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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2017-0599

STATE OF NEW HAMPSHIRE

V.

ABISHEK SACHDEV

Appeal from Final Order of Hillsborough County Superior Court Southern District

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BRIEF OF ABISHEK SACHDEV

ABISHEK SACHDEV

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Oral Argument to be presented by
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(15 minutes requested)

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ISSUES PRESENTED

I. Whether the trial court erred when it found that the Defendant was not in custody entitling him to Miranda protections and denied his Motion To Suppress statements that he made to the Nashua Police Department in violation of Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the Federal Constitution?[1]

II. Whether the trial court erred when it denied the Defendant's Motion To Suppress evidence derived from a warrantless search of his person and the Cricket Wireless store, finding that his consents were free of duress and coercion in violation of Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the Federal Constitution?

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[1] Issues I and II were preserved by Defendant's Motion To Suppress the Statements and Evidence Obtained after Defendant Invoked His Right To Counsel filed on or about March 13, 2017 and the Hearing on that Motion on April 24, 2017.

STATEMENT OF THE CASE

On October 18, 2016 the Hillsborough County Grand Jury – Southern District – indicted the Defendant, charging him with five counts of Aggravated Felonious Sexual Assault. App. at 1-5. Additionally, the State initiated Misdemeanor Informations charging the Defendant with three counts of Simple Assault and one count of Sexual Assault. App. at 6-9.[2] These charges arose out of a sexual encounter that occurred between the Defendant and K.L. on July 12, 2016 in an unfinished retail store in Nashua. See id.

On or about March 13, 2017, the Defendant filed a Motion To Suppress both his statements made to police during an interrogation on July 13, 2016 as well as physical evidence derived from searches of his person and the store where the alleged assaults occurred, which were executed by consents obtained from the Defendant by the police during that interrogation. App. at 10-17. The State Objected to that Motion on or about March 23, 2017. App. at 18-36. The Trial Court held a hearing to consider the Defendant's Motion on April 24, 2017. The Court denied that Motion, issuing a written order on June 19, 2017. OMTS at 1-19.

The Trial occurred over the course of three days. After deliberating, the Jury returned guilty verdicts on two of the AFSA charges, which alleged that K.L. was physically helpless to resist due to her intoxication and that she did not consent. See NOA. The Jury also found the Defendant Guilty of Simple Assault for kissing the alleged victim. See NOA.

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[2] Citations to the record are as follows:

- "App." refers to the Appellant's Appendix filed with this Brief.
- "OMTS" refers to the trial court's order on the Defendant's Motion To Suppress, a copy of which is included with this Brief per Supreme Court R. 16(I).
- "NOA" refers to the Appellant's Notice of Appeal.
- "MH-1" refers to the transcript from the Motion Hearing held on April 24, 2017.
- "MH-2" refers to the transcript from the Motion Hearing held on May 31, 2017.
- "T-1" refers to the transcript from the first day of Trial on June 6, 2017.
- "T-2" refers to the transcript from the second day of Trial on June 7, 2017.
- "T-3" refers to the transcript from the third day of Trial on June 8, 2017.

On September 22, 2017, the Trial Court sentenced the Defendant to 10-20 years at the New Hampshire State Prison on one of the AFSA charges, but suspended 2 years off of the minimum sentence on a condition that he meaningfully participate in the Sexual Offender Treatment Program while incarcerated. See NOA. The Court also sentenced the Defendant to 12 months at the House of Corrections on the charge of Simple Assault, but suspended that sentence for 10 years after his release on the AFSA charge on a number of conditions. The Court did not sentence him on the remaining AFSA charge. See NOA.

This appeal followed.

STATEMENT OF FACTS

I. THE EVENTS SURROUNDING THE ALLEGED ASSAULT

The Defendant is originally from India and moved to the United States in August of 2007. T-3 at 422. Hindi is his first language, but he understands English. T-3 at 422. By the time of the events in this case, the Defendant was the District Manager at Cricket Wireless, a cell phone retailer. T-1 at 49. In July of 2016, the Defendant and Diego Gomez were working to ready a new Cricket Wireless retail store to open in Nashua. T-3 at 423. Mr. Gomez was working to finish the floors in the new store. T-1 at 51. Mr. Gomez and the Defendant worked together late into the evening of July 12, 2016 at the new store. T-1 at 52-53.

The alleged victim, K.L., had been living at a sober house, recovering from alcohol and drug addiction. T-1 at 108. On July, 12th, she worked until 6 PM and returned to the sober house thereafter. T-1 at 110. Upon her return, she was questioned by the host manager regarding whether or not she'd used fentanyl. T-1 at 110. It was a heated exchange. T-1 at 111. The manager threw her out and she left the sober house. T-1 at 113. She was wearing shorts, a tank top, but no shoes as she made her way toward Main Street. T-1 at 113. She found a piece of glass and cut her arm with it. T-1 at 115.

At some point after 9 or 9:30 PM, the Defendant and Mr. Gomez noticed K.L walking barefoot along the streets near the Cricket Wireless store. T-1 at 53 & 55; T-3 at 423. The Defendant initiated contact with her in order to see if she needed any help. T-3 at 424. They offered her flip-flops and invited her inside. T-1 at 54-55 & 118; T-3 at 425. She entered the store willingly -- neither the Defendant nor Mr. Gomez forced her inside. T-1 at 85. She had some scratches and blood on her arms and they attempted to help her -- Mr. Gomez assisted her

to clean the scratches using items from his first aid kit. T-1 at 56-57; T-3 at 426. They also provided her with a t-shirt that she put on. T-1 at 59 & 123; T-3 at 425.

The three got to talking, K.L. saw that they had some cans of beer and she started to help herself to them, drinking one or two beers. T-1 at 60-61 & 86; T-3 at 428. There were only a few cans left out of a six pack. T-1 at 86; T-3 at 427. The group made small talk, K.L. said she'd been working at BJ's. She also asked The Defendant about his work and they talked about the new store. T-3 at 429. K.L. flirted with the Defendant, telling him he had "beautiful eyes." T-3 at 429.

When they ran out of beer, K.L. stated that she wanted more. T-3 at 429. They decided to go to a gas station. T-1 at 62. K.L. suggested a store nearby that sold beer. T-1 at 87 & 123; T-3 at 429. The Defendant purchased a 12 pack of beer. T-1 at 63 & 125. He also purchased condoms. T-2 at 370; T-3 at 432. The group returned to the Cricket store, talked and drank beer in a back office room. T-1 at 91-92; T-3 at 433. Mr. Gomez returned to work on the floors as the Defendant and K.L. remained in the office while the door to the office was open. T-1 at 64, 67-68 & 92.

As they hung out, K.L. leaned her shoulder toward the Defendant, put her head towards his shoulder and said: "I have [had] a long day." T-3 at 434. She said her shoulder hurt, the Defendant offered to rub her shoulders and K.L. answered that "I'll love it if you do that…". T-3 at 435. He rubbed her shoulders for a few minutes; put his hand on her cheek and he started to kiss her. T-3 at 435. K.L responded, kissing him as well and they kissed for a few minutes. T-3 at 436. The Defendant touched her chest as they continued to kiss while K.L. held his neck with her hand. T-3 at 437. The Defendant started to pull her pants down, but remembered that the condoms were with Mr. Gomez. T-3 at 437. He asked her to give him a second, ran outside,

grabbed the condom and returned. T-3 at 437. The Defendant resumed rubbing her shoulders, kissing her and rubbing her chest, taking off her pants thereafter. T-3 at 438. He then stood up, took off his pants, put on a condom, sat down next to her and they began to kiss again. T-3 at 438. They started to have sex. T-3 at 438. She was awake all the while. T-3 at 438. K.L. was engaged and participating as they had sex. T-3 at 438. After a minute or so, K.L. put her hands up, signaled him to stop, said that she was not feeling well and that she needed to throw up. T-3 at 439. The Defendant stopped, got up, gave her a hand, gathered her clothes and gave them to her. T-3 at 439. He then put on his own shorts. T-3 at 439. He offered to show her to the bathroom, but K.L. stated that she wanted to get some fresh air instead. T-3 at 439.

K.L.'s description of this event was different than the Defendant's at Trial. She described that she needed to lie down. T-1 at 128. She alleged that the Defendant kissed her lips, T-1 at 131; attempted to put his penis in her mouth, but that she clenched her mouth shut, T-1 at 133; claimed that the Defendant hit her face with his penis and his hand, T-1 at 134; took off her pants and underwear, T-1 at 134; kissed her breasts, T-1 at 135; and placed his fingers in her vagina, T-1 at 135. K.L acknowledged that she never said "no" when confronted with any of these alleged advances. T-1 at 136. However, K.L. further alleged that the Defendant placed his penis in her vagina and she said "stop." T-1 at 136. She admitted that the Defendant did not threaten her or use any force. T-1 at 180.

At Trial, the Defendant denied raping K.L., attempting to force his penis in her mouth, slapping her with his penis or his hand or placing his fingers in her vagina. T-3 at 444.

Mr. Gomez did not hear any noise or observe signs of distress from the office. T-1 at 93. He did not know what, if anything, occurred between the Defendant and K.L. in the office. T-1 at 94.

As they left the office, the Defendant explained to Mr. Gomez that K.L was not feeling well, wanted to go outside for some air and to throw up. T-3 at 440. They all left the building. T-3 at 440. K.L. asked for a cigarette and the Defendant gave her one. T-3 at 441. The Defendant stood with Mr. Gomez and smoked a cigarette as well. They saw K.L. vomit. In response, the Defendant ran inside, got a bottle of water and gave it to her. At the same time, the Defendant's phone rang with a call from his wife. T-3 at 441. By that time, it was around midnight, the Defendant felt ashamed about the events of the evening and he went home. T-3 at 441-42.

Mr. Gomez continued to accompany K.L. outside of the Cricket store. T-1 at 69. Mr. Gomez flagged down a passing ambulance and K.L. went to the hospital. T-1 at 73. At St. Joseph's Hospital, K.L. did not report the alleged assault. T-1 at 144-45. She did not submit to a sexual assault examination and was discharged that morning. T-1 at 145. She declined the invitation to make any report to the police. T-2 at 217.

K.L. began walking down Kinsley Street when she left the hospital. A friend of hers, Misty Bergeron, drove by, saw her and pulled over. T-1 at 147. K.L. rode with Ms. Bergeron to Nashua Community College and K.L. claimed that she'd been assaulted during the drive. T-1 at 148. Ms. Bergeron recommended that K.L. report the allegation to the police and K.L. agreed to do so. T-149. After meeting with police, they drove K.L. to Southern New Hampshire Medical Center in order to take part in a sexual assault examination. T-1 at 154-55.

II. The Police Interrogation Of The Defendant, His Alleged Consent To Search His Person And The Cricket Store And His Motion To Suppress

The police interrogated the Defendant as part of their investigation, securing statements from him as well as his consent to supply samples of his DNA and to search the Cricket store. Ahead of questioning, two police detectives made contact with the Defendant at the Cricket Store at 4:45 PM the afternoon after the alleged assault. MH-1 at 8 & 51. They told the

Defendant and Mr. Gomez that they were investigating an incident from the night prior that occurred at the store. MH-1 at 10. The detectives were wearing shirts, ties, dress pants and displaying police badges around their necks while carrying guns, handcuffs and radios on their sides. MH-1 at 11. The Defendant and Mr. Gomez agreed to go to the police station. MH-1 at 13, 14 & 51. However, before they left, an additional uniformed police officer responded to the Cricket store in order to stand guard, securing the scene to make sure that no one entered or exited the property while police were questioning the Defendant and Mr. Gomez. MH-1 at 13.

The Defendant and Mr. Gomez drove their own cars to the police department, while the two detectives drove an unmarked police cruiser. MH-1 at 13, 14 & 51. They entered through the front door, but the police did not let the Defendant out of their sight. MH-1 at 52. Two police detectives escorted the Defendant. MH-1 at 52. The Defendant was made to sign in. MH-1 at 52. He signed in at 5:15 PM, but by that time, he'd been in the company of the police for at least 30 minutes. MH-1 at 17. Two police detectives then brought the Defendant from the lobby of the police department, upstairs to the Detective's area. MH-1 at 19. The Defendant was told to wait while they talked first with Mr. Gomez, which took at least 25 minutes. MH-1 at 20 & 22.

After waiting, a police detective brought the Defendant to an interrogation room. MH-1 at 52-53. The room was very small. MH-1 at 23. There was a small square table against the wall with one seat on each side of the table. MH-1 at 23. The Defendant was seated in the chair that was the farthest from the door to the interrogation room. MH-1 at 24. At first, there was one detective in the room with the Defendant and he supplied the Defendant with a "victim witness" form to fill out. MH-1 at 24. The detective left the room to confirm that video and audio recording equipment was working and in order to get a second detective to be part of the interview. MH-1 at 26. The interview began at 5:52. MH-1 at 26. The police began the interview

by explaining that no one forced the Defendant to come to the police department, he was not under arrest and the door to the interview was shut for privacy. App. at 39. They also told the Defendant that he could leave at any time during the interview. App. at 39. Specifically, they explained to the Defendant that "if he wanted to stop talking then we would end the interview and he would be free to leave." MH-1 at 27.

During the interview, the Defendant confirmed that he'd been at the Cricket store the night before with Mr. Gomez and a woman and that they had been drinking. App. at 40-41. He explained his interactions with the woman outside of the store. App. at 41. He told police that they invited her in the store to help her, discussing her injuries, whether she needed help and if she had to go to work the following day. App. at 42. The Defendant admitted that he purchased beer and condoms at a store nearby. App. at 48. He stated that he bought condoms when she was sober, anticipating something might happen between them, but that when she later threw up, he lost interest. App. at 50 & 56. From there, the following exchange occurred between detectives and the Defendant:

> Lombardi: And what happened after she was kissing you?
>
> Defendant: Nothing.
>
> Lombardi: That was it? You're positive?
>
> Defendant: Yes.
>
> Lombardi: Well, if I told you that I had some evidence to suggest otherwise, would you say that that was inaccurate evidence? Like I said, I just -- I just want the truth from you. Okay?
>
> Defendant: I'm telling you the truth.
>
> Lombardi: She's an adult. She's not a kid or anything like that. Okay? You know it is what it is. I just want you to be truthful with me.
>
> Defendant: I have a wife. You have to understand.

Lombardi: We're not going to tell you wife.

Defendant: Yeah. We're not going to talk to your wife.

Lombardi: This is a private conversation just between us. Okay? No one else out of this room is going to hear this. I just want you to be truthful with me. If -- what happens between you and your wife, that's your own thing.

Defendant: Can I consult a lawyer, by any chance?

Lombardi: If you want to talk to a lawyer, that's fine. Okay? I'm just trying to talk to you man to man. Let me lay out what we have right here. Okay? Basically, your store, we're going to need to take some pictures of the inside of it and we're going to need to look through it for some beer cans and some things like that.

Defendant: Okay.

Lombardi: Diego told us that she was bleeding in there and that he had like cleaned her up with some –

Defendant: Yea. He did clean her, yea.

Lombardi: we want -- we want to be able to get those things. So, there's a couple ways for us to go about doing that. Okay? We could get a search warrant. We can get consent from you. It's entirely --

Defendant: Go ahead, you can do that.

Lombardi: Okay. So, what we're going to do, is we'll review a consent to search form. Like I said, we're going to go in there, we're going to take picture, we're going to get those items that we need to get and then you can have your store back. Okay? All right. So--

Defendant: I mean what happened to her? Is she in trouble?

Lombardi: She's not in trouble. Like you said, she had some cuts and scrapes on her. We were trying to figure out where those came from. That kind of stuff.

Defendant: [inaudible] we feel bad because she was walking barefoot. That's why we took her in. I'll be helping you. You can go in and take a look. Whatever you want. So but tomorrow can we do sales over there or no?

Lombardi: Assuming that we can just go in there and take pictures...As soon as we are done [inaudible as they talk over each other].

Lombardi: All right. This is basically our standard consent to search form. Okay, so we have everyone fill this out when we are searching something. So I'll read it and then you can read it with me as I am reading it to you....So "I . . . have been informed of my constitutional right not to have a search made of my . . . .premise.

Defendant: Not to have?

Lombardi: Yes. So you have the right to not let us do this, and have us get a search warrant, which means we'll close down your business until . . .

Defendant: No, you can go ahead . . .

Lombardi: So you have the right to not let us take these pictures and not search your building. Okay? You have that right . . . Hold on one second, let me start again here . . . So I, your name, have been informed of my constitutional right not to have a search made of my premise um without a search warrant and of my right to refuse to consent to . . . such a search . . . do hereby authorize the below listed individuals, who have identified themselves to me as law enforcement officers, to conduct a complete search of my premise situated at your business 83 Main Street. They are also authorized to remove any letters, papers, materials or other property which they may desire. I understand that anything discovery may be used against me in a criminal proceeding. This consent to search has been given by me voluntarily without threats or promises of any kind. Okay, so I'm not threatening you, I'm not telling you that I'm going to do anything that I'm not going to do . . . Do you have any questions about it first of all?

Defendant: Nope.

Lombardi: If you agree to that, you can sign right there and then date and time.

Lombardi: All right. And then. You said nothing sexual happened with you and her, right? Nothing like that.

Defendant: [inaudible].

Lombardi: I was going to fill out another one of these and ask for buccal swabs, which is basically I'll take a little Q-tip and rub the inside of your mouth to get a DNA sample. Are you okay with consenting to that?

DiTullio: It's two Q-tips, they're about this long. We'll rub one on the inside of your cheek and one on the other side of the cheek. And that's it . . .

Lombardi: Like I said, it's to get a . . . some of your DNA

Defendant: Why's that?

Lombardi: You said that there was no sexual assault . . .

Defendant: I want to consult with my lawyer?

Lombardi: Well that's fine if you want to consult a lawyer about that. Like I said I'm not going to force you to do that. I'm not going to make you any promises, but the buccal swabs are to take DNA so we can compare them against any other DNA that may or may not have been found. It's entirely up to you. Same thing with this one, I'm not going to force you to do anything you don't want to.

Defendant: I mean, you can go ahead on that one.

Lombardi: Okay, but you don't want to sign the consent for the swabs for your DNA?

Defendant: Not right now.

Lombardi: Not right now?

Defendant: No.

Lombardi: Okay. All right Fair enough. All right, so with that being said, we'll run out there we'll take photographs, we'll go look through there get that all done and um that way you can have your business back up and running and do what you have to do, okay?

App. at 57-65. The detectives concluded the recorded portion of the interview at 6:11 PM. OMTS at 8.

After the recorded interview concluded, the police took a break to discuss, among themselves, whether to seek a search warrant for a buccal swap. MH-1 at 40. They then returned to the interview room and explained their plan to secure a warrant. Only then did the Defendant consent to the search of his person. MH-1 at 40. The police then reviewed another consent form with the Defendant relating to the buccal swabs and the Defendant signed that form. MH-1 at 41-42. Thereafter, the police brought the Defendant in a police car with two officers to Southern New Hampshire Medical Center in order to collect this evidence from him. MH-1 at 43-46. The detectives stood by at the hospital for over an hour before returning the Defendant to the police department. MH-1 at 83.

Ahead of Trial, the Defendant moved to suppress his statement to the police as well as evidence secured from his person and the Cricket store based on the consents that police obtained after he'd requested counsel on two occasions. App. at 10-17. The Defendant argued that he was in custody for purposes of Miranda, invoked his right to counsel and that the consents secured by police thereafter to search the store and his person were involuntary. App. at 12-16. The Trial court considered the Motion in a hearing on April 24, 2017. MH-1. Thereafter, the Court denied the Defendant's Motion, finding that he was not in custody during the interview and, therefore, not entitled to Miranda warnings such that the police did not violate his rights by continuing questioning even after he asked to speak with a lawyer. OMTS at 14-15. The Court also concluded that the consents obtained by police were free of duress and coercion, reasoning that the Defendant was not in custody when he signed the forms, not threatened and not coerced. OMTS at 19. The Trial Court's analysis regarding the voluntariness of the Defendant's consent in light of his requests to speak with a lawyer, focused, in large part, on the question of whether he was in "custody" for Miranda purposes. OMTS at 17.

III. THE EVIDENCE PRESENTED AT TRIAL ARISING FROM THE DEFENDANT'S STATEMENT TO THE POLICE, THE SEARCH OF THE CRICKET STORE AND HIS PERSON

At trial, police explained that they recovered a condom and condom wrapper during their search of the Cricket store. T-2 at 257-58. The police directed these items of evidence to the forensic lab for testing. T-2 at 271 & 403. The police saw some beer cans, but did not identify how many beer cans or collect them as evidence. T-2 at 257-58, 261, 269, 272 & 279.

Kimberly Rumrill testified at Trial regarding DNA testing she conducted at the forensic lab. T-2 at 306. She testified that sperm from the inside of the condom matched the Defendant.

T-2 at 316-17. She further explained that DNA from the exterior of the condom matched K.L. T-2 at 317.

At Trial, Detective Lombardi testified about his interrogation of the Defendant, stating that the Defendant denied that anything sexual occurred between him and K.L. T-2 at 393. The State then played the Defendant's recorded interview to the Jury. T-3 at 416.[3] During cross-examination, Detective Lombardi acknowledged that the Defendant admitted to purchasing condoms, but stated that he was concerned that his wife might find out. T-3 at 418. The Defendant testified at Trial in order to explain his statements to police, describing that he lied to the police because he was ashamed, loved his wife and afraid that she would find out what happened. T-3 at 443. He also explained that while he was at the Cricket store the next day, he didn't try to hide any evidence. T-3 at 444.

The State confronted the Defendant at Trial regarding his denial of sexual intercourse during the police interview compared to his subsequent Trial testimony admitting they had sex and the DNA results, stating "you needed to explain why your DNA was found on that condom; is that right?" T-3 at 466. The Defendant answered that he knew his DNA would be in the condom and he had nothing to hide. T-3 at 471.

[3] The videotaped statement was played for the Jury, but not transcribed as part of the Trial record. It was, however, supplied as an exhibit during the hearing on the Defendant's Motion To Suppress and is part of the record in this case. See MH 1 at 51. A transcript of that interview is included in the Appendix to this Brief. See App. at 38-68.

SUMMARY OF THE ARGUMENT

The trial court erred when it found that the Defendant was not in custody for purposes of Miranda warnings when he was questioned by the police about the alleged assault. Police initiated contact with the Defendant at his place of business and not the other way around. They stationed a uniformed officer at the store to prevent anyone from coming and going when they asked the Defendant to join them at the police department. The interview occurred at the police department, a place that the Defendant had never been. The interview occurred in a very small room, the Defendant sat the furthest from the door, the door was closed and two detectives squeezed themselves into the room, causing even the trial court to acknowledge that "space appeared to be very limited." The detectives were wearing plain clothes, but had badges around their necks, were armed with guns and carried handcuffs. The manner of questioning was accusatory -- they confronted the Defendant about his denial of sexual contact with K.L, demanded the truth from him and barreled through the Defendant's request to speak with an attorney in response to this critical question. The full encounter between the police and the Defendant lasted over 2 ½ hours. The totality of these circumstances shows that the Defendant was in custody, the trial court erred when it found otherwise and this Court must remand this case for a new trial where the Defendant's statements are suppressed.

The trial court also erred when it found that the Defendant's consents to search the Cricket Wireless store and his person were voluntary. As explained, the Defendant was in custody at the time that the detectives secured these consents, a factor that weighs heavily against a finding that they were voluntarily given. However, even if the Defendant was not in custody, these consents were involuntary for a number of reasons. The consent to search the store was only secured from the Defendant after they threated to close his business, something that the

record shows he clearly did not want to do. This was not an idle threat. The Defendant knew that the police had already stationed a uniformed officer at the store in order to secure it from anyone coming and going. Similarly, the Defendant refused, more than once, to supply consent to search his person for DNA and actually asked to speak with a lawyer to understand the police request. The police did not pause to allow the Defendant to speak with a lawyer about it. The totality of the circumstances, therefore, demonstrates that the Defendant's consents were involuntary, the evidence derived from these consents was wrongly admitted at trial and this Court must reverse the decision and remand the case to the superior court for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THAT THE DEFENDANT WAS NOT IN CUSTODY FOR PURPOSES OF MIRANDA WARNINGS

The police violated the Defendant's rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Sixth Amendments to the United States Constitution when they failed to give him Miranda warnings, which were necessary because a reasonable person in his position would have believed that he was in custody. Thus, the trial court erred when it found that the Defendant was not in custody and allowed his statements to be admitted at Trial.

Before a defendant's responses made during a custodial interrogation may be used as evidence against him, the "State must prove, beyond a reasonable doubt, that it did not violate [his] constitutional rights under Miranda." State v. McKenna, 166 N.H. 671, 676 (2014).

In this case, the Defendant was clearly questioned by the detectives at the police department regarding his encounter with K.L. and, accordingly, the issue is whether he was in "custody" at the time. This Court has stated:

> Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest. In the absence of formal arrest, we must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation. The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station. To determine whether a reasonable person in the defendant's position would believe himself in custody, the trial court should consider the totality of the circumstances of the encounter, including, but not limited to, factors such as the number of officers present, the degree to which the suspect was physically restrained, the interview's duration and character, and the suspect's familiarity with his surroundings.

Id. at 676–77 (internal quotations and citations omitted).

On Appeal, this Court will not overturn the trial court's factual findings unless they are contrary to the manifest weight of the evidence, but reviews the trial court's determination of custody *de novo.* See id. at 677.

There are a number of subtle facts that the trial court overlooked when considering the totality of circumstances in this case, which demonstrate that the police contact with the Defendant was custodial. Two detectives initiated contact with the Defendant at his place of business and they immediately told the Defendant they were there to talk about an incident that occurred there the night prior. MH-1 at 10. The detectives invited him to the police department, but, before they left, summoned a uniform police officer to guard the store in order to prevent anyone from coming and going. This fact was known to the Defendant before he left for the police department. MH-1 at 13. This Court considers the number of officers present and whether police initiated contact with a suspect when assessing "how a reasonable person in the suspect's position would have understood the situation." McKenna, 166 N.H. at 676-77 & 684. A reasonable person that is confronted by police at his place of business about a crime that occurred there and sees a uniform officer guard that place of business before being asked to join police at the department for questioning, would believe he had few choices other than to follow the instructions of the police. This dynamic was missed by the trial court in its custody analysis entirely. OMTS at 11-15.

Similarly, in coming to its finding that the Defendant was not in custody, the trial court emphasized the warning that police gave to the Defendant that he could terminate the questioning at any time, but failed to consider the fact that the police didn't honor their own promise when the Defendant twice asked for the assistance of counsel during the interview. OMTS at 13. Whether a suspect is informed that he or she is at liberty to terminate the interrogation has been regarded by this Court as a significant factor in a custody analysis. See McKenna, 166 N.H. at 680; State v. Locke, 149 N.H. 1, 7 (2002) ("Given the repeated advice that he was free to leave, we conclude that a reasonable person in the defendant's position would

not believe that he was restrained to the degree associated with formal arrest."); State v. Hammond, 144 N.H. 401, 404 (1999) (finding no custody, based, in part, upon fact that officers informed the defendant several times that he was not under arrest and that he was free to leave at any time); State v. Johnson, 140 N.H. 573, 578 (1995) (finding no custody, in part, based upon fact that trooper informed defendant he was free to leave).

In this case, the police dutifully began their interview with the Defendant at the police department by telling him that "[i]f at any time you don't want to talk to us, you just let us know and we'll bring you back outside and you can get in your car and leave." App. at 39. While this cautionary language fits neatly in the prosecution playbook for key phrases offered to a suspect to avoid a later finding of custody, it was a hollow promise in this instance. Later, when the police pressed for the defendant to be "truthful" in response to their questions regarding sexual contact with K.L., the Defendant asked if he could consult with a lawyer. App. at 57-59. Faced with this invocation, the police transitioned, at first, from questions regarding the night prior to a review of the consent form to search the store. App. at 60-63. The police then turned to a consent to secure DNA samples from his person, but began the inquiry by asking the Defendant the same question that caused him to ask for a lawyer in the first place, pressing: "you said nothing sexual happened with you and her; right? Nothing like that?" After the Defendant again denied the allegation, the detectives explained that they wanted to secure a buccal swab from him in order to secure a sample of his DNA. App. at 63. The detectives returned immediately to this tactic, saying again: "you said that there was no sexual assault." App. at 64. The Defendant again responded by saying: "I want to consult with my lawyer." App. at 64. Instead of allowing the Defendant to do so, the police ignored the request and returned to their demand for him to sign a consent form for his DNA sample. App. at 64.

This record shows that the Defendant twice requested the assistance of an attorney regarding the critical question the police asked him -- whether he had sexual contact with K.L. the night before. The second time, detectives blended this question in with their request for the Defendant's consent to give them a DNA sample. By doing so, the police ignored their own offer to the Defendant at the start of the interview, to end the inquiry at any time. While this Court has regularly pointed to a law enforcement offer for a suspect to end the interrogation as a fact tending to show that the Defendant was not in custody, such instructions ought to have meaning and, in this case, they had none. The police ignored their offer to the Defendant to end the interview and went right back to the same well, renewing their questions to him regarding the sexual encounter with the alleged victim the night before, but doing so in the context of a conversation regarding the consent form. Thus, this Court ought not give the same weight to the demonstrably superficial warning police gave to the Defendant in this case as it has done in cases past. It must, instead, find that the trial court overlooked this important detail when it pointed to this warning as a factor weighing against a finding that the Defendant was in custody. See App. at 83.

The Trial Court also pointed out that the police were in plain clothes, another of the factors to consider in assessing the question of custody. McKenna, 166 N.H. at 677. However, this observation glossed over the actual appearance of the detectives involved. In addition to the fact that a fully uniformed police officer appeared at the Cricket store to stand guard before the two detectives brought the Defendant to the police department, the detectives that conducted the interview were dressed in a way that projected their law enforcement authority. They each wore badges around their neck. MH-1 at 11. They had guns at their side. MH-1 at 11. They had handcuffs as well. MH-1 at 11. In pointing to their plain clothes dress, the trial court opted not to

consider these other indicators of police authority that added to the custodial nature of the inquiry in the Defendant's case.

The Trial Court further explained that the interview was short in its duration in coming to its finding that it was not custodial. OMTS at 13. While it is true that the interview lasted less than twenty minutes, the trial court's observation failed to fully measure the time that the Defendant spent with the officers. The police contacted the Defendant at his place of business at 4:45 PM. MH-1 at 8 & 51. After a uniformed officer secured the Defendant's business, the Defendant travelled with the police to the police department, arriving at approximately 5:15 PM. MH-1 at 17. After signing in, he waited for the police to first speak with Mr. Gomez. The detectives didn't begin questioning the Defendant until 5:52 PM. MH-1 at 26. The Defendant's interview concluded at 6:11 PM. App. at 78. The police then brought him to the hospital to submit DNA samples in an unmarked squad car. While the record is not clear regarding when the police ended their contact with the Defendant, the detectives acknowledged that they stood by at the hospital waiting for the collection process for over an hour. MH-1 at 83. This conservatively means that the detectives spent over 2 ½ hours with the Defendant -- making contact with him at the Cricket store, directing him to the police department, having him wait for the questioning of Mr. Gomez to conclude, undergoing his own interrogation and then being transported by unmarked police car to the hospital before being brought back to the police department. By making the point that the interview was short, the court below missed the qualitative reality that the Defendant was actually taking direction from police for over two and a half hours. See McKenna, 166 N.H. at 685-86 (comparing cases where questioning for 90 minutes to two hours contributed to a finding of custody with others where questioning was as short as 15 minutes to suggest that there was no custody).

The trial court further emphasized the even tone of the discussion and absence of accusatory questions to underscore its finding that the Defendant was not in custody. OMTS at 13. This trial court's analysis misses the mark on these points. In fact, accusatory questions made by the police weigh in favor of a finding of custody. See McKenna, 166 N.H. at 683. The manner of police questioning was accusatory in this case. The Defendant explained that K.L. kissed him, but told the police that she was "too fucked up" and denied any further sexual contact. App. at 57. The detective responded by saying: "That was it? Okay. You positive? The Defendant said: "yes." App. at 57. The Detective then countered: "Well, if I told you that I had some evidence to suggest otherwise, would you say that that was inaccurate evidence? Like I said, I just -- I just want the truth from you. Okay?" App. at 57. When the Defendant explained his hesitancy to answer further for fear his wife would learn, the detective told him that it was a private conversation and stated that "I just want you to be truthful with me." App. at 58. The Defendant no doubt appreciated the direction of the officer's question and his demand for the truth. After all, the Defendant then asked to consult with a lawyer. App. at 58.

During this exchange, the detective urged the Defendant to be truthful with him on multiple occasions and confronted him with alleged evidence which was inconsistent with his denial of sexual contact with K.L. See State v. Jennings, 155 N.H. 768, 774 (2007) (weighing in favor of custody that officers repeatedly confronted defendant with their belief that victim was telling truth); State v. Dedrick, 132 N.H. 218, 225 (1989) (weighing in favor of custody that defendant was accused of untruths and confronted with damning information). The contours of this exchange demonstrate that "a reasonable person would not feel at liberty to terminate a police interview after being confronted with such evidence, as a reasonable person understands that the police ordinarily will not set free a suspect when there is evidence strongly suggesting

that the person is guilty of a serious crime." McKenna, 166 N.H. at 683. Contrary to the Trial Court view that the atmosphere of the interview tended toward a finding that the Defendant was not in custody, the manner of the police questioning, their repeated demand for the Defendant to tell the truth and their claim to have evidence that suggested that the Defendant was lying all amounted to the type of accusatory questioning that shows that he was in custody at the time.

The Trial court minimization of the record on all of these points created an alternative reality that permitted it to absorb the more obvious facts that demonstrated the custodial nature of the police interaction with the Defendant. The trial court rightly "acknowledge[d] that there are some facts suggesting that the defendant was in custody, including the conditions of the interview room." OMTS at 14.

In fact, the Defendant's dealings with the police from the start shows that the totality of the circumstances in this case amounted to a custodial encounter with the Defendant. The detectives initiated contact with the Defendant at his place of business. See McKenna, 166 N.H. at 684 ("When confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist."). Before police left the Cricket Wireless store to question the Defendant at the police department, they called in a fully uniformed police officer to guard the store, something that the Defendant knew before police questioned him at the police department. Cf. id. at 679 (emphasizing that "the relevant inquiry is the *effect on the suspect*"). The interview occurred at the police department and not in the Defendant's home or his place of business, notwithstanding the fact that the police initiated contact with him there. See id. at 677 (identifying the defendant's "familiarity with his surroundings" among the factors to consider in a custody analysis). The Defendant's interview occurred in a "small" room, the door was closed, the defendant sat in the

chair furthest from the door and even the trial court noted that "[w]hen all three individuals were in the room, space appeared to be very limited." OMTS at 14. There were two detectives present for the interview both of whom were armed, had badges around their necks and carried handcuffs. MH-1 at 11, 23 & 24. All of these facts demonstrate that the Defendant was in custody.

Viewed in their totality, the circumstances of the police interrogation of the Defendant was custodial, the trial court erred when it found otherwise and admitted the Defendant's statements at Trial, requiring that and this Court reverse that decision and remand this case for a new trial where the Defendant's statements, which were the product of custodial interrogation without the benefit of Miranda warnings, are suppressed from evidence.

II. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE DEFENDANT'S CONSENT TO SEARCH THE STORE AND HIS PERSON WERE VOLUNTARY

The manner in which police secured his consents to search the store and his person violated the Defendant's rights under Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. The process of securing those consents were coercive and involuntary because the Defendant only signed them after spending over an hour with armed detectives while his place of business was being guarded by another uniformed officer, twice asking for a lawyer, including in order to specifically understand the consent form for a DNA sample and being threatened police would close his business if they needed to take the time to get a warrant. Accordingly, this Court must reverse the trial court decision regarding the voluntariness of consent and remand this case for a new trial.

Part I, article 19 states: "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Unless a warrantless search [or seizure] falls within one of the few specifically established and well-delineated exceptions, it is *per se* unreasonable." State v. Pinkham, 141 N.H. 188, 189 (1996). Consent is one such exception. See State v. MacDonald, 129 N.H. 13, 20, (1986). "A voluntary consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause." State v. Livingston, 153 N.H. 399, 405 (2006).

"In the case of a consensual search, the State must show from all the surrounding circumstances that the consent given was free, knowing, and voluntary." State v. Prevost, 141 N.H. 647, 650 (1997). The State bears the burden of proving, by a preponderance of the evidence, that the consent was free, knowing and voluntary. The voluntariness of the consent is a question of fact determined by examining the totality of the circumstances. See Livingston, 153 N.H. at 405.

Informing the defendant of viable alternatives to consent, such as securing a search warrant, does not necessarily vitiate consent. State v. Patch, 142 N.H. 453, 459 (1997). Likewise, a "prior refusal does not necessarily invalidate a subsequent consent as involuntary." Id. However, threats that go beyond the intention of officers to secure a search warrant in the absence of consent, may render consent involuntary. See State v. Socci, 166 N.H. 464, 473-74 (2014) (collecting cases where threats beyond simply securing a warrant rendered consent involuntary such as placing a child in social service custody during the search, threatening to arrest a friend or girlfriend or securing a consent during custodial interrogation).

Many courts have held that Miranda relates "to the compulsory self-incrimination barred by the Fifth Amendment and not to unreasonable searches and seizures proscribed by the Fourth

Amendment." State v. Johnston, 150 N.H. 448, 456–57 (2004) (holding that Defendant had no constitutional right to be advised of his Miranda rights prior to consenting to a search). However, the fact that the defendant was in custody may weigh heavily against a finding of valid consent. See State v. Watson, 151 N.H. 537, 540–41 (2004).

To meet its burden of establishing consent to a search in accordance with the mandates of Part I, Article 19 of the New Hampshire Constitution, the State must show that, under the circumstances surrounding the search, it was objectively reasonable for the officers conducting the search to believe that the Defendant had consented to it. State v. Baroudi, 137 N.H. 62, 66 (1993).

This Court will disturb the trial court's factual findings only if they are unsupported by the record or are clearly erroneous. See McKinnon–Andrews, 151 N.H. 19, 22 (2004). Its review of the trial court's legal conclusions, however, is *de novo.* See Livingston, 153 N.H. at 405.

The Defendant's consents in this case were involuntary and the trial court erred by finding otherwise. First, the detectives secured the Defendant's consents during a custodial interrogation without Miranda warnings as previously established herein. While the necessity of Miranda warnings arises in the context of potentially incriminating statements in response to custodial police questioning, the question of whether a suspect is in custody is also a factor that courts consider "heavily" in determining whether a consent was involuntary. See Watson, 151 N.H. at 540–41. In this case, the Defendant was in custody when he gave his consent contrary to the finding of the trial court. The police initiated contact with the Defendant and not the other way around, MH-1 at 8 & 51; they did so at his business, they summoned a uniformed police officer to guard that business while they asked the Defendant to participate in an interview at the police department, MH-1 at 13; the room where the interview occurred was small, the Defendant

sat furthest from the door, the door was closed, MH-1 at 23, 24, 27; there were two armed detectives wearing badges around their necks in the room, MH-1 at 11; they leveled accusatory questions at the Defendant in that they confronted him on multiple occasions in response to his claim that he did not have sexual contact with K.L., demanded the truth from him on multiple occasions, App. at 57-58 & 64; ignored two requests by the Defendant for a lawyer, including one such request that related to understanding the consent to search his person for a DNA sample, App. at 58 & 64; and spent over 2 ½ hours with the Defendant, MH-1 8, 51 & 83, App. at 78. The court below erred when it found that these circumstances did not amount to custody. OMTS at 15. In turn, the trial court wrongly rejected a concern for custody in coming to its finding that the Defendant consented to these searches voluntarily. After all, the fact that the defendant was in custody weighs "heavily" against a finding of valid consent. See Watson, 151 N.H. at 540-41 (citing United States v. Barnett, 989 F.2d 546, 555 (1st Cir.), cert. denied, 510 U.S. 850, 114 S.Ct. 148, 126 L.Ed.2d 110 (1993)).

Regardless of whether the Defendant was in custody, his consent was involuntary for a myriad of other reasons. The police didn't just warn that they'd get a search warrant if he didn't consent, they also stated that they would close his business while they sought a warrant and conducted the search. App. at 61. The trial court side-stepped this concern simply saying that it is acceptable to inform a defendant of viable alternatives to consent, pointing to this Court's decision in Livingston. OMTS at 18. However, in Livingston, the viable alternative was to get a search warrant and contact the owner of the home where contraband was believed to be. See Livingston, 153 N.H. at 406.

The threat was different in this case as was the Defendant's reaction to it. The detective told the Defendant: "you have the right to not let us do this and have us get a search warrant,

which means we'll close down your business until…". App. at 61. The Defendant immediately jumped in to address the fear of business closure, stating: "Yeah, you can go ahead." App. at 61. The Defendant's concern for his ability to continue to open the store was clear from his responses to the detectives. For example, the Defendant said: "So, like tomorrow, can we do the sales over there or no?" App. at 60. He even offered to accompany officers to the store in order to expedite the process. App. at 60. The Defendant's concern for his ability to continue on at work is apparent from these exchanges.

Accordingly, this is not a situation, as found by the trial court, where the police were simply explaining to a suspect viable alternatives to securing his consent such as securing a search warrant. Rather, the police indicated that they would close his business at least during the time it would take to get a search warrant and execute it. The Defendant knew full well that the police were serious in making this threat. To be certain, they had already stationed a uniformed officer at the store with instructions not to let anyone in or out and the Defendant was well aware of the fact that they had done so even before joining the detectives at the police department for his interview. MH-1 at 13. In these ways, the law enforcement threat to close down the Defendant's business went well beyond a mere reference to the fact that they could obtain a warrant and was much more akin to the types of threats that this Court has previously recognized as coercive when exacting consent from a suspect. Cf. Socci, 166 N.H. at 473 (implicit threat to make arrest, use crowbars and take away the defendant's children undermined finding of voluntary consent); United States v. Ivy, 165 F.3d 397, 403 (6th Cir. 1998) (holding that defendant's consent was not voluntary under totality of circumstances when, among other things, officer made statements to the effect that he would arrest defendant's girlfriend and take away their small child if he did not consent, which "went far beyond a mere reference to the fact that

he could obtain a [search] warrant"); United States v. Bolin, 514 F.2d 554, 560–61 (7th Cir. 1975) ("In view of the fact that the defendant signed the consent form while undergoing custodial interrogation and only after he had been impliedly threatened that his girlfriend would be arrested if he did not sign, we hold that the consent was involuntary and therefore invalid"); United States v. Tibbs, 49 F.Supp.2d 47, 48, 53 (D.Mass. 1999) (noting that, once the officer indicated that he would obtain a search warrant, whereupon social services would take defendant's child into custody, if she did not consent, "there was no question that she would succumb [to signing consent form] hardly voluntarily"); State v. Davis, 304 P.3d 10, 15 (N.M. 2013) (in determining voluntariness of defendant's consent, "[s]pecific factors indicating coercion include ... threat of violence or arrest").

The trial court likewise minimized the Defendant's requests to speak with a lawyer, especially as that request related to the police request for consent to search his person. In responding to the argument that the consents were not valid in light of the Defendant's request to speak with a lawyer, the trial court simply reasoned: "As noted above, the defendant was not in custody at the time he requested to consult with a lawyer, and therefore the police did not violate his Miranda rights by continuing to speak with him or asking for his consent." OMTS at 17. This exceeding brief analysis misses the point, entirely. The trial court never attempted to grapple with the reality that on one occasion where the Defendant requested a lawyer, he had done so in order to specifically understand the consent form as it related to the police request to secure his DNA sample. App. at 64. The Defendant twice stated that the did not wish to consent to the DNA search at that time and clearly stated that "I want to consult with my lawyer." App. at 64.

Regardless of whether the Defendant was in custody, this back and forth makes clear that the Defendant declined the initial invitations by police to consent to a search of his person for

DNA and actually wanted to talk to a lawyer about it. Time was never afforded to the Defendant to speak with a lawyer. Rather, police caucused amongst themselves outside the interview room and then returned to tell the Defendant that they were going to secure a search warrant instead. MH-1 at 39-40. The trial court's reasoning focused in on the question of custody as it related to the Defendant's request for a lawyer without at all considering why he made that request in the context of the police demand to search his person. It is fair to infer that he wished to speak with a lawyer to understand the consent form, appreciate the value of the evidence that the police sought to secure, the impact that such evidence would have on the investigation and any potential criminal charges. This is not a question of custody, it is an inquiry into whether the Defendant's multiple refusals to consent to the search of his person, coupled with his request to speak with a lawyer about it, rendered his consent involuntary. The trial court never responsibly addressed this question, which is a concern because the totality of these circumstances demonstrate that the consent to search his person was involuntary. See Livingston, 153 N.H. at 405.

III. THE IMPACT OF THE TRIAL COURT DECISION REGARDING THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENTS AND THE VOLUNTARINESS OF HIS CONSENTS

The trial court's finding that the Defendant's statements were admissible and that his consents to search the store and his person were voluntary, reshaped the trial entirely and, no doubt, compelled the Defendant to the stand to explain the evidence that police unconstitutionally secured from him. During his interview with the police, the Defendant denied sexual contact with K.L., though he explained his concern that his wife may learn about his conversation with the police. App. at 57-59. The consent to search the store resulted in the police discovery of a condom. T-2 at 257-58. The consent to search his person resulted in the police creating a DNA profile for the Defendant. T-2 at 316-17. The forensic testing of this evidence

established that both the Defendant's and K.L.'s DNA was on the condom. T-2 at 316-17. Thus, the Defendant was in the unenviable position of having to explain his initial denial of sexual contact with K.L. in light of the subsequent discovery that his DNA and that of the alleged victim were found on the condom from the store. The State directly implicated this concern in its cross-examination of the Defendant when the prosecutor asked: "you needed to explain why your DNA was found on that condom; is that right?" T-3 at 466.

The prosecutor's question draws into particular clarity the impact of the unconstitutional police investigatory techniques in this case. The Defendant made an initial denial of sexual contact with K.L., but did so in a custodial setting, without the benefit of Miranda warnings and despite the fact that he asked for a lawyer in response to the series of questions that elicited this response. App. at 57-59. The police then secured his consent to search the store, but only after they indicated that they would close it in order to conduct the search. The police also exacted consent from the Defendant to search his person, but did so after he'd declined the search and specifically asked to speak with a lawyer about it. The consents, in these ways, were involuntary, but lead to the discovery of forensic evidence that connected the Defendant to the alleged sexual encounter, contradicting his initial denials of the same to the police. The admission of this unconstitutionally seized evidence at trial, required the Defendant to take the stand in order to explain it, which he did by testifying that he was reluctant to initially acknowledge what was a consensual sexual encounter with K.L. for fear that his wife would find out about his infidelity. This explains how the unconstitutionally seized evidence defined the trial proceedings and burdened the Defendant's right not to testify if he chose not to guaranteed to him by the 5th, 6th and 14th Amendments to the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution.

All of this could have been avoided if the police followed some simple steps. Instead of pushing the boundary of custodial interrogation, they could have simply offered Miranda warnings. Rather than do so, police questioned the Defendant under circumstances that appeared custodial in several ways, placing the trial court judge in the position of engaging in intellectual gymnastics to explain away the otherwise custodial nature of their inquiry. The police also could have simply secured search warrants for the store and the Defendant's person. Instead, police ignored the Defendant's initial denials of consent to search his person, his request for a lawyer to talk about that consent and issued threats to the Defendant that they would close his business if he didn't consent to a search of it. There was absolutely nothing that stopped the police from taking these constitutionally required steps and thereby safeguarding the admissibility of the Defendant's statements as well as evidence seized from the store and his person. The police instead avoided both offering warnings to the Defendant that are at the heart of our nation's constitutional and cultural understanding and the involvement of a neutral and detached magistrate to evaluate any warrant requests and, instead, conducted an interrogation and warrantless searches which were unconstitutional. This Court can't let this conduct stand as it reflects a disturbing erosion in the constitutional protections of our people not to be compelled to incriminate themselves and to be free from searches at the whim of law enforcement absent meaningful evaluation of whether cause exists to set aside our rights.

CONCLUSION

For the reasons stated herein, this Court must reverse the trial court's decision denying the Defendant's Motion To Suppress both his statements to police and evidence derived from his consents to search the Cricket Wireless store and his person, vacate his convictions and remand this case to the superior court for a new trial.

REQUEST FOR ORAL ARGUMENT

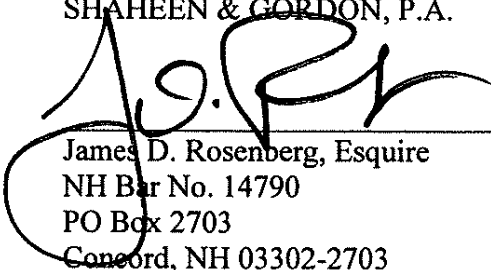
Abhishek Sachdev requests oral argument, to be presented by James D. Rosenberg, Esq.

CERTIFICATION REGARDING DECISION BELOW

Pursuant to Supreme Court Rule 16(I), the decision of the trial court regarding the Defendant's Motion To Suppress was in writing and is included with this Brief.

Respectfully submitted,

Abhishek Sachdev
By and through his attorneys,
SHAHEEN & GORDON, P.A.



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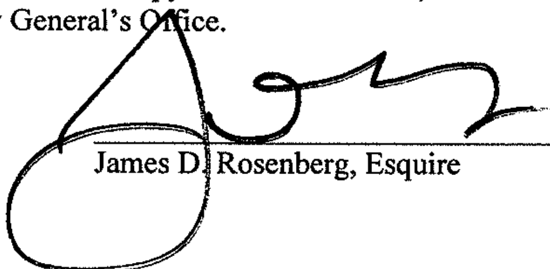
CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the above Brief, this 7th day of February, 2018 to the New Hampshire Attorney General's Office.



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NOTICE OF DECISION

File Copy

Case Name: **State v. Abhishek Sachdev**
Case Number: **226-2016-CR-00592**

Enclosed please find a copy of the court's order of June 19, 2017 relative to:

Motion to Suppress

June 22, 2017

Marshall A. Buttrick
Clerk of Court

(565)

C: Leslie M. Gill, ESQ; Timothy J Goulden, ESQ; Robert Francis Johnson, III, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2016-CR-00592

State of New Hampshire

v.

Abishek Sachdev

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Abishek Sachdev, is charged with five counts of aggravated felonious sexual assault, one count of sexual assault, and three counts of simple assault. He moves to suppress any evidence obtained after he allegedly invoked his right to counsel during an interview with two detectives. The State objects. The Court held a hearing on the defendant's motion on April 24, 2017. It heard testimony from Detectives Frank Lombardi and Christopher DiTullio of the Nashua Police Department. For the reasons set forth below, the defendant's Motion to Suppress is DENIED.

Findings of Fact

The Court makes the following factual findings based on the evidence presented at the suppression hearing.[1] In July 2016, K.L. reported to Detective Lombardi that she had been sexually assaulted. K.L. described her assailant as a thin, darker skin man named "Abi" (pronounced "Abbey"). K.L. told Detective Lombardi that she met Abi at a

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[1] Because of the short amount of time between the suppression hearing and the defendant's trial, the Court previously issued an order summarily denying the defendant's motion to suppress. This order contains the Court's factual findings from the suppression hearing and is intended to fully address the issues. The Court stresses that all of the information contained in this order is drawn from the suppression hearing record. The Court has not considered any of the evidence from the defendant's trial in any manner. See State v. Pseudae, 154 N.H. 196, 200 (2006) (noting that on appeal, "[t]he parties may not rely on evidence presented only at trial . . . because this evidence was not before the trial court at the suppression hearing"); State v. Gonzalez, 143 N.H. 693, 700 (1999) (prohibiting defendant from relying on evidence presented at trial to support his argument on appeal, where such evidence did "not appear in the suppression record").

new Cricket Wireless store ("the store") on the corner of Main Street and Water Street in Nashua and that the assault occurred in the store. K.L also gave other information to the detective, including the name of a potential witness and a description of two vehicles.

On July 13, 2016, at approximately 4:45 p.m., Detectives Lombardi and DiTullio went to the store described by K.L. They wore plain clothes with their badges around their necks and their guns displayed on their hips. Although the store had not yet opened to the public—it was being remodeled—the detectives were able to enter the store through the main entrance. Upon entering, the detectives spoke with the defendant and another man named Diego Gomez. The defendant and Mr. Gomez showed the detectives around the store and they all made small talk. The detectives informed the defendant and Mr. Gomez that they were investigating an incident from the prior night reported by a female. The detectives asked if they would be willing to give statements at the police station "voluntarily," to which the defendant and Mr. Gomez agreed. This conversation occurred on the sales floor area of the store. It was cordial, polite, and short, lasting five minutes.

All four of the men then left the store. Mr. Gomez locked the doors and a patrol officer arrived to secure both entrances to ensure that no one could enter while they were gone. The defendant and Mr. Gomez drove to the station in their own vehicles. Detective Lombardi suggested they take separate vehicles in case either of them finished early or wanted to leave the station. The detectives drove an unmarked cruiser. All three vehicles arrived at the police station simultaneously and they parked in the front lot of the police station. The detectives, Mr. Gomez, and the defendant

entered the police station through the front lobby. Mr. Gomez and the defendant were signed in as visitors at 5:15 p.m. and given visitor badges. (See State's Ex. 1.) The detectives did not take any items from the defendant such as his keys or cell phone. The defendant remained in Detective Lombardi's sight during this process.

After signing in the defendant and Mr. Gomez as visitors, the detectives brought them to a waiting area in the detectives' bureau located on the second floor. The detectives decided to first interview Mr. Gomez. Detective Lombardi asked the defendant to remain in the waiting room while they interviewed Mr. Gomez. The defendant agreed. The detectives told the defendant to let them know if he needed anything during the wait. There is a television in the waiting room, although it is unclear if the detectives told the defendant that he could use it while he waited. The defendant was not restrained in any way in the waiting area. He was alone and unsupervised. Likewise, the door to the exit remained unlocked and the defendant could have left at any time without the assistance of the detectives or any other officer.

The detectives began interviewing Mr. Gomez at 5:21 p.m. The interview lasted twenty-five minutes, after which Detective DiTullio escorted Mr. Gomez back to the main lobby. While Detective DiTullio was with Mr. Gomez, Detective Lombardi met the defendant in the waiting room. Detective Lombardi brought the defendant to an interview room in the Special Investigations Division. The interview room was small, containing a table and three chairs. Detective Lombardi gave the defendant a "victim/witness background sheet" and asked him to complete it. (See State's Ex. 2.) Detective Lombardi then left the room to set up the recording equipment. Once Detective DiTullio returned, both detectives entered the interview room.

The interview began at 5:52 p.m. It was both audio and video recorded. At the beginning of the interview, Detective Lombardi stated the following: "No one forced you to come in here, right? You're not under arrest right now. Um, that door is shut just for our privacy. It's not locked. If at any time you don't want to talk to us, you just let us know and we will bring you back outside and you can get in your car and leave." (State's Ex. 5.) Prior to any questioning, the defendant received a call on his cell phone, which was on the table in the interview room. The defendant answered the call and had a very brief exchange with the caller. After the call, the defendant completed the "victim/witness background sheet." The detectives then began to question the defendant about the night of July 12th. The tone of the interview was very conversational. The detectives did not raise their voices. The defendant gave long narrative responses to their questions rather than simple "yes" or "no" answers.

In the interview, the defendant acknowledged meeting K.L. at the store the previous night, referring to her as "that girl." The defendant stated that he saw K.L. walking near the store barefoot and asked her if she needed help. K.L. had numerous scratches on her body and was very cold. The defendant believed that she was "on something"—apparently referring to drugs. K.L. agreed to go into the store. K.L. told the defendant that she had been kicked out of her house. K.L. saw that the defendant and Mr. Gomez were drinking beer, and asked if she could drink as well. They agreed. Once they ran out of beer, the defendant left the store to buy more beer and a pack of condoms. The defendant returned and the three of them continued to drink and "hang out." K.L. drank several more beers. At some point, K.L. vomited and also fell asleep. The defendant denied that anything sexual happened between them, but acknowledged

that he purchased the condoms in case something might "happen." (Id.) The defendant told the detectives that his wife called around 12:30 and that was when he left the store. At that point, K.L. was outside on the sidewalk with Mr. Gomez.

The defendant also reported that K.L. tried kissing him but he did not reciprocate because she was vomiting and "too fucked up." Approximately thirteen minutes into the interview, the following exchange occurred:

> Lombardi: And what happened after she was kissing you?
>
> Defendant: Nothing.
>
> Lombardi: That was it? You're positive?
>
> Defendant: Yes.
>
> Lombardi: Well, what if I told you that I had some evidence to suggest otherwise? Would you say that that was inaccurate evidence? Like I said, I just want the truth from you. Okay?
>
> Defendant: I am telling the truth.
>
> Lombardi: She's an adult. She's not a kid or anything like that, okay? You know, it is what it is. I just want you to be truthful with me.
>
> Defendant: I have a wife. You have to understand that.
>
> Lombardi: We're not going to talk to your wife. This is a private conversation just between us, okay? No one outside of this room is going to hear this. I just want you to be truthful with me. If . . . what happens between you and your wife, that's your own thing.
>
> Defendant: Can I consult a lawyer by any chance?
>
> Lombardi: If you want to talk to a lawyer, that that's fine. Okay, I'm just trying to talk to you man to man. Um, let me lay out what we have right here, okay. Basically, um, your store—we're going to need to take some pictures of the inside of it. We're gonna need to look through it for some beer cans and some things like that. Diego told us that she was bleeding in

there and that he had like cleaned her up with some [inaudible]. We want to be able to get those things. So there is a couple ways for us to go about doing that. Okay. We can get a search warrant or we can get consent from you. It's entirely . . .

Defendant: You can go ahead. You can do that.

DiTullio: Let me go get the consent form.

[Detective DiTullio leaves the room]

Lombardi: All right, so what we are going to do is review a consent to search form. As I said, we are going to go in there, we're going to take pictures, we're going to get those items that we need to get, and then you can have your store back. Okay. Um. All right. So.

[Detective DiTullio returns with form]

Defendant: I mean what happened to her? Is she in trouble?

Lombardi: She's not in trouble. Like you said, she had some cuts and scrapes on her. We were trying to figure out where those came from. That kind of stuff.

Defendant: [inaudible] we feel bad because she was walking barefoot. That's why we took her in. I'll be helping you. You can go in and take a look. Whatever you want. So but tomorrow can we do the sales over there or no?

Lombardi: Assuming that we can just go in there and take pictures . . . As soon as we are done [inaudible as they talk over each other]

. . .

Lombardi: All right. This is basically our standard consent to search form. Okay, so we have everyone fill this out when we are searching something. So I'll read it and then you can read it with me as I am reading it to you. . . . So "I . . . have been informed of my constitutional right not to have a search made of my . . . premise."

Defendant: *Not* to have?

Lombardi: Yes. So you have the right to not let us do this, and have us get a search warrant, which means we'll close down your business until . . .

Defendant: No, you can go ahead . . .

Lombardi: So you have the right to not let us take these pictures and not search your building. Okay? You have that right. . . . Hold on one second, let me start again here . . . So I, your name, have been informed of my constitutional right not to have a search made of my premise um without a search warrant and of my right to refuse to consent to . . such a search . . . do hereby authorize the below listed individuals, who have identified themselves to me as law enforcement officers, to conduct a complete search of my premise situated at your business 83 Main Street. They are also authorized to remove any letters, papers, materials or other property which they may desire. I understand that anything discovered may be used against me in a criminal proceeding. This consent to search has been given by me voluntarily without threats or promises of any kind. Okay, so I'm not threatening you, I'm not telling you that I'm going to do anything that I'm not going to do. . . . Do you have any questions about it first of all?

Defendant: Nope.

Lombardi: If you agree to that, you can sign right there and then date and time.

[Defendant signs form]

Lombardi: All right. And then. You said nothing sexual happened with you and her, right? Nothing like that.

Defendant: [inaudible]

Lombardi: I was going to fill out another one of these and ask for buccal swabs, which is basically I'll take a little Q-tip and rub the inside of your mouth to get a DNA sample. Are you okay with consenting to that?

DiTullio: It's two Q-tips, they're about this long. We'll rub one on the inside of your cheek and one on the other side of the cheek. And that's it. . . .

Lombardi: Like I said, it's to get a . . . some of your DNA.

Defendant: Why's that?

Lombardi: You said that there was no sexual assault . . .

Defendant: [inaudible] consulting a lawyer?

Lombardi: Well that's fine if you want to consult a lawyer about that. Like I said I'm not going to force you to do that. I'm not going to make you any promises, but the buccal swabs are to take DNA so we can compare them against any other DNA that may or may not have been found. It's entirely up to you. Same thing with this one, I'm not going to force you to do anything you don't want to.

Defendant: I mean, you can go ahead on that one [referring to the search of the store].

Lombardi: Okay, but you don't want to sign the consent for the swabs for your DNA?

Defendant: Not right now.

Lombardi: Not right now?

Defendant: No.

Lombardi: Okay. All right. Fair enough. All right, so with that being said, we'll run out there. We'll take photographs, we'll go look through there get that all done and um that way you can have your business back up and running and do what you have to do, okay?

(Id.) The recording is shut off shortly thereafter at approximately 6:11 p.m.

At that point, both detectives left the room. The defendant remained in the interview room. Once outside of the interview room, the detectives reviewed the information they had gathered so far in the case. They decided that they would apply for a search warrant to obtain buccal swabs, penile swabs, pubic hairs, fingernail clippings, and some of the defendant's clothing. After approximately five minutes,

Detective Lombardi returned to the interview room to inform the defendant about the next steps in the process. The detective told the defendant that they were going to apply for a search warrant to obtain the buccal swabs and other bodily samples. The detective explained the search warrant application process, and again asked for the defendant's consent to obtain these samples. During this discussion, which was very brief, the defendant changed his decision regarding his consent to search his person. It is not clear what prompted the defendant to change his mind regarding consent.[2] This interaction was not recorded as the equipment was previously turned off. However, Detective Lombardi credibly testified that he did not make any threats or promises to the defendant.

The defendant then executed a "consent to search" form similar to the one for the store. Detective Lombardi wrote the defendant's name on the form, read it aloud, and asked the defendant if he had any questions. This consent form authorized the police to search the defendant's person for "buccal swabs, clothing, undergarments, swabs of fingers, penile swabs [and] pubic combing." (State's Ex. 4.) Detective Lombardi asked the defendant to place his initials next to the list of items to be searched. The detective explained that, because of the amount of information on the form, he wanted the defendant to understand "everything that was being requested of him." The defendant initialed the form next to the list of items and signed the bottom of the form at 6:30 p.m. (See id.) He did not have any questions during the process.

Detective Lombardi retrieved Q-tips and performed the buccal swabs in the interview room. The detectives and the defendant then left the police station through

[2] During the cross-examination of Detective Lombardi, it was suggested that the defendant may have given consent because he did not want the detectives to show up at his house with a warrant. However, the detective could not recall if that was said.

the main lobby. They drove together in the detectives' unmarked cruiser to Southern New Hampshire Medical Center for additional evidence collection. The defendant did not have any objections with this process. The defendant sat in the rear seat; the detectives sat in the front. The cruiser did not have a "cage," and the rear door could be opened by the occupant from the inside. In fact, the defendant was able to exit the vehicle on his own upon arrival at the hospital. The defendant was not restrained in any manner at any time except for a seat belt. The detectives did not ask the defendant any questions during the drive.

Once at the hospital, the detectives and the defendant entered the emergency room. The defendant was eventually admitted as a patient and brought to a room where he waited for a SANE nurse to arrive to collect the evidence. Detective Lombardi remained outside of the room, but kept the defendant in his sight to ensure that the defendant did not attempt to destroy any evidence. During this time, Detective DiTullio left the hospital to go to the store to assist other detectives in "processing" the scene. Eventually, the SANE nurse arrived and took the requested evidence from the defendant. Detective Lombardi was present in the room during this process. After the evidence was collected, the nurse gave it to Detective Lombardi.

Detective DiTullio returned to the hospital about an hour later. They then all drove back to the police station together. The defendant was not asked any questions during the return drive. Once at the station, Detective Lombardi thanked the defendant for his cooperation and also gave the defendant his business card. The defendant then got in his vehicle and left the station. He was not arrested at that time. In fact, the

police did not obtain an arrest warrant until July 20, 2016, and the defendant was not arrested until July 22, 2016.

The defendant now moves to suppress "any and all evidence" obtained after he allegedly "invoked his right to counsel." (Def.'s Mot. Supp. at 1.) The defendant claims that the detectives ignored his invocation of his right to counsel in violation of the rights guaranteed by Miranda v. Arizona, 384 U.S. 436 (1966). In addition, the defendant argues that his consent to search his store and his person was not given "free[ly], knowing[ly], and voluntary." (Id. ¶ 24 (citation omitted).) The State maintains that the defendant was never subject to custodial interrogation and therefore he was not entitled to Miranda protections. (State's Obj. Def.'s Mot. Supp. ¶ 38.) The State also asserts that the evidence establishes that the defendant voluntarily gave his consent to search the store and his person. (Id. ¶ 42.)

Analysis

I. Invocation of Right to Counsel

The defendant moves for suppression pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment to the United States Constitution. However, as the New Hampshire Constitution is at least as protective in this area, the Court "address[es] the defendant's claim under the State Constitution and rel[ies] upon federal law only to aid in" the analysis. State v. Gribble, 165 N.H. 1, 11 (2013) (citing State v. Ball, 124 N.H. 226, 231–33 (1983)).

"[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (emphasis added). In other words, "where a person

is not subject to a custodial interrogation, the obligation on the part of the police to issue Miranda warnings and to respect the invocation of Miranda rights does not attach." State v. Carroll, 138 N.H. 687, 696 (1994). Therefore, no constitutional violation occurs when the police ignore a suspect's request for a lawyer when that suspect is not in custody. State v. Lewis, 129 N.H. 787, 797 (1987). Thus, the threshold issue in this case is whether the defendant was in custody at any time during his interview on July 13, 2016.

The legal standard for custody is well-established:

> Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest. In the absence of formal arrest, [the Court] must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation. The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station. To determine whether a reasonable person in the defendant's position would believe himself in custody, the trial court should consider the totality of the circumstances of the encounter, including, but not limited to, factors such as the number of officers present, the degree to which the suspect was physically restrained, the interview's duration and character, and the suspect's familiarity with his surroundings.

State v. McKenna, 166 N.H. 671, 676–77 (2014) (internal citations and quotations omitted).

In this case, there are numerous factors that suggest the defendant was not in custody. The defendant agreed to go to the police station voluntarily and drove himself there. See Carroll, 138 N.H. at 696 (no custody where defendant "drove himself to the police station"); State v. Hammond, 144 N.H. at 404 (defendant not in custody where he drove himself to station, was told that he was not under arrest, and was allowed to go home at the end of questioning). When the defendant arrived at the police station, he entered through the front lobby. The defendant was signed in as a visitor and was

given a visitor's badge. See Commonwealth v. Garcia, 824 N.E.2d 864, 868 (Mass. 2005) (no custody where officer and defendant "entered the station through its visitor entrance"). Only two detectives were present throughout the day. See McKenna, 166 N.H. at 685 ("[I]n isolation, the involvement of only two officers in the interrogation would weigh against custody."). The detectives were dressed in plain clothes. See Hammond, 144 N.H. at 404 (holding no custody where, among other things, police were not in uniform). While armed, the detectives did not brandish their weapons. See United States v. Hughes, 640 F.3d 428, 436 (1st Cir. 2011) ("Only two [officers] carried visible weapons, and those weapons remained in their holsters throughout the visit.").

Most importantly, at the start of the interview, the defendant was notified that his presence was voluntary and that he was not under arrest. See McKenna, 166 N.H. at 679 (noting a statement to a suspect that he is not under arrest generally weighs in favor of a finding of no custody). Detective Lombardi also told the defendant that he could stop the interview at any time and that the defendant would be permitted to leave. See id. at 680 (informing suspect he is free to terminate interview is "a significant factor in our custody analysis"). Throughout the interview, the detectives presented a relaxed demeanor and were cordial toward defendant. The detectives did not act aggressively or raise their voices. The majority of the questioning was not accusatory in nature, and as soon as it became accusatory, the defendant asked about consulting a lawyer and the questioning ceased. See id. at 681 (court should consider "the presence or absence of both accusatory questions and accusatory statements" in custody analysis). Finally, the interview was extremely short—it lasted less than twenty minutes. See State v. Goupil, 154 N.H. 208, 226 (2006) (finding no custody when interview lasted

less than fifteen minutes); State v. Johnson, 140 N.H. 573, 578 (1995) (finding no custody, in part, when questioning lasted approximately ten minutes).

The Court acknowledges that there are some facts suggesting that the defendant was in custody, including the conditions of the interview room. The interview room contained a square table, and three chairs placed on the three open sides of the table. The defendant sat in the chair furthest from the door. Detective DiTullio sat across from the defendant and Detective Lombardi sat at the open side of the table between the two. When all three individuals were in the room, space appeared to be very limited. Additionally, the detectives initiated contact with the defendant. See McKenna, 166 N.H. at 684 ("Also relevant to [the Court's] assessment of the character of the interrogation is the fact that the police initiated the contact with the defendant."). The questioning took place at the police station and there was no evidence that the defendant had ever been there before or was otherwise familiar with his surroundings. See Jennings, 155 N.H. at 774 (finding custody where "the police interviewed the defendant . . . in the closed-door, confined atmosphere of the interview room").

However, as noted above, the ultimate question, when balancing all of the facts, is at what point, if any, was there "restraint on freedom of movement of the degree associated with formal arrest." McKenna, 166 N.H. at 676 (citations omitted). After considering the "totality of the circumstances of the encounter," Jennings, 155 N.H. at 772 (quotation omitted), and "balancing all of the relevant factors," McKenna, 166 N.H. at 686, the Court finds that the defendant was not in custody at any point during the interview and therefore was not entitled to Miranda protections. As such, Detective Lombardi did not violate the defendant's constitutional rights by asking him further

questions after he asked to consult a lawyer. See Lewis, 129 N.H. at 797 ("Since [the defendant] was not in custody or deprived of freedom, his decision to seek counsel was not the invocation of any Miranda right, and Miranda imposed no further obligation on the police."); State v. Portigue, 125 N.H. 338, 345 (1984) ("If she had no Miranda rights to invoke at these moments, because she was not then in custody, the police were faced with nothing they had to 'honor' at their peril under a Miranda analysis."). Therefore, his motion to suppress on that basis is DENIED.

II. Consent[3]

Next, the defendant challenges the validity of the warrantless searches of the store and his person. "Under Part I, Article 19 of our State Constitution, warrantless [searches] are *per se* unreasonable and illegal unless they fall within the narrow confines of a judicially crafted exception to the warrant requirement." State v. Gay, 169 N.H. 232, 240 (2016) (citation omitted). "A voluntary consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause." State v. Watson, 151 N.H. 537, 540 (2004) (citation omitted). "The burden is on the State to prove, by a preponderance of the evidence, that the consent was free, knowing and voluntary." Id. (citation omitted). "Voluntariness is a question of fact, based on the totality of the circumstances." Id. (citation omitted).

After considering the testimony and evidence from the suppression hearing as well as viewing the interrogation video, the Court is convinced by a preponderance of the

[3] The defendant did not cite any provision of the Federal or State Constitutions in making this argument. The Court will assume that the defendant's arguments are made pursuant to Part I, Article 19 of the State Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. However, because "[t]he Federal Constitution offers the defendant no greater protection than does the State Constitution" in this area, State v. McInnis, 169 N.H. 565, 571 (2017), the Court will address "the defendant's claim under the State Constitution, and cite federal opinions for guidance only," id. at 569.

evidence that the defendant validly consented to the searches. First, the State has produced two consent forms signed by the defendant authorizing the search of the store and of his person. While not conclusive, these forms are persuasive evidence that the defendant voluntarily consented to the searches. See id. at 541 (noting that "the use of a written consent form may be an important factor when evaluating" the validity of consent); State v. Johnston, 150 N.H. 448, 454 (2004) ("Importantly, the defendant also signed a consent to search form . . . ."); cf. State v. Derby, 131 N.H. 760, 762 (1989) (signed Miranda waiver was "persuasive" evidence of knowing, intelligent, and voluntary waiver, although not "dispositive"). Second, as noted above, the defendant was not in custody at the time he gave his consent to search. Cf. Watson, 151 N.H. at 540–41 (explaining that "in some situations, the fact that the defendant is in custody may weigh heavily against a finding of valid consent") (citation omitted).

Third, in the video recording, Detective Lombardi clearly explained to the defendant that he did not have to consent to either search. See generally Watson, 151 N.H. at 541 (noting that "it is good policy for police officers to advise persons that they have a right to refuse to consent to a warrantless search") (citation omitted). The defendant obviously understood that explanation as he did not initially consent to the search of his person. See State v. Patch, 142 N.H. 453, 459 (1997) ("The fact that the defendant consented to a search of his vehicle's trunk and to portions of the Perras residence, but refused to consent to a further search of his own residence, indicates that the defendant understood his right to refuse to consent to a search, and further that the consent was knowingly, voluntarily, and freely given."). Fourth, the defendant's tone and demeanor in the video showed that he freely and voluntarily—perhaps even

enthusiastically—gave his consent to search the store. Cf. Watson, 151 N.H. at 541 (upholding trial court's finding of consent even where trial judge found that defendant's consent was "perhaps done unenthusiastically").

In his motion, the defendant fails to acknowledge any of these facts in his argument. Instead, he asserts that his consent was "coerced" because he "asked for counsel twice and was not allowed to consult with an attorney" prior to consenting to the searches. (Def.'s Mot. Supp. ¶ 24.) The Court disagrees that the defendant's request to speak with counsel rendered his confession involuntary or coerced. As noted above, the defendant was not in custody at the time he requested to consult with a lawyer, and therefore the police did not violate his Miranda rights by continuing to speak with him or asking for his consent. This is not a situation where the Court must engage in a "taint" analysis. See State v. Hight, 146 N.H. 746, 750 (2001) (explaining factors trial court should consider when consent is given after an illegal detention). The Court acknowledges that the defendant requested to speak with an attorney regarding the consent to search his person. However, Detective Lombardi did not ignore that request. In fact, he stated "Well that's fine if you want to consult a lawyer about that. Like I said I'm not going to force you to [consent]." Thus, the detective made it clear to the defendant that he could consult a lawyer before consenting to the search of his person. Nevertheless, after the detective informed the defendant that they were going to obtain a warrant, the defendant changed his mind and decided to sign a voluntary consent form, where the defendant was again advised of his right to refuse consent. See State v. Green, 133 N.H. 249, 259 (1990) ("Although Green initially refused consent, prior refusal does not necessarily invalidate a subsequent consent as involuntary.").

Finally, the defendant argues that his consent to search his store was coerced because Detective Lombardi told him that "if he didn't consent to a search, a warrant would be obtained and his business would be closed." (Def.'s Mot. Supp. ¶ 24.) Again, the Court disagrees. It is well-established that merely "[i]nforming a defendant of viable alternatives to a consent search does not necessarily vitiate consent." State v. Livingston, 153 N.H. 399, 406 (2006) (quotation omitted). Here, it is true that Detective Lombardi told the defendant, "So you have the right to not let us do this, and have us get a search warrant, which means we'll close down your business until" when they were reviewing the consent form. Presumably, the detective would have finished that sentence with "until the search is complete" or something to that effect. However, the defendant did not allow the detective to finish the sentence. Instead, the defendant interrupted the detective to immediately provide consent. Moreover, the defendant had already verbally consented to search at least twice prior to this alleged "threat" being made. It therefore did not cause him to consent to the search.

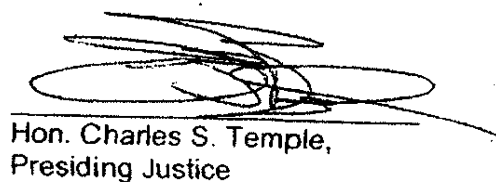
Based on Detective Lombardi's tone and demeanor, the Court does not find that Detective Lombardi was threatening to close the defendant's store *permanently* or was otherwise making any other type of impermissible threat. Compare United States v. Ivy, 165 F.3d 397, 403 (6th Cir. 1998) (holding that defendant's consent was not voluntary under totality of circumstances when, among other things, officer made statements to the effect that he would arrest defendant's girlfriend and take away their small child if he did not consent, which "went far beyond a mere reference to the fact that he could obtain a [search] warrant"). Instead, the detective was merely advising, or at least attempting to advise, the defendant of the consequences of his refusal to give consent.

See Patch, 142 N.H. at 459 (consent not coerced even where "the trial judge found only that the police threatened to get a search warrant, a realistic alternative available to them"). In other words, Detective Lombardi's "was explanatory rather than coercive." Livingston, 153 N.H. at 406 (citations omitted).

In sum, the Court has carefully considered the totality of the circumstances surrounding the defendant's consent. Because the defendant signed two consent forms, was not in custody, and was not threatened or coerced in any way, the Court finds that the State has shown by a preponderance of the evidence that his consent to search the store and his person was voluntary and free of duress and coercion. Accordingly, the defendant's motion to suppress the fruits of the searches of the store and his person is DENIED.

So ordered.

Date: June 19, 2017



Hon. Charles S. Temple,
Presiding Justice