her trial testimony that:

> [T.M.] 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.

*Id.* at 118. While the State does not dispute the trial court's assessment that Walker's statement "appears to have crossed into the realm of expert testimony," defense counsel's decision to not object was not constitutionally deficient. As the trial court noted, Walker offered the statement at issue "without any prompting from the State." Supp. 20.

Moreover, the prosecutor declined to ask any follow-up questions regarding the statement. *Id.* In this context, the trial court rightfully found that defense counsel "could have made a tactical decision to not object so as to avoid bringing further attention to the brief comment." As noted throughout this brief, courts afford this type of strategic decision a "high degree of deference." *Dewitt*, 143 N.H. at 30; *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"). Thus, the trial court properly found that defense counsel's conduct was reasonable.

### 4. Defense counsel reasonably introduced evidence that Dixon previously assaulted T.M. in an effort to establish that someone other than the defendant caused T.M.'s sexualized behavior and need for counseling.

The defendant conceded before the trial court that the fact that another individual confessed to aggravated felonious sexual assault involving T.M. was a "double-edged sword for the defense." DBA 9.

> On the one hand, the defense could choose to offer up Dixon's abuse as an explanation for T.M.'s sexual knowledge and/or to attempt to explain her accusations against Wilbur. On the other hand, allowing the jury to hear about Dixon's abuse, particularly the fact that he had admitted to said abuse, would run a significant risk of bolstering T.M.'s credibility (by allowing the State to argue she truthfully accused someone who ultimately confessed) and creating an unfavorable comparison to Wilbur.

*Id.* at 9-10. Now, the defendant argues to the precise contrary—that "no strategic consideration" justified defense counsel's 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. DB 26. And what's more, that defense counsel elicited this testimony "without a reasonable strategy," renders the decision "manifestly unreasonable" and her assistance constitutionally deficient. *Id.* at 10, 27.

The defendant's new position on appeal is nothing more than an attempt to deprive defense counsel of the deference courts generally afford to strategic trial decisions, since as the defendant argues, "[a] court cannot defer to a strategy that does not exist." *Id.* at 26. However, the only evidence that the defendant can muster to support his lack-of-strategy argument is the fact that defense counsel was understandably unable to recall—some six years after the fact—exactly when she determined that it was necessary to question T.M. regarding the Dixon assault. Instead, the trial record makes clear that defense counsel made a sound, strategic decision to elicit testimony regarding the prior abuse of T.M. once T.M. testified that she had been previously abused by someone other than the defendant, but nonetheless attributed her sexualized behavior and need for counseling solely to the defendant's then-alleged conduct.

Prior to trial, the parties agreed not to admit evidence of the Dixon assault at trial. T 83. However, T.M. testified during trial that her stepmother signed her up for counseling "before the whole Jason thing came up *because I've already had this happen before*." *Id.* at 64 (emphasis added). The prosecutor then elicited testimony from T.M. on redirect regarding her past sexualized behavior toward her siblings. *Id.* at 79-80. T.M. blamed the defendant for causing this behavior. *Id.* at 79 ("He's the reason why I accidentally hurt my sister."). Once the jury heard this testimony, defense counsel made

the strategic decision to examine T.M. regarding prior assaults perpetrated against her by someone other than the defendant to establish that T.M.'s need for counseling and her prior sexualized behavior "could very well have been as a result of the fact that she was molested by somebody else before." *Id.* at 83. While this testimony may cut both ways—a fact that the defendant in fact concedes—that does not render defense counsel's trial decision to elicit such testimony constitutionally deficient. To the contrary, that decision is precisely the type of strategic decision to which this Court affords a "high degree of deference." *Dewitt*, 143 N.H. at 30. As the trial court properly recognized—"[t]here are countless ways to provide effective assistance in any given case," Supp. 19 (quoting *Strickland*, 466 U.S. at 689); and here, "either course would have been reasonable, *id.*

### B. Because defense counsel's representation fell within the wide range of reasonable professional assistance, the court need not address whether any claimed errors prejudiced the outcome of the case; but otherwise, the prosecutor's conduct did not adversely impact the verdict.

For the reasons stated above, this Court need not address the prejudice element of the ineffective-assistance analysis because defense counsel's representation was not constitutionally deficient. *See, e.g., Roy*, 148 N.H. at 665 ("Because the defendant has not demonstrated that his counsel's performance was deficient, we need not address whether he was actually prejudiced by counsel's conduct."). Regardless, for the reasons stated below, any alleged errors in defense counsel's representation did not impermissibly prejudice the outcome of the defendant's case.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686; *see Lockhart v. Fretwell,* 506 U.S. 364, 372 (1993) (the prejudice inquiry of the ineffectiveness analysis focuses "on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair."). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. To meet the second prong—or prejudice component—of the ineffectiveness test, the defendant must show that but for the challenged action, the result of the proceeding would have been different. *State v. Collins,* 166 N.H. 210, 213 (2014). "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland,* 466 U.S. at 696.

Here, there was no reasonable probability that, absent the claimed errors, the jury would have had a reasonable doubt respecting guilt. The defendant concedes as much, stating, "the State's case, without legal errors, was legally sufficient." DB 28, n. 1. As the record demonstrates, the evidence of guilt was substantial. T.M. testified and described the manner in which she was repeatedly assaulted—where, when, how, and by whom. She testified regarding how the defendant groomed her for the assaults and escalated the assaults over time. T.M. also testified that the defendant urged her to hide

the assaults from her "Mama"—an urging that she heeded despite the fact she did not realize the assaults were bad and instead thought that they were a "game."

Moreover, the defendant's argument that he would have been acquitted but for defense counsel's claimed errors fails for at least five additional reasons. First, the defendant was charged with four counts of aggravated felonious sexual assault, but despite defense counsel's claimed deficient representation, the jury acquitted him on two of these charges. This matters because the effect of each of defense counsel's alleged instances of deficient representation would apply equally to the two counts of digital penetration and the acquitted charges of penile penetration. If certain testimony bolstered T.M.'s credibility with regard to the digital-penetration allegations, it would have had the same effect on the penile-penetration charges. But it did not. Similarly, if the prosecutor's mischaracterization of evidence during closing led the jury to believe the defendant did not actually deny the allegations against him, this would include the allegations of penile penetration. But again, it did not. The fact that the jury still acquitted the defendant on some of the charged crimes demonstrates that the alleged errors in representation were not determinative of the outcome of the case. For this independent reason, the defendant's argument necessarily fails.

Second, the defendant's prejudice argument as applied to defense counsel's decision not to object to the prosecutor's closing argument fails because it is seemingly portrays the prosecutor's statements during opening and closing argument as "evidence." DB 27-28. But argument during opening and closing argument is not evidence. In fact,

the trial court specifically instructed the jurors that the "evidence" the defendant now claims prejudiced the outcome of his trial was not evidence at all.

> You have heard the lawyers discuss the facts and the law in their arguments to you. These arguments are not evidence. Their purpose is to help you understand the evidence and the law. If the lawyers have stated the law differently from the law as I explain it to you in these instructions, then you must follow these instructions and ignore the statements of the lawyers. If the lawyers have stated the evidence differently from how you recall it, then you should follow your own memory of what the evidence is.

T 178-79. Jurors are presumed to follow the trial court's instructions, since they are presumed to "understand that they are bound to follow the law as instructed to them at the close of the case and provided in written form." *State v. Cosme*, 157 N.H. 40, 46 (2008).

Moreover, there was evidence that the defendant denied T.M.'s allegations. As discussed above, Officer Stevens testified on direct and cross that the defendant denied T.M.'s allegations during his pre-trial interview. Thus, the jury had before it evidence that the defendant denied the allegations against him. Further, any risk of prejudice or danger that the jurors would abandon their recollections of the evidence in favor of the parties' arguments regarding the facts was eliminated by the trial court's explicit instructions on that point. *See, e.g. State v. Cooper*, 168 N.H. 161, 170 (2015) (a curative instruction ameliorated any risk of prejudice from the prosecutor's misstatement of the law).

Third, the defendant's argument that defense counsel's mid-trial decision to question T.M. about James Dixon prejudiced his defense is fatally undercut by his concession that the Dixon evidence was a "double-edged sword for the defense" that could have helped and harmed his defense. DBA 9-10. Defense counsel's prejudice

argument as to this evidence must fail given his acknowledgment that the evidence at issue had equal probative and prejudicial value.

Fourth, the admission of Walker's testimony did not bolster T.M.'s credibility as to impermissibly prejudice the outcome of the case. Contrary to the defendant's assertions, this case is unlike *State v. Reynolds*, 136 N.H. 325 (1992), and *State v. Huard*, 138 N.H. 256 (1994), because the prosecutor did not intentionally solicit the testimony at issue and did not attempt to use the yielded testimony to enhance the victim's credibility. *Huard*, 138 N.H. at 258; *Reynolds*, 136 N.H. at 326-27. Instead, the prosecutor largely ignored the yielded testimony—he did not ask any relevant follow-up questions to develop the theme or address it during his closing argument. Moreover, while the defense pressed a theory that the victim had made inconsistent statements about the defendant's assaults, any claimed inconsistencies were not as significant as those present in *Reynolds*. *Cf. Reynolds*, 136 N.H. at 326-27. Thus, the potential rehabilitative effect of Walker's testimony, if any, was significantly less than the officer's testimony in *Reynolds*. This too weighs against prejudice.

Instead, this case is akin to *State v. Lemieux*, 136 N.H. 329 (1992), a comparison with which the defendant agrees. DB 29-30. In *Lemieux*, a DCYF worker testified "yes" when the prosecutor directly asked whether she made a determination of whether the victim suffered abuse. *Lemieux*, 136 N.H. at 331. However, while this Court found this testimony was improper, it primarily declined to find reversible error because, unlike in *Reynolds*, the testimony at issue "was not directed to a specific inconsistency in the victim's testimony in an effort to explain it." *Id.* at 331 (also declining to reverse because

testimony was cumulative and the victim vividly testified regarding the abuse). The same is true here. Not only did the State fail to use the testimony at issue at all, but it certainly did not use it to rehabilitate a specific inconsistency within T.M.'s testimony. Instead, the challenged testimony was nothing more than an unprompted statement that the parties largely ignored throughout the rest of the trial. Thus, the trial court properly found that it did not dictate the outcome of the case.

Fifth, the fact that the prosecutor used T.M.'s mothers unexpected testimony that she "went to th[e] court the next morning and got stuff so he couldn't take the other kids" during his closing to support the argument that T.M.'s mother believed T.M. did not impermissibly prejudice the outcome of the case.

As discussed above, the trial court instructed the jury that argument is not evidence. Moreover, it also instructed the jury that they were the "sole and exclusive judges of the facts of the credibility of all of the witnesses." T 182.

> In deciding whether the State has proved the charges against the Defendant beyond a reasonable doubt, you must weigh the credibility of the witnesses; that is, it is up to you to decide who to believe. If there is any conflict between the witnesses, then you must resolve the conflict and decide what the truth is. Simply because a witness has taken an oath to tell the truth does not mean you have to accept the testimony as true. You are the sole and exclusive judges of the facts of the credibility of all of the witnesses who have testified in the trial of this case and of the weight to be given to the testimony of each witness.

*Id.* Despite T.M.'s mother's testimony and the prosecutor's argument, the jury did not credit all of T.M.'s testimony. Instead, the jury found T.M. credible with regard to the charges of digital penetration, but not penile penetration. This fact indicates that the jury fulfilled the trial court's charge that they were the "sole and exclusive judges of the facts

of the credibility of all of the witnesses," and did not simply defer to the inference or the argument that T.M.'s mother believed T.M.

## CONCLUSION

For the foregoing reasons, the record demonstrates that the jury convicted the defendant based on the weight of the evidence and not as a result of the quality of defense counsel's representation. Accordingly, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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## CERTIFICATE OF SERVICE

I, Elizabeth A. Lahey, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, David M. Rothstein, Deputy Director, by first-class mail postage prepaid, at the following address:

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