

Re

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0096

The State of New Hampshire

v.

Jonathan J. Marden

2018 OCT 26 P 12:44

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

STATE'S APPEAL PURSUANT TO RSA 606:10 FROM AN ORDER
OF THE SUPERIOR COURT FOR THE SOUTHERN DISTRICT
OF HILLSBOROUGH COUNTY

BRIEF FOR THE DEFENDANT

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(15 minutes)

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ISSUES PRESENTED

1. As the trial court observed in setting aside the verdict against Mr. Marden, this Court has been reluctant to find valid strategic reasons for defense counsel's failure to object to expert testimony regarding behavioral characteristics of the complainant. The issue in this case is whether the jurisprudence from *State v Cressey*, 137 N.H. 402 (1993) to *State v. Collins*, 166 N.H. 210 (2014) supports the finding below that trial counsel was ineffective in failing to object to the testimony of Dr. Gladstone.

2. During the testimony of the sexual assault nurse examiner, trial counsel attempted to question the witness as to statements the complainant made about having sex with her boyfriend a day or two prior to her sexual encounter with the defendant. The State objected to this evidence due to the lack of proper notice and trial counsel then withdrew the question. The question presented is whether trial counsel was ineffective due to his failure to give pretrial notice under N.H. R. Crim. P. 14(b)(2)(B) of his intent to question the complainant about her prior sexual activity with another man.

STATEMENT OF THE CASE

On September 8, 2017, Jonathan Marden was convicted on one count of aggravated felonious sexual assault. Mr. Marden had been represented at trial by Attorney Timothy Goulden and retained new counsel shortly after the verdict. App. 25.¹ On October 11, 2017, after listening to a recording of the trial, Mr. Marden's new counsel filed a motion to set aside the verdict on the grounds of ineffective assistance of counsel. *Id.* at 26.

There was a hearing on November 30, 2017 where the defendant's trial counsel² testified about his representation of Jonathan Marden. *Id.* at 2. On December 14, 2017 the trial court found that Attorney Goulden rendered ineffective assistance of counsel and set aside the verdict and ordered a new trial. *Id.* at 1 & 21. Specifically, the trial court found that trial counsel was ineffective in failing to object to the testimony of Dr. Gladstone regarding the behavioral and emotional symptoms experienced by the complainant three weeks after she reported being sexually assaulted by the defendant. *Id.* at 21. The State filed a notice of appeal of the trial court's decision pursuant to RSA 606:10 on February 22, 2018.

¹ "App." refers to the appendix at the end of the State's brief.

² "Trial counsel" refers to Attorney Timothy Goulden.

STATEMENT OF FACTS

1. Defendant's testimony and evidence in support of defendant's testimony

On September 6, 2017 Jonathan Marden went to trial on one count of aggravated felonious sexual assault for an offense that was alleged to have occurred on October 26, 2016. Tr.³ 4. The charge against Mr. Marden was based upon the testimony of a young woman with whom he had a previous personal relationship. App. 3. The complainant and the defendant dated between February and May of 2016. Tr. 352. The defendant testified that he ended the relationship with the complainant because he felt she was untrustworthy. Tr. 353. The complainant's testimony suggests that she ended the relationship with Mr. Marden by blocking him on social media. Tr. 28.

On or about October 25, 2016, Jonathan Marden contacted the complainant via a message on Snapchat. Tr. 28-29. The complainant replied to this message and the two discussed her work schedule at the Target store at the mall in Nashua. Tr. 31-32 & 354. The complainant invited Mr. Marden to meet her the following day at 9:30 p.m. after she finished her shift. Tr. 354.

Around 9:30 p.m. on October 26, 2016, the defendant went to the Target parking lot. Tr. 355. The complainant walked into the parking lot and, after going into her own car, she joined the defendant in his car by getting into the passenger seat of his car. Tr. 355. After about 10 minutes of conversation,

³ "Tr." Refers to trial transcript.

the two started kissing. Tr. 37-38 & 356. The defendant testified that the complainant then touched his penis over his clothing while they were kissing. Tr. 356-357.

After they started kissing, Mr. Marden got into the passenger seat area with the complainant. Tr. 357. Mr. Marden then started to take the complainant's pants off and she appeared to assist him in taking some of her clothing off. Tr. 358. The defendant then took off his pants and the two engaged in sexual intercourse. Tr. 358. The defendant testified that the complainant's actions indicated that she consented to sexual intercourse and she never said "no" or indicated in any way that she did not consent. Tr. 358-359.

The defendant testified that he withdrew his penis from the complainant before he ejaculated, and then he ejaculated on the seat of the car. Tr. 359. He further testified that after he withdrew his penis from the complainant's vagina she said "stop." Tr. 359-360. Then there was a knock on the window of the car. *Id.*

The person knocking on the door was a security official from Target. App. 3. Through their security cameras, the security services at the mall had observed the activity between the defendant and the complainant and they believed this activity to be sexual in nature. *Id.* Security services notified the Target store of this activity. *Id.* When a Target supervisor knocked on the window of the defendant's car the defendant rolled down his window. *Id.* 3-4. The Target supervisor instructed the defendant to leave the area. *Id.* During

the conversation with the defendant, the Target supervisor recognized the complainant as an employee of the store. *Id.*

The complainant asked the defendant to drive her down to the bottom of the ramp of the parking garage and let her out. Tr. 361-362. The defendant testified that the complainant said, “Oh, great, I’m going to lose my job.” Tr. 361. When she entered the store, the complainant told her supervisor and another co-worker that what the security officer had just witnessed was not merely her having sex in the car, but rather her being raped. App. 4. The complainant was crying and said that she loved working at the store and did not want to lose her job. Tr. 138. The police were notified and responded to the scene. *Id.* The complainant was then taken to the local hospital for a sexual assault examination. App. 4.

2. Dr. Gladstone’s testimony

The State called Dr. Gwendolyn Gladstone as a witness at trial. *Id.* Attorney Goulden did not file a motion in limine regarding Dr. Gladstone’s testimony even though he was aware that Dr. Gladstone’s report included a diagnosis that the complainant had certain behavioral and emotional symptoms consistent with Posttraumatic Stress Disorder (“PTSD”). Tr. 154-155; Mot. Hr’g 36.⁴ Trial counsel’s only effort to limit the testimony of Dr. Gladstone was an agreement with the prosecutor whereby the witness would not use the term “PTSD.” *Id.*

⁴ “Mot. Hr’g” refers to the motion hearing on November 30, 2017.

Gladstone was an agreement with the prosecutor whereby the witness would not use the term "PTSD." *Id.*

Prior to her testimony about her meeting with the complainant, Dr. Gladstone testified that her expertise was in the diagnosis and treatment of child abuse and child sexual assault. The jury heard evidence from Dr. Gladstone that she worked for Dartmouth Hospital at their child advocacy and protection program. Tr. 156. The jury also heard that for the past nine years Dr. Gladstone had specialized in the care of children in cases where there was a report of abuse or neglect. Tr. 156-15. Dr. Gladstone explained that most of the children who were referred to her were referred because their regular medical providers did not feel competent to treat the medical questions regarding abuse. Tr. 157. Dr. Gladstone testified that she went to medical school at Columbia University and she belongs to the American Academy of Pediatrics. Tr. 158. She further testified that she is board certified as a pediatrician by the American Board of Pediatrics with a sub specialty board certification in child abuse. *Id.*

While the State did not use the term PTSD when questioning Dr. Gladstone, they instead substituted the phrase "symptoms of significance" to ask this witness about the emotional and behavioral symptoms described by the complainant to Dr. Gladstone. Tr. 163-164.

MS. DEVINE: Okay. Did you get into any detail about the assault itself?

GLADSTONE: She did not want to talk about the assault. She did tell me some --

MR. GOULDEN: Objection. May we approach, Your Honor?

THE COURT: You may.

(Sidebar begins at 10:14 a.m.)

MR. GOULDEN: Your Honor, this is hearsay what she's about to say we already heard from the victim. She's testified to what happened. This is hearsay and I'm asking that we just move on to the diagnosis. I think that's what she's here for.

MS. DEVINE: Actually, Your Honor, this part is relevant because what she's going to testify to is that [complainant] had mentioned that he didn't use a condom and that she didn't know whether he finished which is relevant to her concerns about whether she has sexually transmitted disease and that's what she's going to testify to, not the rest of it.

THE COURT: And that's it?

MS. DEVINE: Yeah.

MR. GOULDEN: If that's it.

MS. DEVINE: Yeah.

MR. GOULDEN: Okay, Your Honor.

(Sidebar ends at 10:15 a.m.)

BY MS. DEVINE:

Q So what information, she didn't want to talk about the assault generally, but did she provide you some relevant information?

A Yeah. She did tell me that her assailant had -- she wasn't sure if he had, what she called finished --

Q Okay.

A -- during the assault.

Q And did she also indicate whether or not he used a condom?

A Yes she did, although I don't, at the moment, recall whether she said yes or no. If it'd be all right, I'd like to look at my report here.

MS. DEVINE: With the Court's permission, may --

THE COURT: She may. You may review your report and then look up and respond to the question.

THE WITNESS: He had not worn a condom.

BY MS. DEVINE:

Q What other symptoms of significance did she mention to you during your conversation with her?

A She had some physical symptoms and she had some emotional symptoms. Physical symptoms included the genital irritation that I talked about. She also had difficulty with her appetite and had lost weight. She had difficulty sleeping. She felt sad and was crying. She described having less ability to go out of her house to play outside with her brother, to go to school, to socialize. She'd had some preoccupation with thoughts that had made it hard for her to concentrate at school. She had some intrusive images of the assault. And as a consequence, she couldn't concentrate on her school work and had gotten some bad grades, whereas previously she had been on the honor roll.

Q Okay.

A She told me that her symptoms were getting better, but that they still were present, and this was at more than three weeks after the assault.

Tr. 162-164.

The State also elicited evidence from Dr. Gladstone that the complainant was concerned that she might have contracted a sexually transmitted disease ("STD"). Tr. 166-167. Dr. Gladstone advised the complainant to get tested to determine whether she had contracted an STD. Tr. 164. There was no evidence presented during the trial that the defendant had any STD.⁵ Mot. Hr'g 38.

⁵ In his motion to set aside verdict, the defendant also set forth a claim that trial counsel was ineffective in failing to object to the testimony regarding the complainant's concerns about having an STD as this evidence was inadmissible under *State v. Smith*, 135 N.H. 524 (1992) where there was no proof that the defendant had an STD. App. 29. As the trial court found

Dr. Gladstone also testified that that she advised the complainant to see a counselor “because of the persistence of her symptoms, despite several weeks having passed.” *Id.*

3. Nurse Ruiz’s testimony

The State called Jenny Ruiz, a sexual assault nurse examiner (SANE), as a witness at trial. Nurse Ruiz’s report documented that she asked the complainant if she had had any sexual activity in the five days prior the alleged assault. App. 30. The report indicated that the complainant responded that she had sexual activity two days earlier. *Id.* Although she found that the complainant had no injuries, Ms. Ruiz testified that the alleged victim had redness in her vaginal area and that the complainant was very uncomfortable during the exam. Tr. 161, 164, 187-188 &199. During the cross-examination of Ms. Ruiz trial counsel asked, “When was the last time that this patient advised you that she had had consensual sexual activity?” Tr. 199. In response to this question, the State made an objection citing the “rape shield law.” Tr. 199-200. Trial counsel responded to the State’s objection by stating, “I’m not asking, nor did I ask the alleged victim about her sexual history.” Tr. 200. During the bench conference regarding the State’s objection, the court noted that evidence of prior sexual activity of the alleged victim may be relevant to explain any injuries to the alleged victim.⁶ *Id.* After the trial court’s

Attorney Goulden’s failure to object the *Cressey* testimony required a new trial, the trial court did not address this issue in its order. App. 1-23.

⁶ See *State v. LaClair*, 121 N.H. 743, 746 (1981)(Evidence of prior sexual activities might explain physical injuries of the alleged victim).

remarks, defense counsel said, “There were no injuries...” and then he withdrew the question. *Id.*

4. Testimony of Attorney Goulden at Post-Conviction hearing

Attorney Goulden was a witness at the November 30, 2017 hearing on the defendant’s motion to set aside verdict. At that hearing Attorney Goulden was asked if he had prepared written examinations for each of the witnesses in the case. Mot. Hr’g 33-34. At first Attorney Goulden answered “no” to this question and then he said that he did not know if he prepared written examinations of the witnesses. *Id.* Finally, he said he believed he prepared written examinations of the witnesses, but he could not explain why those notes were not in his file. *Id.*

Attorney Goulden testified that he spoke to the prosecutor about Dr. Gladstone’s testimony prior to trial. Mot. Hr’g 35. Attorney Goulden said that he had an agreement with the prosecutor whereby the prosecutor would not elicit testimony from Dr. Gladstone as to her diagnosis that the complainant had symptoms consistent with PTSD. *Id.*

Trial counsel did make one objection to the testimony of Dr. Gladstone. When Dr. Gladstone was asked whether the complainant got into any details about the assault, Attorney Goulden made a hearsay objection. Tr. 162. As part of that objection, Attorney Goulden said, “This is hearsay and I’m asking that we just move on to the diagnosis. I think that's what she's here for.” *Id.*

It was shortly after Attorney Goulden’s hearsay objection to the doctor’s testimony that the State asked Dr. Gladstone to describe any “symptoms of

significance.” Tr. 163. Attorney Goulden did not recall the doctor or the prosecutor using the word “symptoms” at trial. Mot. Hr’g 51.

When asked about why he did not object to the testimony from Dr. Gladstone, Attorney Goulden described Gladstone’s testimony as “benign.” Mot. Hr’g 37-38. Goulden testified that he was not worried about Dr. Gladstone’s testimony because he could give an alternative explanation for the complainant’s symptoms because “[i]t was three weeks later” and “[t]he symptoms could have been because she was worried.” Mot. Hr’g 52. Attorney Goulden never asked Dr. Gladstone if the symptoms she testified to at trial would also be consistent with stress and/or related to lying. Tr. 155-166. Additionally, during his closing arguments Attorney Goulden never offered any alternative explanation for the symptoms testified to by Dr. Gladstone. Tr. 392-398.

When asked specifically about the testimony from Gladstone regarding the behavioral characteristics, Attorney Goulden testified that he thought he had “diffused” this testimony.

Attorney Goulden: Again, I will just say it again for you, I thought that Gladstone I diffused (sic) and I thought she was benign. I don’t think that she hurt my case.

Attorney Brown: So you don't think it hurt your case that she talked about the victim having nightmares?

Attorney Goulden: No.

Attorney Brown: You don't think she talked about the victim having intrusive thoughts hurt your case?

Attorney Goulden: No.

Attorney Brown: You don't think about the fact -- the fact that the victim had her grades were slipping (sic) after these alleged events. You don't think that hurt your case?

Attorney Goulden: No.

Mot. Hr'g 41.

During his cross examination of Dr. Gladstone, Attorney Goulden did not ask her any questions regarding the behavioral characteristics. Tr. 165-167. Only two topics were addressed by Attorney Goulden during his cross of Dr. Gladstone: 1) the fact that this expert was usually called as a prosecution witness; and 2) a person does not need to get sexually assaulted to get an STD and could get an STD from any party. Tr. 155-166.

SUMMARY OF ARGUMENT

1. Trial counsel was ineffective in failing to object to the testimony of Dr. Gladstone concerning the emotional and behavioral characteristics exhibited by the complainant consistent with *State v. Cressey*, 137 N.H. 402 (1993), *State v. Collins*, 166 N.H. 210 (2014) and *State v. Luce*, 137 N.H. 419 (1993). The State's argument that this testimony was admissible because Dr. Gladstone did not explicitly opine that she thought the witness was in fact sexually assaulted is contrary to the law. As the trial court's order observed, "...the New Hampshire Supreme Court's decisions in *Cressey* and *Luce* demonstrate that such an explicit statement is not necessary to render the testimony inadmissible." As the facts presented at trial required the jury to resolve the conflict between the complainant's and the defendant's

testimony, Dr. Gladstone's testimony was prejudicial to a degree that requires a new trial.

2. Trial counsel was ineffective in failing to give pretrial notice under N.H. R. Crim. P. 14(b)(2)(B) of his intent to question the complainant about her prior sexual activity with another man. Evidence that the complainant engaged in sexual activity two days before the alleged assault by the defendant would have provided an alternative explanation for the physical symptoms described by SANE nurse Ruiz and by Dr. Gladstone.

ARGUMENT

- 1. This Court should affirm the trial court's finding that trial counsel was ineffective in failing to object to testimony from an expert in the field of sexual assault regarding significant behavioral characteristics of the complainant.**

The trial judge granted the defendant's motion to set aside the verdict in this case after finding that trial counsel was ineffective in failing to object to Dr. Gladstone's testimony regarding certain behavioral symptoms experienced by the complainant which Dr. Gladstone found to be significant. The trial court based this finding on a review of the transcript, the testimony of trial counsel at a post-conviction hearing and on its reading of this Court's decisions in *State v. Cressey*, 137 N.H. 402 (1993), *State v. Collins*, 166 N.H. 210 (2014) and *State v. Luce*, 137 N.H. 419 (1993).

Not only did the trial court find that, under the *Cressey* line of cases, there was no valid strategic reason for trial counsel's failure to object to the evidence in question, the court also found that it cannot be said with sufficient certainty that the jury would reach the same result in the absence of the testimony of Dr. Gladstone. App. 22.

The State makes three arguments in support of its request that this court reverse the trial court's order: A) the expert testimony at issue in *Cressey*, *Luce* and *Collins* was substantially different than the testimony of Dr. Gladstone in the above-captioned matter; B) Dr. Gladstone's testimony was properly admitted to rebut the defendant's claim that the complainant was falsely claiming lack of consent to keep her job; and C) trial counsel's failure to object to the testimony of Dr. Gladstone was not prejudicial to the defendant.

A. Dr. Gladstone's testimony regarding the behavioral and emotional symptoms of the complainant was inadmissible under *Cressey, Luce and Collins*.

The State's first argument is that the trial court's finding that counsel was ineffective pursuant to *Cressey, Collins* and *Luce* was mistaken because Dr. Gladstone's testimony did not make a specific link made between the symptoms the complainant reported and alleged sexual assault. This argument fails to consider the complete context of the testimony of Dr. Gladstone.

Prior to asking Dr. Gladstone about the behavioral and emotional symptoms experienced by the complainant, the prosecution asked Dr. Gladstone about her expertise and experience. The State established that Dr. Gladstone graduated from Columbia Medical School, was a board-certified pediatrician, with a sub specialty in child abuse, and that she was employed at the Child Advocacy Program at Dartmouth.

After the State elicited evidence regarding Dr. Gladstone's distinguished education and accomplishments in the field of sexual assault, they then asked Dr. Gladstone about any "symptoms of significance" reported by the complainant. In response to this question, Dr. Gladstone testified that the complainant had difficulty with her appetite, had lost weight, had difficulty sleeping, felt sad and cried, had difficulty leaving her house, difficulty at school and difficulty socializing. This testimony can best be summarized as a preeminent expert in the field of sexual assault testifying that the complainant's emotional and behavioral symptoms were significant. Further,

this testimony occurred during a jury trial where the central issue was whether the complainant had been sexually assaulted or, as the defendant contended, was untruthful about being sexually assaulted. A reasonable juror would have assumed that this sexual assault expert believed that the symptoms described above were linked to the issue of whether the complainant had in fact been sexually assaulted. There would have been no purpose for the testimony of Dr. Gladstone other than to have the jury believe the complainant had in fact been sexually assaulted because of symptoms described to the jury.

The State argues that Dr. Gladstone's testimony was permissible because she did not explicitly link the behavioral symptoms exhibited by the complainant to the sexual assault. This argument fails because the symptoms were in fact linked to the claim of sexual assault when the State asked the witness to describe "symptoms of significance." As the trial court observed, *Cressey* and *Luce* demonstrate that an explicit statement linking the symptoms in question to the alleged abuse is not necessary to render the testimony inadmissible where the testimony in question suggested "...the logical conclusions to which the jury was being drawn by the expert's testimony." App. 19. "When inferences or conclusions are so obvious that they could be as easily drawn by the jury as the expert from the evidence, expert testimony regarding such inferences is inadmissible." *State v. Favoccia*, 51 A.3d 1002, 1025–26, (Conn. 2012); citing *State v. Iban C.*, 881 A.2d 1005, 1017 (Conn. 2005).

Dr. Gladstone's testimony improperly linked the behavioral and emotional symptoms specific to the complainant in this case to the sexual assault at issue. This link was created by numerous factors including the subject matter of the testimony, the fact that the doctor was discussing symptoms specific to the complainant as opposed to generalized symptoms, the fact that the symptoms were described as "significant" as well as the inferences and logical conclusions that a reasonable juror would draw from this expert testimony. Trial counsel therefore erred in failing to object to this testimony.

B. Contrary to the State's argument, the testimony of Dr. Gladstone was not admissible to rebut the defense argument that the complainant was lying because she feared losing her job.

The State's second argument is that the evidence was properly admitted to rebut the defendant's theory that the complainant lied about the lack of consent in order to keep her job after being discovered by a co-worker in the defendant's car. The State argues that Dr. Gladstone's testimony was not admitted to establish that the complainant was sexually assaulted but instead to rebut the defense claim that she was lying about being sexually assaulted. What the State is really arguing is that they were not introducing the expert testimony to prove that the complainant was sexually assaulted but instead were introducing the evidence to rebut the defendant's claim that she was lying about the lack of consent. The State argues that "[i]f the victim was merely worried about losing her job, she would not have been manifesting symptoms three weeks later." State's Brief at 23. This argument concedes that the State was introducing Gladstone's testimony to prove that the complainant must

have been sexually assaulted because she exhibited significant behavioral symptoms three weeks after the alleged assault.

Attorney Goulden has not claimed that he did not object to Dr. Gladstone's testimony because he felt it was relevant to rebut the claim that the complainant was afraid of losing her job. Mot. Hr'g 31-64. Attorney Goulden did claim that he did not object to this evidence being introduced because he felt he could offer an alternative explanation as to why the complainant exhibited emotions and behavioral symptoms three weeks later:

I thought temporarily (sic) was so distanced that I didn't think that it was problematic for us. It was three weeks later. The symptoms could have been because she was worried. Our theory of the case always was that she was lying. Liars will have all the same symptoms that when they're worried about something that was described. I was not worried about Dr. Gladstone. Mot. Hr'g 52.

Attorney Goulden did not ask Dr. Gladstone any questions as to whether liars would have the same symptoms as persons who were sexually assaulted. Attorney Goulden did not offer any independent expert evidence that liars exhibit the same symptoms as persons who were sexually assaulted. Mot. Hr'g 52. Most importantly, Attorney Goulden did not make any arguments during closing arguments addressing the testimony of Dr. Gladstone. Tr. 392-398.

C. Dr. Gladstone's testimony was prejudicial to the defendant.

The State argues that because there was evidence that the complainant was very distraught and emotional at the time she reported these charges, testimony from Dr. Gladstone that she was still experiencing emotional

symptoms three weeks later is merely cumulative evidence and therefore not prejudicial.

In support of this argument, the State points to the testimony of several witnesses who described the complainant's emotional state immediately following her report that she was allegedly raped. State's Brief 25. These witnesses were Kevin Curran, Tiffany Huggins and Julia Widtfeldt. *Id.* All of these witnesses were employees of Target. Tr. 90, 121,133. These witnesses, who were also the complainant's co-workers, described her as "confused," "distraught" and "hysterical" on the date she made the allegations against Mr. Marden. Tr. 137, 105, 127. The State argues that "Dr. Gladstone's testimony simply established that the victim was still having an emotional reaction to the event, as opposed to fabricating an assault..." State's Brief 26.

Dr. Gladstone did not merely describe the complainant as being emotional during their meeting three weeks later, but instead described "symptoms of significance." Tr. 163. These symptoms went beyond merely describing the complainant's emotions where the expert testified to the complainant's loss of appetite, weight loss, difficulty sleeping, loss of ability to go out outside, difficulty going to school, difficulty socializing, and preoccupation with thoughts that made it hard for her to concentrate at school. Tr. 164. Dr. Gladstone also testified that the complainant had some intrusive images of the alleged assault. *Id.*

The evidence does not support the State's argument that "Dr. Gladstone was merely reiterating what was before the jury." State's Brief 26. The

witnesses who described the complainant as “upset” and “distraught” on October 26, 2016 were not experts in the diagnosis and treatment of sexual assault. The reason why expert testimony such as provided by Dr. Gladstone in this trial has been found to be prejudicial is the risk the jury will surrender their duty to decide the case themselves:

The reliability of evidence is of a special concern when offered through expert testimony because such testimony involves the potential risks that a jury may disproportionately defer to the statements of an expert if the subject area is beyond the common knowledge of the average person, and that a jury may attach extra importance to an expert’s opinion simply because it is given with the air of authority that commonly accompanies an expert’s testimony. *State v. Cressey*, 137 N.H. at 405.

Again, when a distinguished expert on sexual assault, who has personally met with and examined the complainant regarding the alleged assault, testifies that these symptoms are significant she is not merely reiterating testimony. It was clear that the State wanted to the jury to attach special importance to the testimony of Dr. Gladstone.

The trial court found this testimony impermissibly bolstered the complainant’s credibility and was particularly problematic where the defense was consent and the “case turned on the complainant’s credibility.” App. at 20, quoting *State v. Collins*, 166 N.H. at 214. Additionally, this type of expert testimony is particularly dangerous when the expert in question is one who treated or evaluated⁷ the complainant. See *State v. Favoccia*, 51 A. 3d at 1014.

⁷ In *State v. MacRae*, 141 N.H. 106, 109 (1996) this Court held that while in some circumstances generalized testimony regarding characteristics of a victim of sexual assault may be admissible to explain counterintuitive behavior such as delayed reporting and recantation, testimony regarding the specific behavior of a specific victim is inadmissible. The State has not argued, nor does the record support a finding that the testimony of Dr. Gladstone was

Trial counsel stated that he did not object to this evidence because he thought it could be explained away yet he never offered any evidence to explain it either through cross-examining Gladstone, offering counter expert testimony or making an alternative explanation for the symptoms during his closing arguments. Mot. Hr'g 52; Tr. 392-398.

Trial counsel's failure to object to the testimony of Dr. Gladstone was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. Trial counsel was ineffective in failing to file a timely notice regarding the admissibility of the prior sexual activity of the complainant and this error denied the defendant his right to effective assistance of counsel.

Trial counsel's failure to object to the testimony of Dr. Gladstone, standing alone, creates a "reasonable probability that the result of the proceeding would have been different had competent legal counsel been provided." App. 22, quoting *State v. Sharkey*, 155 N.H. 638, 641 (2007). Trial counsel's failure to file notice of prior sexual activity under rule 412 further compounded this error.

At the relevant point in the trial, the jury had already heard evidence that the complainant went to Dr. Gladstone three weeks after she went to the police complaining of vaginal irritation. The jury had also heard from Ms. Ruiz that the alleged victim was in physical discomfort during the genital exam and that there was redness in the genital area. The State was obviously

admissible as generalized expert testimony to explain certain counterintuitive behavior of the complainant in this case.

introducing this evidence for a purpose, i.e., to prove that the discomfort, redness and irritation experienced by the complainant were consistent with non-consensual sexual activity. Evidence that the complainant engaged in sexual activity two days earlier would provide an alternative explanation for the physical symptoms that would be consistent with the defendant's theory of consent.

The State argues that evidence regarding the irritation and redness in the genital area was not significant evidence because it may have been a side effect of the medication provided to the complainant. The State further argues that since this evidence was related to the use of medication, trial counsel was not ineffective in failing to file notice of intent to use evidence of prior sexual activity. State's Brief 28. This argument begs the question of why the State would introduce this evidence if it had no relevance to the issue of whether the complainant engaged in non-consensual sexual activity.

Counsel's failure to object to the testimony of Dr. Gladstone in and of itself constitutes sufficient error such that it requires this Court set aside the verdict in this case. This error, when combined with trial counsel's error in not filing proper notice to introduce relevant evidence of the alleged victim's prior sexual activity, is of such a magnitude that this Court must set aside this verdict. The right to effective assistance of counsel requires that trial counsel's cumulative efforts amount to meaningful representation. *See People v. Boden*, 82 A.D. 3d 781, 783 (N.Y. App. Div. 2011). While a single error on the part of

trial counsel may amount to ineffective assistance of counsel, this Court should examine all the errors cumulatively.

CONCLUSION

In applying the *Strickland* standard, the trial court observed that this Court has been reluctant to find valid strategic reasons for defense counsel's failure to object to expert testimony regarding behavioral characteristics of an alleged victim. The trial court also found that there was no reasonable tactical or strategic purpose for trial counsel's failure to object to this evidence. Finally, the trial court also found that there is a reasonable probability that the result of the proceeding would have been different if counsel had made a proper objection to Dr. Gladstone's testimony. App. 20-23.

While trial counsel's failure to object to the testimony of Dr. Gladstone, standing alone, justifies a finding of ineffective assistance of counsel, trial counsel's failure to file proper notice under N.H. R. Crim. P. 14(b)(2)(B) only further supports the defendant's argument that he is entitled to a new trial under Part 1, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

This Court should therefore affirm the trial court's order and remand this case for jury trial.

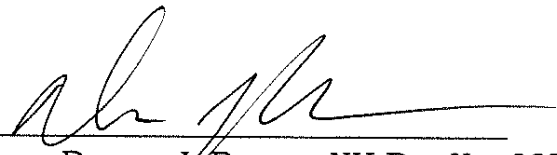
The defendant requests fifteen-minute oral argument.

Respectfully submitted,

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By his attorneys,

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Dated: October 26, 2018

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CERTIFICATION OF SERVICE

I hereby certify that I have sent two copies of the Defendant's Brief to counsel for the State, Stephen Fuller, Esquire, by first-class mail postage prepaid, at the following address:

Stephen D. Fuller
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capital Street
Concord, N.H. 03301-6397

A handwritten signature in black ink, appearing to read 'Donna J. Brown', is written over a horizontal line.

Donna J. Brown