THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0096

The State of New Hampshire

v.

Jonathan J. Marden

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 STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUES PRESENTED

1. During her direct examination, a State's expert who had conducted a medical review of the victim testified to certain symptoms exhibited by the victim. The presented question is whether, in the context of the defendant's theory of the case and all the evidence presented at trial, defense counsel's failure to object to that testimony on grounds based on *State v. Cressey*, 137 N.H. 402 (1993), and its progeny constituted ineffective assistance of counsel requiring reversal.

2. During defense counsel's cross-examination of a State's witness, a Sexual Assault Nurse Examiner, he attempted to elicit testimony regarding the victim's other recent partners. The presented question is whether, in the context of the defendant's theory of the case and all the evidence at trial, counsel's failure to give pretrial notice under *N.H. R. Crim. P.* 14(b)(2)(B), or to articulate an alternative theory for admission of the evidence, constituted ineffective assistance of counsel requiring reversal.

Both questions were presented in the superior court by the defendant's motion to set aside the verdict and the State's opposition thereto. *See* App. 25–43.[1]

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[1] References to the transcript of the trial will be made as "Tr. __."
References to the transcript of the hearing on the defendant's motion to set aside the verdict will be made as "Mot. Hr'g __."
References to the appendix to this brief will be made as "App. __."

STATEMENT OF THE CASE AND FACTS

1. The State's case

The defendant, Jonathan J. Marden, was charged by indictment with, and convicted of, one count of aggravated felonious sexual assault for engaging in intercourse with the victim without her freely given consent. Tr. 4, 432. *See* RSA 632-A:2, I(m) (2016). The evidence at trial established the following facts.

On October 26, 2013, the victim was working at Target in the Pheasant Lane Mall in Nashua, New Hampshire. Tr. 25. On that date, the victim and the defendant had dated a few times, but were no longer in a relationship. Tr. 26–27. The victim was in high school, but the defendant had already graduated. Tr. 28. The victim did not want to talk to the defendant anymore, and had blocked him from her social media. Tr. 28.

On October 25, the defendant contact the victim through Snapchat using a new username so that the victim did not immediately know who the sender was. Tr. 29–30. The defendant wanted to know where the victim was working and what her hours were, and the victim told him. Tr. 31, 32.

On October 26, the victim left Target at about 9:30 p.m. at the end of her shift and headed for her car, which was parked on the top level of the parking garage just outside the store. Tr. 33. The defendant was there in his own car. Tr. 35. He lowered his window and said hi to the victim, and she walked over to

the car to speak to him. Tr. 36. She got into the defendant's car and sat in the passenger's seat as they spoke. Tr. 37.

The defendant started to kiss the victim, and then climbed on top of the victim. Tr. 37, 41. The victim told the defendant to get off her, but he did not. Tr. 42. She put her hands on his chest and tried to push him off her, but he was too heavy. Tr. 42. She told him to stop, but he continued the assault. Tr. 42–43. The defendant unbuttoned the victim's khakis and pushed them down to her knees; he then pulled down her leggings and underwear. Tr. 43. He then pulled down his own pants and penetrated the victim with his penis. Tr. 44. The victim continued her attempt to push him off her and kept telling him to stop, but the defendant continued his assault. Tr. 44, 45–46.

The manager at Target, Kevin Curran, and Tiffany Huggins, another Target employee, were notified by mall security that they believed there were some people "fooling around or messing around on the parking deck." Tr. 93; *see also* Tr. 123. Curran, Huggins, and a security guard went up to the upper deck and saw what appeared to be two people having sex in one of the cars. Tr. 97, 124–25. Curran knocked on the car window, which caused the defendant to get off the victim. Tr. 47, 74, 98, 126. Curran noticed that it was the victim only after the defendant had gotten off her. Tr. 98. Curran told the defendant that he needed to leave, and that he wasn't welcome back for a year. Tr. 99.

The victim felt embarrassed and didn't say anything because she was afraid of the defendant's reaction. Tr. 48. The defendant started to drive down the exit ramp, but the victim told him to stop the car. Tr. 48. As she got out of the defendant's car, the defendant apologized to her. Tr. 48. The victim then walked back into Target. Tr. 49, 136.

Julia Widtfeldt, a team leader at Target, noticed the victim walk back into Target. Tr. 137. The victim "was shuffling, her hair was all messed. It was in like a top knot, but it was all over the place, it was all askew. And she just seemed not like herself. She seemed very out of it, very, almost confused. Just kind of walked in kind of looking around and something wasn't right." Tr. 137. When Widtfeldt asked the victim if she was all right, "she fell down started to cry and she fell down on her knees and … proceeded to tell me that what he saw wasn't what he thought he saw." Tr. 137. "She was saying, ['I didn't want to, I didn't want to. He made me.['" Tr. 138. "[S]he was crying and very hard to understand at this point. And then she said, ['H]e raped me. I don't want to lose my job.['] And just kept crying repeating over and over again, ['I love working here, I don't want to lose my job[,'] and was just very inconsolable at that." Tr. 138.

Curran also noted that the victim was "very distraught," and that "[s]he was crying." Tr. 105. Further, Huggins described the victim's emotional state as "hysterical" and "very upset," "really upset." Tr. 127, 128. The victim told Curran

that what he had just seen was her boyfriend raping her. Tr. 105. She also said that she was afraid of losing her job, and Curran reassured her, saying that if what she was saying was true, she did not have to worry about that. Tr. 105. Curran told the victim that she should call the police. Tr. 50, 105. The victim felt sick to her stomach and "was an emotional wreck." Tr. 51.

After the victim called the police, "[s]he had started to calm down by then, but then her demeanor changed …—it was very defeated." Tr. 139. As Widtfeldt described it at trial, "It was almost as if [the victim] was in shock, like she—I kind of had to help her get up into the office and I sat her down and we called 911 and stood outside the room. I asked her if she wanted some privacy. She didn't. She didn't want me to go too far. So I stood in the hallway while she made the phone call." Tr. 139.

An ambulance came and took the victim to the hospital; Widtfeldt followed in her own car. Tr. 51. At the hospital, a SANE (sexual assault nurse examiner) examined the victim and asked her questions. Tr. 52, 55. About a week later, the victim was interviewed at a Child Advocacy Center. Tr. 56. During the interview, the victim used drawings to describe what happened because it was difficult for her to talk about it. Tr. 58. Some time after the interview, the victim spoke with Dr. Wendy Gladstone. Tr. 58. Dr. Gladstone was interested in whether the victim had any sexually transmitted diseases, irritation in the victim's genital area, her

loss of sleep, her weight loss, and her falling grades at school. Tr. 59. When the prosecutor asked the victim at trial whether Dr. Gladstone was able to explain what could have caused the irritation in her genital area, the victim answered, "The medication I took." Tr. 59.

On cross-examination of the victim, the following exchange occurred:

Q: Okay. And you walked in, and you eventually spoke with your boss, Mr. Curran?

A: I did.

Q: And you told him what you saw out there was my ex-boyfriend raping me, and I don't want to lose my job?

A: I didn't want to lose my job over something that wasn't true. I wanted him to know what really happened.

Q: Because if you had had sex with a boy in the parking lot, you thought that you could lose your job?

A: Yes. It's not okay to do that in a public parking lot.

Q: And you mentioned several times to several people that that was your chief fear, was losing your job; is that correct?

A: Wasn't—no.

Q: You didn't tell the policeman that?

A: I don't remember.

Q: You told Mr. Curran?

A: That I didn't want to lose my job over something that wasn't true.

Q: You told Tiffany Huggins … that?

A: She was with Kevin, yes.

Tr. 78.

At trial, the State played the video of the defendant's interview with the Nashua Police Department. Tr. 294. The lower court included a large portion of that interview in its order granting the defendant's motion to set aside the verdict. *See* App. 8–13. In that interview, the defendant admitted to having intercourse with the victim. App. 10. He also admitted that he did not immediately stop when the victim told him to stop and tried to push him off her. App. 8–9, 11–12.

2. The defendant's testimony

At trial, the defendant testified in his own behalf. Tr. 351. He admitted to having sex with the victim. Tr. 358. During his trial testimony, however, the defendant unequivocally testified that the victim never said no or tried to push him off her while they were having sex. Tr. 358–59. Rather, according to the defendant's testimony, the victim said stop only after he had already pulled out and was ejaculating onto the seat. Tr. 359. He then testified that the victim said stop at the same time that they heard the knock on the car window. Tr. 360. He testified that when he drove her to the bottom of the ramp, the victim was upset because she was afraid of losing her job. Tr. 361. He categorically denied raping the victim. Tr. 369.

3. Dr. Gladstone's testimony

The State called Dr. Gwendolyn Gladstone as a witness. Tr. 155. She was a pediatrician specializing in the care of children where there has been suspected abuse or neglect. Tr. 156–57. The State qualified her as an expert in this area at trial. Tr. 159.

Based on the assault, the child advocacy and protection program at Dartmouth referred the victim to Dr. Gladstone, and she had an appointment with her on November 17, 2016. Tr. 159.

> The purpose of the visit was to review the medical care she had received at the time she originally came for care following the assault which was the same day. It was to review her medical testing, what medication she had been given, how she was doing both physically and emotionally since, whether she had been connected with a counselor, whether she needed follow up testing and if so, what that would be.

Tr. 160.

During the visit, when Dr. Gladstone asked whether the victim had any principal concerns, the victim mentioned some vaginal irritation. Tr. 161. The victim was concerned that she might have contracted an infection because she wasn't sure if the defendant had "finished" and he had not used a condom. Tr. 162–63. Dr. Gladstone, however, explained that she thought that "that was not an infection, that it was probably because when she had been seen in the emergency room, [where] they gave her three very powerful antibiotics and that

can often cause irritation for a period of time." Tr. 165. She thought that that condition would improve, but to see her regular doctor if it did not. Tr. 165.

During direct examination, after the State asked what other "symptoms of significance" the victim mentioned, Dr. Gladstone answered:

> 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.
>
> ....
>
> 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. 163–64. Because she was still experiencing these symptoms three weeks later, Dr. Gladstone recommended counseling. Tr. 164.

On cross-examination, the following exchange occurred with the defendant's trial counsel:

> Q: .... You could get a sexually transmitted disease from any partner that you slept with; is that correct? If it was unprotected sex?
>
> A: It's possible to get a sexual infection if somebody has unprotected sex, yes.
>
> Q: With anybody, it doesn't have to—

A: If they have an infection.

Q: It doesn't have to necessarily be that you are assaulted, that that translates to an STD, it could be—you can get a sexually transmitted disease from any partner that you slept with?

A: If a person had other partners besides the person who assaulted them, yes, that's possible.

Q: And just to be clear on that, Doctor, the information that you received, you don't validate it any way, you just receive it and you act as if it were correct information?

A: That's correct.

Tr. 166–67.

4. Nurse Ruiz's testimony

The State called Jenny Ruiz, a sexual assault nurse examiner (SANE), and qualified her as an expert in SANE examinations. Tr. 167, 175. Nurse Ruiz examined the victim in the early the morning of October 27, 2016. Tr. 177, 179. As part of the examination, Nurse Ruiz asked the victim questions, took possession of her underwear and leggings, took buccal swabs for testing, and conducted a physical examination. Tr. 180–84, 186–87. Nurse Ruiz did not note any injury in the victim's pelvic area except for "a little bit of redness." Tr. 187. Nurse Ruiz also testified that the medications that the victim was prescribed could cause vaginal irritation, among other side effects. Tr. 190.

During cross-examination, trial counsel asked Nurse Ruiz whether the victim had told her the last time she had had consensual sexual activity. Tr. 199.

The State objected, citing the rape-shield statute. Tr. 199–200. Defense counsel argued that the evidence could be relevant to whether she consented to sex with the defendant. Tr. 200. He did not argue that it would be relevant to explain any injuries. Tr. 200–01. The court sustained the objection. Tr. 201.

5. The motion for new trial

On October 12, 2017, the defendant (now represented by different counsel) filed a motion for a new trial based on allegation of ineffective assistance of counsel. App. 25–34. The defendant argued that Dr. Gladstone's testimony regarding the "'symptoms of significance' regarding the … victim's emotional and mental state three weeks following the … assault" was inadmissible under *State v. Cressey*, 137 N.H. 402 (1993), and that trial counsel's failure to object to the testimony on that ground amounted to constitutionally ineffective assistance of counsel. App. 27–28. He argued that this expert testimony was not relevant for any proper purpose, and that its only purpose was to vouch for the victim's credibility by suggesting that she exhibited symptoms consistent with being sexually assaulted. App. 27–29. Further, the defendant argued that counsel's failure to object was so serious that it deprived him "of a fair trial, a trial whose result is reliable." App. 29 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The defendant further argued that Dr. Gladstone's testimony that the victim had complained that she was having irritation and feared that she had an infection

was inadmissible. App. 29. Defense counsel failed to object to this testimony, and had also not filed any notice that he planned to introduce evidence of the victim's other sexual activity. App. 29–30. Thus, when the State objected to defense counsel's question to Ruiz, defense counsel's response demonstrated a misunderstanding of how the rape-shield law excluding such evidence applied. App. 30–31. The defendant argued that trial counsel's misunderstanding of the law led to his failure to file the notice even though he had evidently planned to question Ruiz about the victim's prior sexual activity. App. 31.

He also argued that defense counsel erroneously argued at trial that there were no injuries to the victim to be explained by other sexual activity, even though there was such evidence. App. 31–32. Offering no grounds to admit the evidence that he sought, trial counsel withdrew the question regarding other sexual activity. App. 32. The defendant argued that evidence of other sexual activity two days before the assault would have been valuable evidence suggesting an alternative cause of the victim's injuries. App. 33.

The State filed its substantive objection to the defendant's motion on November 17, 2017. The State argued that the case came down to the victim's claim that the sex was not consensual, weighed against the defendant's claim that it was. App. 38. Thus, Dr. Gladstone's testimony regarding the victim's symptoms

three weeks after the assault was introduced as relevant to the question of whether the act had been consensual. App. 38.

The State argued that Dr. Gladstone's testimony was not the type of testimony that would be excluded under *State v. Cressey* because Dr. Gladstone never gave an opinion regarding whether the symptoms she observed were consistent with a sexual assault. App. 38–39. Indeed, the State argued that Dr. Gladstone's testimony was expressly admissible under *Cressey* because it was used to rebut the defendant's suggestion that the victim was lying about being assaulted. App. 39.

Further, the State argued that where it was not disputed that the defendant and the victim had had sex, and where the only real issue was whether the victim had consented, any evidence of whether the victim had had sex with someone else two days before the assault would have had no probative value, and would only have been unduly prejudicial. App. 41. The State argued that neither Ruiz nor Dr. Gladstone offered an opinion regarding whether the victim's physical condition was connected to whether she had consented. App. 41.

The superior court held a hearing on the defendant's motion on November 30, 2017. The defendant's new counsel argued again that Dr. Gladstone's testimony regarding the victim's emotional symptoms three weeks after the assault was not admissible because it was irrelevant as it did not rebut any claim made by

the defendant, and because it was inadmissible under *State v. Cressey*, 137 N.H. 402 (1993), and *State v. Collins*, 166 N.H. 210 (2014). Mot. Hr'g 8–9. When asked whether the victim's emotional state could be relevant to whether she had consented, defense counsel argued that it was not, because Dr. Gladstone was describing symptoms the victim showed three weeks after the assault. Mot. Hr'g 12–13. Further, she argued that the evidence impermissibly bolstered the victim's credibility and was especially damaging because Dr. Gladstone was presented as an expert. Mot. Hr'g 14, 29. She also argued that trial counsel failed to argue that his questions on cross-examination of Ruiz regarding the victim's other sexual partners were relevant to suggest an alternative source for the victim's genital irritation. Mot. Hr'g 17–18.

In response, the State argued that Dr. Gladstone never offered the specific type of testimony that this Court ruled should have been excluded in *State v. Cressey*. Mot. Hr'g 18–19. Further, the State explained that Dr. Gladstone's testimony regarding the victim's emotional symptoms "was presented to show and rebut the consent [defense] because [the defendant] claimed that she made it up … because she didn't want to lose her job. Someone who is making something up about not wanting to lose a job at Target is not going to lose seven pounds, can't sleep, having their grades plummet. That's why that was relevant and that was why it was admissible." Mot. Hr'g 19.

The State argued that the time lapse of three weeks was not relevant because the trauma of a sexual assault would last well after her initial medical examination. Mot. Hr'g 20. Thus, the fact that it lasted for three weeks suggested that the victim was telling the truth when she claimed that she had not consented. Mot. Hr'g 20.

Defense counsel called the defendant's trial counsel, Tim Goulden, as the sole witness at the hearing. Mot. Hr'g 31. Goulden testified that he did not think that Dr. Gladstone's testimony at issue either harmed or helped his theory of the case. Mot. Hr'g 41–42, 56, 57. He testified that he and the prosecutor had agreed before trial that the prosecutor could ask Dr. Gladstone about the victim's emotional symptoms, but that Dr. Gladstone would not give any conclusions that would link those symptoms to a sexual assault. Mot. Hr'g 50–51. Goulden explained that he could give an alternative explanation for the victim's symptoms:

> I thought temporarily it 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.

Goulden also testified that he had not conducted any research on the admissibility of evidence of sexually transmitted diseases. Mot. Hr'g 38. When asked whether he thought the evidence of genital irritation had harmed his case, he

said that it neither harmed nor helped his case because there was never any evidence that either the defendant or the victim had an STD. *See* Mot. Hr'g 37–39. Thus, Goulden had not filed a notice of intent to introduce evidence of the victim's other sexual activity, and decided to try to get the evidence in by asking Ruiz about the possibility that the genital irritation could have come from anyone—not just the defendant—only after the State had introduced Ruiz's entire report during her direct testimony. *See* Mot. Hr'g 44–47. Further, Goulden had elicited testimony that a person does not have to be sexually assaulted to contract an STD, and that an STD could be contracted from anyone with whom the victim had had sex. Mot. Hr'g 60.

On December 14, 2017, the superior court issued its order granting the defendant's motion. App. 1. The court found that the defendant had demonstrated constitutionally ineffective assistance based on the defendant's allegation concerning Dr. Gladstone's testimony. *See* App. 18–20, 22. In its order, the court quoted at length from Dr. Gladstone's testimony, the defendant's interview with the police, and the defendant's testimony at trial; and it relied heavily on *State v. Cressey*, *State v. Collins*, and *State v. Luce*, 137 N.H. 419 (1993). *See* App. 16–22.

Specifically, the court found that Dr. Gladstone's testimony about the victim's "symptoms of significance" was "similar to that given by the expert in *Cressey*," although in this case, unlike in *Cressey*, "Dr. Gladstone did not go so far

as to explicitly draw a line between those 'symptoms of significance' and sexual abuse." App. 18–19. The court ruled, however, that this Court's "decisions in *Cressey* and *Luce* demonstrate that such an explicit statement is not necessary to render the testimony inadmissible." App. 19. " Rather, [this] Court highlighted the logical conclusions to which the jury was being drawn to by the expert's testimony." App. 19. Since the jury knew that Dr. Gladstone had met with the victim three weeks after the assault and had recommended counseling, the court found, although "Dr. Gladstone did not explicitly state that she believed, based on the victim's 'symptoms of significance,' that she had been sexually assaulted, the jurors could easily have reached that conclusion on their own from her testimony." App. 19.

The court also compared the symptoms that Dr. Gladstone had testified to to the symptoms in *Cressey*, and concluded that such symptoms "added little to the State's case except to impermissibly bolster the complainant's credibility." App. 20 (quotation omitted). The court found the situation "particularly problematic where, as here, the central issue [was] whether or not the complainant had consented to the sexual acts …." App. 20. Furthermore, the court dismissed trial counsel's testimony at the motion hearing that he could explain the symptoms and that he did not believe that the testimony at issue would harm his theory of the case. App. 20. Although the court would have been willing to give a trial attorney

latitude concerning such decisions, it believed that such latitude was no longer possible in *Cressey's* wake. App. 20.

On the question of prejudice, the court ruled that the introduction of the defendant's statement to the police as evidence at trial did not mitigate trial counsel's error. App. 21. Specifically, the court found that the defendant's statements to the police regarding the timing of the victim's saying "Stop," his stopping, and the Target employees' knocking on the car window meant that his statements were not a definite admission of guilt, and could have actually been taken in the defendant's favor. App. 22. The court concluded that without Dr. Gladstone's testimony, the jury might not have reached the same conclusion. App. 22.

SUMMARY OF THE ARGUMENT

1. The lower court erred in its reliance on *State v. Cressey*, *State v. Collins*, and *State v. Luce*, and thus erred in its conclusion that trial counsel rendered ineffective assistance for failing to object to Dr. Gladstone's testimony regarding the symptoms that the victim had reported to her. The State elicited the evidence to rebut the defendant's theory of the case—that the victim had lied when she claimed that she was assaulted because she was embarrassed when she was discovered by her coworkers and she was afraid that she would lose her job. Further, Dr. Gladstone's testimony was very much unlike the type of testimony that this Court held to be inadmissible in *State v. Cressey* because Dr. Gladstone did not suggest or imply that the symptoms indicated a sexual assault.

2. Trial counsel was not ineffective for failing to file a notice of intent to introduce other sexual activity by the victim because such evidence would not have been relevant to any issue in dispute, and would have been inadmissible under RSA 632-A:6, II, the rape-shield statute.

ARGUMENT

1. The lower court erred in ruling that trial counsel's failure to object to Dr. Gladstone's testimony regarding the victim's symptoms constituted ineffective assistance of counsel requiring reversal.

The lower court ruled—based 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)—that trial counsel's failure to object to Dr. Gladstone's testimony regarding the symptoms that the victim reported to her constituted ineffective assistance of counsel requiring a new trial. This ruling is in error, and must be reversed.

The standard for determining whether trial counsel provided constitutionally ineffective assistance requiring reversal is the same under both the federal and state constitutions. An allegation of ineffective assistance of counsel is not to be accepted lightly.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

> might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 689 (1984) (quotation marks and citations omitted); *see also Collins*, 166 N.H. at 212–13 (applying same standard under the New Hampshire Constitution).

In *State v. Cressey*, the expert witness

> interviewed [the victims] prior to trial, and her testimony was a substantial part of the State's case-in-chief. She testified in general about the effects that sexual abuse has on children and about the symptoms and behaviors commonly exhibited by sexually abused children. She testified in particular about the interviewing techniques she used with [the victims] and about her evaluation of each child. Ultimately [the expert] stated that the symptoms exhibited by each child were consistent with those of a sexually abused child.

Cressey, 137 N.H. at 404. Further, the expert

> relied on several different types of information. She interviewed each child, asking open-ended questions about their lives, backgrounds, family situations, and the alleged abuse. [She] then used a disassociative events scale to identify and assess any of the children's behaviors that could be interpreted as manifestations of disassociative behavior resulting from post-traumatic stress. …
>
> Finally, [the expert] evaluated the children through a technique of art therapy. … [She] testified that a child drawing a person of the opposite sex in the first drawing, drawings of people with no secondary sex characteristics, drawings of people with no hands, feet, or arms, and the presence of genitals in a drawing are some of the many potential indicators of abuse.
>
> ….

> From all of the information gathered and observations made during her evaluations of [the victims], [the expert] ultimately testified that the children exhibited symptoms consistent with those of children who have been sexually abused.

Id. at 405–06.

Based on this evidence, this Court held that the expert's testimony was not sufficiently reliable to be admitted as evidence that the children were sexually assaulted. *Id.* at 407. This Court found that "the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science," and that "a psychological evaluation of a potentially abused child does not present the verifiable results and logical conclusions that work to ensure the reliability required in the solemn matter of a criminal trial." *Id.*

The evidence that this Court found to be inadmissible in *Cressey* was very different from Dr. Gladstone's very brief testimony repeating the symptoms that the victim had described to her. Dr. Gladstone did not evaluate the victim's psyche for signs of abuse, nor did she even attempt to diagnose the victim as having symptoms consistent with having been sexually assaulted. There were no tests conducted on the victim, and thus no interpretation of any test results in this case.

Indeed, as the State explained below, the evidence concerning the victim's emotional state was not offered to show that she had signs of having been sexually abused. The defendant's theory of the case was that after being discovered in the defendant's car having sex, the victim had a motive to lie about being raped

because she didn't want to lose her job. Therefore, the State offered the testimony at issue to rebut the suggestion that she was falsely claiming a lack of consent just to keep her job. *See* Mot. Hr'g 19. If the victim was merely worried about losing her job, she would not have been manifesting such symptoms three weeks later. Thus, the testimony was not offered to suggest that she had been abused, and Dr. Gladstone made no effort to connect the victim's symptoms with abuse, as the expert in *Cressey* had done. Evaluating trial counsel's decision not to object in a very deferential light, as must be done in these cases, this Court should conclude that Dr. Gladstone's testimony did not violate *Cressey*, and therefore no objection was warranted.

Neither *State v. Collins* nor *State v. Luce* requires a different result. In *State v. Collins*, the expert "testified that the complainant's behaviors 'fit perfectly into the same kind of behavioral symptoms that we would see for a child who had been sexually abused.'" *Collins*, 166 N.H. at 213. He further testified that because of the victim's disclosure of previous assaults, "he realized that 'we were no longer dealing with a major depressive disorder,' but rather 'a post-traumatic stress disorder on a child who had—who—who allegedly had been sexually abused.'" *Id.* (brackets and ellipsis omitted). He also testified "that the complainant's disclosure 'was the missing piece,' in his treatment of her. He stated that once the complainant disclosed the sexual assaults, 'it all fit into place' and 'made sense of

all of her behaviors prior to this, especially things like hygiene.'" *Id.* On this evidence, this Court found that counsel had rendered ineffective assistance for failing to object, saying,

> In effect, [the expert] was allowed to opine that the complainant was a victim of child sexual abuse. Her behaviors, he testified, 'fit perfectly' with those of a child sexual abuse victim. After the complainant disclosed the sexual assaults, [the expert] diagnosed her with post-traumatic stress disorder caused by alleged sexual abuse. [Such] testimony constitutes a clear example of the type of unreliable evidence that we have held should be excluded from criminal trials.

Collins, 166 N.H. at 214 (quotation omitted).

Similarly, in *State v. Luce*, the State presented the testimony of a psychologist who was asked to interpret the drawings of a child-victim. *Luce*, 137 N.H. at 421. That witness "was permitted to testify … that 'these drawings are consistent with those of a child who's been sexually abused.'" *Id.* She also testified, "[A]ny child who brought me pictures like that would raise in my mind extremely serious concerns that this child was being sexually abused." *Id.* This Court concluded that the expert's "testimony [was] a clear example of the type of unreliable evidence that [this Court has] held should be excluded from criminal trials." *Id.*

As explained above, in this case, Dr. Gladstone did not interpret the victim's symptoms, did not opine on their cause, and did not describe any symptoms of a child who had been sexually abused. The evidence was therefore

hardly the type of evidence that must be excluded under *Cressey*, *Collins*, or *Luce*. Trial counsel therefore did not render ineffective assistance by failing to object.

Even if trial counsel's decision not to object is determined to fall below the range of reasonable professional assistance, however, the defendant is entitled to no relief because trial counsel's failure did not cause such prejudice that a new trial is warranted. "To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Collins*, 166 N.H. at 213. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). "In making this determination, [this Court will] consider the totality of the evidence presented at trial." *Id.* (quotation omitted).

Here, several witnesses testified to the victim's emotional state just after the assault. Widtfeldt testified that the victim "seemed very out of it, very, almost confused," and that she fell down started to cry and she fell down on her knees …." Tr. 137. Curran described her as "very distraught," and said that "[s]he was crying." Tr. 105. In addition, Huggins described her as "hysterical" and "very upset," "really upset." Tr. 127, 128. There was also testimony from the coworkers, as well as from the victim herself on cross-examination, that the victim was afraid of losing her job because of what happened. *See* Tr. 38, 78.

Dr. Gladstone's testimony simply established that the victim was still having an emotional reaction to the event, as opposed to fabricating an assault just to keep her job. Furthermore, the victim herself testified that during her appointment, Dr. Gladstone was interested in any possible STDs, irritation in the her genital area, her loss of sleep, her weight loss, and her falling grades at school. Tr. 59. Thus, Dr. Gladstone was simply reiterating what was already before the jury. In the face of all the testimony at trial—and given that there was no dispute that the victim and the defendant had had sex, and there was no link made between the symptoms the victim reported and sexual abuse—the evidence at issue would not have affected the outcome of the case.

2. Counsel's decision not to file a pretrial notice under *N.H. R. Crim. P.* 14(b)(2)(B) to introduce evidence of the victim's other sexual activity did not constitute ineffective assistance of counsel.

The superior court did not discuss the defendant's second claim of ineffective assistance of counsel. However, it was fully litigated, and therefore this Court is in as good a position as the lower court to determine the issue. Therefore, if this Court should reverse the lower court on the defendant's first allegation of ineffective assistance, as a matter of judicial economy, it should also determine his second claim instead of remanding to the superior court to decide the issue.

The defendant claimed that his counsel failed to file the proper notice of his intent to introduce the victim's other sexual activity. App. 29–30. *See N.H. R. Crim. P.* 14(b)(2)(B). Further, he claimed that counsel's misunderstanding of the rape-shield law led to his loss of an opportunity to introduce evidence that might have explained the irritation that victim reported in her genital area. *See* App. 30–33. Although trial counsel had argued for admission on the erroneous ground that it was relevant to consent, the error had no effect on the outcome of the case. *See* RSA 632-A:6, II (2016) ("Prior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter.").

Both Dr. Gladstone and Nurse Ruiz mentioned some irritation reported by the victim. Nurse Ruiz described it as "a little bit of redness." Tr. 187. She opined, however, that such irritation could be caused by the medications that the victim

had been prescribed. Tr. 190. Dr. Gladstone also testified that she thought that the irritation was a side effect of "three very powerful antibiotics" that the victim had been prescribed during her emergency room visit. Tr. 165. Indeed, the victim herself reiterated Dr. Gladstone's assessment that the irritation was caused by medication. Tr. 59.

On cross-examination of Dr. Gladstone, trial counsel elicited her testimony that there even if someone had an STD, that was no indication of an assault, and that a person could contract an STD from anyone. Tr. 166–67. Further, there was no evidence that the victim actually had an infection. Therefore, there was no need to establish or suggest an alternative source.

Thus, there was no reason to present any evidence of any other sexual activity by the victim. Such evidence would have been irrelevant to any issues in the case, and would have been excluded under RSA 632-A:6, II. Thus there was no ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the order of the trial court and reinstate the defendant's conviction.

The State requests a fifteen-minute oral argument.

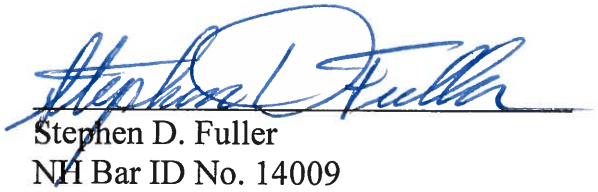
Under Supreme Court Rule 16(3)(i), the State certifies that the appealed decision is in writing and is appended to this brief. App. 1–23.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General



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August 15, 2018

CERTIFICATE OF SERVICE

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

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95 Market Street
Manchester, NH 03101

August 15, 2018

Stephen D. Fuller

APPENDIX TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
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SUPERIOR COURT

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Nashua NH 03060

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NOTICE OF DECISION

File Copy

Case Name: **State v. Jonathan J Marden**
Case Number: **226-2017-CR-00029**

Enclosed please find a copy of the court's order of December 14, 2017 relative to:

Defendant's Motion to Set Aside Verdict

December 14, 2017

Marshall A. Buttrick
Clerk of Court

(565)

C: Catherine M. Devine, ESQ; NH Department of Corrections; Superintendent; Donna Jean Brown, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

226-2017-CR-00029

STATE OF NEW HAMPSHIRE

v.

JONATHAN MARDEN

ORDER ON DEFENDANT'S MOTION TO SET ASIDE VERDICT

The defendant, Jonathan Marden, was found guilty of Aggravated Felonious Sexual Assault on September 8, 2017, after a trial by jury. The sentencing hearing is scheduled for December 29, 2017. The defendant, subsequent to the verdict, has moved for the Court to set aside the jury's guilty verdict alleging ineffective assistance of counsel at trial. The State objects. The Court held a hearing on this matter on November 30, 2017, at which it heard arguments from both sides, as well as testimony from Attorney Timothy Goulden, the defendant's trial counsel. For the reasons that follow, the defendant's motion is granted.

Background

The Court notes the following matters relevant for consideration of this order. The defendant and the complainant had been in a personal relationship from about February of 2016 to May of 2016, when the complainant ended the parties' relationship. At the time of the incident, on October 26, 2016, the complainant was 17 years old and the defendant was 20.

On October 26, 2016, the defendant contacted the complainant via her Snapchat account, saying hello and asking if she was working. The complainant was then working part-time at the Target store at the Pheasant Lane Mall in Nashua, which the defendant knew because she had done so during their relationship as well. The complainant responded that she was working from 4:00 p.m. until 9:30 p.m. that evening. The defendant stated that he might stop by. When the complainant finished her shift at 9:30 p.m., she noticed the defendant's car in the Target parking area of the mall while walking to her own car. The complainant got into the passenger seat of defendant's car and she and the defendant began talking.

After a few minutes, they began to kiss, and eventually sexual intercourse took place in the defendant's vehicle. The defendant contends that the sexual relations were consensual; the complainant asserts that they were not. Whether consensual or otherwise, the activities taking place were interrupted by a knock on the car door window by a store supervisor and a security official from Target. Security services at the mall had observed activity which security believed to be sexual occurring in the defendant's car via security cameras posted in the Target store's parking lot and had notified Target.

After the defendant rolled down the window, the Target supervisor directed the occupants to leave the area. The supervisor had also recognized the complainant.

The defendant began to drive out of the parking structure and stopped in the exit ramp area. The complainant exited the defendant's car and returned to Target and told the supervisor and another co-worker that what the supervisor and the security official had just seen was not merely her having sex in the car, but, rather, was her being raped. The police were notified and responded to the scene. The complainant was then taken to a local hospital for a sexual assault examination. The investigation and trial followed.

At trial, the State called as a witness Dr. Gwendolyn Gladstone, who was qualified to testify as an expert in treating and diagnosing child sexual assault. The defendant's trial counsel, Attorney Timothy Goulden, did not object. Dr. Gladstone testified about her meeting with the complainant approximately three weeks after the alleged assault. Dr. Gladstone testified that she had met with the complainant for a follow-up visit after the alleged sexual assault.

First, Dr. Gladstone testified that the complainant had stated that she "was having some vaginal irritation and ... was concerned that that might indicate that she had acquired an infection." (Trial transcript at 161.) The State then had the following exchange with Dr. Gladstone regarding the complainant's reported emotional symptoms:

> 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.

(Id. at 163–64.) Dr. Gladstone further testified that based on this meeting, she had recommended that the complainant "be tested for sexual infections," and that she "see a counselor, because of the persistence of her symptoms, despite several weeks having passed." (Id. at 164.)

Prior to the above-quoted testimony, Attorney Goulden had objected to the testimony on hearsay grounds:

> 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 she just move on to diagnosis. I think that's what she's here for.
>
> [STATE]: Actually, Your Honor, this part is relevant because what she's going to testify to is that [the complainant] had mentioned that [the defendant] didn't use a condom and that she didn't know whether he finished is relevant to her concerns about whether she has a sexually transmitted disease and that's what she's going to testify to, not the rest of it.
>
> THE COURT: And that's it?
>
> [STATE]: Yeah.
>
> MR GOULDEN: If that's it.
>
> [STATE]: Yeah.
>
> MR GOULDEN: Okay, Your Honor.

(Id. at 162–63.) Attorney Goulden did not make any further objections to Dr.

Gladstone's testimony.

On cross-examination, Attorney Goulden questioned Dr. Gladstone about the complainant's report of vaginal irritation:

> Q. ... Now the – and I'm not a doctor, so please help me out with this. You could get a sexually transmitted disease from any partner that you slept with; is that correct? If it was unprotected sex?
>
> A. It's possible to get a sexual infection if somebody has unprotected sex, yes.
>
> Q. With anybody, it doesn't have to –
>
> A. If they have an infection.
>
> Q. It doesn't have to necessarily be that you are assaulted, that that translates to an STD, it could be – you can get a sexually transmitted disease from any partner that you slept with?
>
> A. If a person had other partners besides the person who assaulted them, yes, that's possible.
>
> Q. And just to be clear on that, Doctor, the information that you received, you don't validate it any way, you just receive it and you act as if it were correct information?
>
> A. That's correct.

(Id. at 166–67.) Attorney Goulden did not ask Dr. Gladstone any further questions.

The State then called Jenny Ruiz, a Sexual Assault Nurse Examiner ("SANE") who examined the complainant after the alleged assault. On cross examination, Attorney Goulden sought to ask Nurse Ruiz about the complainant's reported past sexual activity:

> Q. Okay. And when was the last time that this patient advised you she had had consensual sexual activity?
>
> A. I would have to look back at my note, but I believe it was –
>
> [State]: Objection.

The Court: Come forward please.

The Court [to the State]: Yes, ma'am.

[State]: Rape shield law and why is it relevant?

Mr. Goulden: Your Honor, I just asked the State's witness if everything on there [was] important and she told me it was. I'm asking a question about the document that they've submitted to you and told you that was very important. Rape shield law is the inquiry of the person themselves. I'm not asking and nor did I ask the victim about her sexual history, but I can ask about this notation here.

The Court: Well, what was the notation?

[State]: Prior consensual sexual activity a few days before. It's not relevant. It's not admissible under the rape shield law no matter who it comes from, unless he lays proper foundation, which he has not done.

Mr. Goulden: Your Honor, this case comes down to the allegation that [the defendant] had nonconsensual sex with her. It's relevant to show that there are times where this girl engaged in consensual sex. Therefore she could have engaged in consensual sex with [the defendant]. It's relevant.

[State]: It is not relevant and that does not come over this rape shield law. That requires a pre-trial hearing under State v. Howard, which we did not have, which [Attorney Goulden] did not raise and it's not admissible.

The Court: Well, is there any evidence that she had sexual relations so close in time to this particular one that the injuries if she had any injuries could be attributed to that. I think the Supreme Court allows that.

Mr. Goulden: I'm not – that's not why I'm asking.

[State]: There were no injuries.

Mr. Goulden: There were no injuries, Judge.

The Court: Okay.

Mr. Goulden: I don't want to mislead the Court.

The Court: So the objection is sustained.

(Id. at 199–201.)

Later, the State called Detective Caleb Gilbert of the Nashua Police Department ("NPD") to testify. Detective Gilbert was involved in investigating the alleged assault and testified that as part of that investigation, he interviewed the defendant at approximately 3 a.m., a few hours after the alleged assault occurred. The defendant agreed to speak with the police without an attorney. Detective Gilbert and another detective interviewed the defendant in an interview room at the police station.

As part of Detective Gilbert's testimony, the State played the audio/video recording of the defendant's fifteen-minute interview. During that interview, the defendant and the detectives had the following exchange. The Court needs to set forth this portion of the interview at length because of the factual and legal issues at bar.

> Detective: And then, you start making out? And she is making out back, I guess is my question?
>
> Defendant: Yeah, she was okay with that part.
>
> Detective: Okay. What do you mean, 'that part'?
>
> Defendant: She was okay with making out, and then, a little bit before the Target employees came [inaudible], she was saying 'Stop.'
>
> Detective: Alright. Um, did you stop?
>
> Defendant: It was the same time as the Target employees knocked on the door.
>
> Detective: Okay. So, she tells you 'stop' a little bit before the Target employees knock on the window?
>
> Defendant: Yes.
>
> Detective: Do you stop at that point, or do you keep going?
>
> Defendant: I stopped when the Target employees knocked on the door.
>
> Detective: So you kept going after she said 'stop.'

Defendant: Yeah.

Detective: Alright. Um, so, I'm going to back up a little bit.

Defendant: Okay.

Detective: You guys are making out, she's okay with that, you said. Um, and then you get on top of her, she – how does that happen? Obviously you're in a car, so –

Defendant: Yeah, I got on top of her in the passenger seat.

Detective: Okay. And did she seem okay with that?

Defendant: Yeah, a little bit.

Detective: What do you mean, 'a little bit'?

Defendant: She – she was okay with it.

Detective: Okay. Did she ever tell you 'no' at that point?

Defendant: No.

Detective: Um, and then, are you still making out at this point, or what –

Defendant: Yeah, I was making out with her, and then taking off her pants, and she had [inaudible].

Detective: Okay. Um, so, you took her pants and her leggings off. Did she seem okay with that?

Defendant: Um, yeah, kind of.

Detective: What do you mean, 'kind of'?

Defendant: Um, she was kind of saying 'no.'

Detective: How did she kind of – like did she say 'no,' or did she like, have a back way, or what do you mean, 'kind of'?

Defendant: Yeah, she was like backing away.

Detective: Okay. Backing away, and then you just, took them off? Did she say anything to you at this point? Or you could just tell that she was only

kind of okay with it?

Defendant: [Inaudible.]

Detective: Okay. Um, so they you get her leggings off. Did she have underwear on?

Defendant: Yeah, she had on a thong.

Detective: And you took that off?

Defendant: [Inaudible.]

Detective: Okay. So now do you take her shirt off at all?

Defendant: No.

Detective: You don't take her shirt off. Okay. So you take her pants, her leggings, her thong off, so she's naked from the waist down?

Defendant: Pretty much.

Detective: Okay. Are you naked at all at this point?

Defendant: [Inaudible.]

Detective: Okay. So she's naked. What happens after you take her – all of her, her pants, her leggings, and her thong off?

Defendant: Just started doing stuff.

Detective: Like what? We're all guys here, so you can say whatever it is.

Defendant: We started to have sex.

Detective: Okay. So at what point do you take your pants off?

Defendant: Um, after I took hers off.

Detective: Okay. And do you do that on top of her? Or, how does that work?

Defendant: Yeah, on top of her.

Detective: Okay. Um, so, at this point, you're taking your pants off, right? Does it seem like she's still okay with this? Like, what is she doing, like --

Defendant: Yeah, at first [inaudible] and then the Target employees knock on the window and she said, 'stop.'

Detective: Okay, so – I watched the video, okay, so it – it looks like there's a – and I [inaudible] exactly, to say it, but five or ten minutes there, okay. Um, so, you take your pants off, and you guys start having sex. Okay. Um, are you wearing a condom?

Defendant: [Inaudible.]

Detective: No. Um, so, once you get your pants off and you get her pants off, you guys start having sex. Are you, are you on top of her? Is she on top of you?

Defendant: [Inaudible.]

Detective: You were on top of her. Okay. Um, was she kind of pushing back at you at all? Was she saying 'no'? Like –

Defendant: Yeah, she was pushing back a little bit, taking her pants off, and then the Target employees came knocking on the door.

Detective: Okay, alright. By 'pushing back,' how was she doing that? Was she like, both hands on your chest, or was she like –

Defendant: Yeah, [inaudible].

Detective: Okay. And you could feel her pushing you?

Defendant: [Inaudible.]

Detective: Okay. Um, when you felt that push, did you stop, or did you keep going?

Defendant: Yeah, I stopped a little bit.

Detective: A little bit? What do you mean by 'a little bit'?

Defendant: I stopped a little bit and then the Target employees knocked on the window.

Detective: Okay. When you 'stopped a little bit,' okay, and I just want to be very clear about this, okay, so – so the 'little bit,' so I need concrete answers, you know what I mean? So, she tells you 'stop,' and puts her hands on your shoulders, right? And you told us earlier, you said, she told

you to stop, and you kept going, and then the Target employees knock on the door. Is that what happened? Or did she tell you stop, and you immediately stopped?

Defendant: No, [inaudible].

Detective: Okay, so she tells you stop, and you kind of keep going, and then the Target employee knocks on the window.

Defendant: Yeah.

Detective: Um, do you ejaculate?

Defendant: Yeah, on top of the seat.

Detective: What do you mean, on top of the seat? So there's like the part you sit on, like the bottom piece right here and the back –

Defendant: Yeah.

Detective: So, on the part you sit on?

Defendant: Yeah.

Detective: Okay. Um, and then, okay – and then, is this before or after the Target employee knocks on the window?

Defendant: It was before.

Detective: Okay, so – you guys are pretty much done when the Target employee comes up?

Defendant: Yeah.

Detective: What does he say to you?

Defendant: I mean, he just said [inaudible].

Detective: Okay. Um, and then what do you do?

Defendant: I drove my car to the bottom [of the ramp], and she got out.

Detective: What is she saying to you as you guys are pulling out? So I watched the video, right – you guys pull out, and then you drive down the ramp, and then you kind of stop on the ramp a little bit.

Defendant: Um, she was just saying that she thought she was getting fired or something.

Detective: Okay. Um. And anything else? Did she say anything else? Was she freaking out? Like –

Defendant: Yeah, a little bit – [inaudible].

Detective: Why was she crying?

Defendant: Because she thought she was going to get fired.

Detective: Okay. So then, when you say that you drive around, you just stop at the bottom of the ramp?

Defendant: Yeah.

Detective: Okay. And then she gets out, and then you go home?

Defendant: I stopped to get a sandwich before I went home.

Detective: Is there anything else about tonight that we didn't cover and you want me to know about what happened tonight?

Defendant: [Inaudible.]

Detective: Is there – anything else [inaudible].

Defendant: [Inaudible.]

Detective: Okay, like I said, um, if there's anything else, I'm going to give you my card, and you can give me a call.

....

(Trial rec., Sept. 7 at 2:45–3:01.)

The defendant testified on September 8, 2017, the final day of the trial. He stated that the complainant did not say "no" while they were kissing, when he first got on top of her, when he took off her pants, leggings and underwear, or when they began having sex. (Trial transcript at 358–59.) The defendant then had the following exchange with Attorney Goulden:

Q. Okay. And did you finish having sex with [the complainant]?

A. I pulled my penis out of her vagina and at that point I was finishing, I ejaculated onto the seat and then -

Q. You pulled your penis out why?

A. Because I didn't want to ejaculate inside of her.

Q. Did she tell you to stop at that point?

A. She had her hands on my shoulders and I ejaculated onto the seat, and then as I was going that she said stop, so then I –

Q. Now, what were you doing when you heard her say the word stop, Jon, what were you doing?

A. I was finishing myself. My penis was not inside of her vagina at that point.

Q. Okay. And after you heard the word stop, what happened, if anything, at that moment?

A. There was a knock on my window.

Q. Now, Jon, I need you to tell the jury, from the time that she said stop to the time that you heard the known on the window, how much time went by?

A. It was at the same time.

Q. Thanks, Jon. And somebody knocked on your window. Did you know who that was?

A. No.

Q. Okay. When you heard the knock on the window, what did you do?

A. I got back into my driver's seat and rolled down my window to see what he had to say.

(Id. at 359–60.)

The defendant testified further that after the Target employees left, the complainant asked him to drive her to the bottom of the parking area ramp, and that

while he was doing so, she said, "Oh, great, I'm going to lose my job." (Id. at 361.) According to the defendant, those were the only words she said to him before exiting his vehicle. (Id.)

The trial concluded on September 8, 2017. After deliberations, the jury returned a guilty verdict. The defendant has since retained different counsel, and now moves to set aside the guilty verdict on the grounds that Attorney Goulden had been ineffective for failing to properly object to Dr. Gladstone's testimony regarding the complainant's "symptoms of significance," as well as for failing to file timely notice regarding the admissibility of the complainant's prior sexual activity.

Analysis

"To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient, and, second, that counsel's deficient performance actually prejudiced the outcome of the case." State v. Collins, 166 N.H. 210, 212 (2014) (citation omitted). If the defendant fails to establish either prong, the court must find "that counsel's performance was not constitutionally defective." Id. (citation omitted). "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact," so courts "will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and [they] review the ultimate determination of whether each prong is met *de novo*." Id. (quotations omitted; emphasis in original).

In order to satisfy the "performance prong" of the test, "the defendant must show

that counsel's representation fell below an objective standard of reasonableness." Id. (citation omitted). To do this, the defendant "must show that counsel made such egregious errors that [he] failed to function as the counsel the State Constitution guarantees." Id. (citation omitted). In making this determination, courts "afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic decisions that counsel must make." Id. at 212–13 (citation omitted). "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 213 (quotation omitted).

Here, the defendant argues that Attorney Goulden's representation had been constitutionally ineffective for: (1) failing to object to Dr. Gladstone's testimony regarding the complainant's "symptoms of significance"; and (2) failing to file timely notice regarding the admissibility of the complainant's sexual activity that was said to have taken place two days prior to the alleged assault. The State counters that because Dr. Gladstone never explicitly stated that she believed that the complainant had been sexually assaulted, "there was no Cressey violation." (State's Obj. Mot. Set Aside Verdict ¶ 8.)

State v. Cressey stands for the proposition that "expert testimony may not be offered to prove that a particular child has been sexually abused." Cressey, 137 N.H. 402, 412 (1993). In Cressey, a child psychologist, qualified as an expert in child sexual abuse,

> testified in general about the effects that sexual abuse has on children and about the symptoms and behaviors commonly exhibited by sexually

> abused children. She testified in particular about the interviewing techniques she used with [the alleged victims] and about her evaluation of each child. Ultimately [the expert] stated that the symptoms exhibited by each child were consistent with those of a sexually abused child.

Id. at 404. The New Hampshire Supreme Court ruled that this testimony was "not sufficiently reliable to be admitted in a criminal trial as evidence that [the alleged victims] were sexually abused," because "the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science." Id. at 407. The Supreme Court rejected the State's "assertions that the scope of [the expert's] testimony was somehow limited by her statements in conclusion that the children exhibited symptoms *consistent* with those of sexually abused children," explaining that it "[saw] no appreciable difference between this type of statement and a statement that, in her opinion, the children were sexually abused." Id. The Supreme Court offered this guidance concerning expert testimony in child sexual abuse cases:

> Expert psychological evidence can only be admissible in a case such as this if it is at least partly based on factors in addition to and independent of the victim's accounts. Otherwise, the expert's conclusions are of no value to the jury because they present no new evidence and are merely vouching for the credibility of the child victim witness.

Id.

Collins presented a similar situation, where, at trial, defense counsel had failed to object to expert testimony offered by the alleged victim's therapist. The therapist "testified that the complainant's behaviors 'fit perfectly into the same kind of behavioral symptoms that we would see for a child who had been sexually abused.'" Collins, 166 N.H. at 213. The trial court found that testimony to be inadmissible, explaining that his "testimony is the type of expert testimony that the [s]upreme [c]ourt has held may not be offered to prove that a particular child has been sexually abused." Id. (citation omitted).

The Supreme Court agreed with the trial court's ruling, and found that defense counsel had been ineffective for failing to object:

> In light of our abundant case law on the subject, we can conceive of no strategic purpose for defense counsel's failure to object to [the therapist's] improper expert witness testimony. Defense counsel's failure to object cannot reasonably have been said to have been part of a trial strategy or tactical choice.

Id. at 214 (quotation omitted). The Supreme Court found further that "the prejudice in this case was manifest":

> As in most sexual assault cases, this case turned on the complainant's credibility. However, because of defense counsel's errors, that credibility was impermissibly bolstered.

Id. (quotation omitted).

In State v. Luce, 137 N.H. 419 (1993), the New Hampshire Supreme Court ruled that the expert's testimony was "a clear example of the type ... that [was] held should be excluded [under Cressey]," Luce, 137 N.H. at 421 (citation omitted), when the expert

> engaged in a "blind interpretation" of the drawings [by the alleged child victim] on the stand. She had not reviewed the drawings prior to trial, had no knowledge of the circumstances surrounding their creation, and had not interviewed the child who drew them. ... [The expert] was permitted to testify over defense counsel's objection that these drawings [were] consistent with those of a child who's been sexually abused.

Id. (quotation omitted). The Luce court again rejected the State's argument "that [the expert's] testimony was limited by her conclusion that the drawings ... were *consistent* with those of a sexually abused child," finding that "[i]n practice, ... [there is] no appreciable difference when the testimony is offered to prove that a child has been sexually abused." Id. at 422 (citation omitted; emphasis in original).

Here, Dr. Gladstone had testified to the complainant's "symptoms of significance." Such testimony is similar to that given by the expert in Cressey.

However, unlike the expert in Cressey, Dr. Gladstone did not go so far as to explicitly draw a line between those "symptoms of significance" and sexual abuse. On the other hand, 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. Rather, the Supreme Court highlighted the logical conclusions to which the jury was being drawn to by the expert's testimony.

Here, the jury knew that Dr. Gladstone was an expert in diagnosing and treating childhood sexual assault. They also knew that Dr. Gladstone had met with the complainant three weeks after the alleged assault, and that as a result of that meeting, Dr. Gladstone had recommended that the complainant seek counseling. While Dr. Gladstone did not explicitly state that she believed, based on the victim's "symptoms of significance," that she had been sexually assaulted, the jurors could easily have reached that conclusion on their own from her testimony.

Further, a number of the "symptoms of significance" testified to by Dr. Gladstone, like those testified to in Cressey, "could just as easily have been the result of some other problem, or simply may be appearing in the natural course of the [alleged victim's] development." Cressey, 137 N.H. at 408. Dr. Gladstone testified that she observed the following "symptoms of significance" exhibited by the complainant:

- "She had some emotional symptoms"
- "Difficulty with her appetite and had lost weight"
- "Difficulty sleeping"
- "She felt sad and was crying"
- "She described having [inaudible] ability to go outside her house – to play outside with her brother, to go to school, to socialize"
- "She 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 could not concentrate on her school work and had gotten some bad grades whereas previously she had been on the honor roll"

(Def.'s Mot. Set Aside Verdict ¶ 3.) This testimony added little to the State's case except to "impermissibly bolster" the complainant's credibility. Collins, 166 N.H. at 214. This is particularly problematic where, as here, the central issue is whether or not the complainant had consented to the sexual acts: "this case turned on the complainant's credibility." Id. (quotation omitted).

At the hearing on the Motion to Set Aside the Verdict, Attorney Goulden testified that he had made the decision to not object to Dr. Gladstone's testimony because he believed that her testimony could be "explained away" and would not hurt the defendant if the jury adopted the defense theory of the case. Attorney Goulden testified that he did not believe, prior to trial, that Dr. Gladstone's testimony would be an impediment to the defense theory of the case.

While the Court would, under other circumstances, give defense counsel more latitude concerning those decisions, since Cressey these determinations have become far more problematic for counsel to pursue. Under the Cressey line of cases, courts have been reluctant to find valid strategic reasons for defense counsel's failure to object to such testimony. See Collins, 166 N.H. at 214 ("In light of our abundant case law on the subject, we can conceive of no strategic purpose for defense counsel's failure to object to [the] improper expert witness testimony."). Accordingly, the Court finds that Attorney Goulden had been ineffective for failing to object to Dr. Gladstone's inadmissible testimony.[1]

[1] The Court does note that Attorney Goulden had objected to Dr. Gladstone's testimony on hearsay grounds. He did not, however, object on Cressey-based grounds.

The Court now turns to the second prong of the ineffective assistance of counsel analysis – whether "counsel's deficient performance actually prejudiced the outcome of the case." Id. at 212 (citation omitted). To meet that prong, "a defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided." State v. Sharkey, 155 N.H. 638, 641 (2007) (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case." Id. (citation omitted). In making this determination, courts "consider the totality of the evidence presented at trial." Collins, 166 N.H. 210 at 213 (quotation omitted).

In Collins, the New Hampshire Supreme Court found that the defendant's trial counsel's failure to object to similar testimony had been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 215. The primary differentiating factor between Collins and the instant case is that here, the defendant made a potentially incriminating statement to the police, the audio/video recording of which was introduced at trial. The question then becomes whether the fact that the defendant's statement was introduced attenuates any error made by defense counsel.

The Court concludes that it does not. In the interview, the defendant states that while the complainant was okay with kissing and initially seemed fine with having sex, at some point she put her hands on his shoulders to try to push him off and said "stop." However, the defendant also said that this happened immediately prior to the Target employees knocking on the car window. Furthermore, the defendant testified that the complainant did not tell him to stop until after they had already stopped having sex and

he had ejaculated on the car seat, and that the Target employees knocked on the car window immediately after she said that. Specifically, the defendant stated that the two events (the complainant saying "stop" and the Target employees knocking on the window) happened "at the same time." (Trial transcript at 360.)

While the defendant's statements in his interview could be seen as inculpatory, those statements were not definitive admissions of guilt of a crime, and, given the added context of the defendant's live testimony, could also be interpreted in the defendant's favor. Without Dr. Gladstone's testimony, it would have essentially been the complainant's testimony against the defendant's. The defendant's audio/video recorded statement and trial testimony offer the jury two plausible interpretations: either the complainant had said "stop" and tried to push the defendant off of her in an attempt to stop him from sexually assaulting her, or she may have done so because she could see the Target employees approaching the vehicle. The defendant's audio/video recorded statement does not necessarily preclude the latter interpretation.

Given that the defendant's statements to the police were subject to varying interpretations, it cannot be said with sufficient certainty that the jury would have reached the same conclusion based on those statements in the absence of Dr. Gladstone's testimony. "[C]consider[ing] the totality of the evidence presented at trial," Collins, 166 N.H. at 213 (quotation omitted), the Court finds that there is a "reasonable probability that the result of the proceeding would have been different had competent legal representation been provided." Sharkey, 155 N.H. at 641 (citation omitted).

The following orders are entered:

1. The defendant's motion to set aside the verdict is granted.

2. The sentencing hearing scheduled for December 29, 2017 is cancelled.
3. The defendant's pre-trial bail conditions are reinstated.
4. This matter shall be placed on the docket for a new trial.
5. This matter shall be scheduled for a trial management conference concerning the new trial.

SO ORDERED.

12-14-17
Date

Philip P. Mangones
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough Superior Court Southern District

Case Name: State of New Hampshire v. Jonathan J. Marden

Case Number: 226-2017-CR-00029
(if known)

BAIL ORDER

This Bail Order is made ☑ By Agreement ☐ After Hearing

Pending ☑ trial ☐ violation of probation hearing ☐ sentencing ☐ appeal; the defendant shall

I. A. ☑ Be released on $ $10,000.00 personal recognizance. PREVIOUSLY POSTED

B. ☑ Be released on $ $250.00 cash or corporate surety / CASH ONLY.

II. DEFENDANT'S RELEASE IS SUBJECT TO THE CONDITIONS THAT:

A. Defendant not commit a federal, state or local crime while on release.

B. Defendant shall keep on file with this Court a current mailing address and check daily at that address for receipt of notices in this case, and appear at all times specified in notices issued by the Court.

III. The Court determines that because the above conditions will not reasonably assure the appearance of the defendant as required or will endanger the safety of the defendant or of any other person or the community, the following additional conditions of release will be imposed:

1. ☑ Defendant shall have no contact, direct or indirect, with Alexa G.
2. ☑ The defendant shall live at: 5 Blackstone Drive Unit 27, Nashua, NH 03063
3. ☐ The defendant shall not travel outside of New Hampshire.
4. ☑ The defendant shall execute a Waiver of Extradition approved by the Court.
5. ☑ The defendant shall refrain from possessing a firearm, destructive device, dangerous weapon, or ammunition.
6. ☑ The defendant shall refrain from the excessive use of alcohol and the use controlled drugs as defined in RSA 318-B.
7. ☐ The defendant shall comply with the following curfew: _____
8. ☐ The defendant shall report, in person, to the NH Dept. of Corrections Field Office on today's date.
9. ☐ The defendant shall report, in person, to the _____ Police Department: ☐ daily ☐ weekly, at a time to be set by the police dept. and be subject to random drug testing.
10. ☐ The defendant shall abide by all the terms and conditions of probation and/or parole.
11. ☐ The defendant shall surrender his/her passport to the Court, and/or not obtain a passport.
12. ☐ The defendant shall apply to _____ for an intake assessment within _____ days of release.
13. ☐ The defendant shall meaningfully participate in treatment at _____ If the defendant leaves the program for any reason other than successful completion, bail shall automatically convert to _____.
14. ☐ The Criminal Bail Protective Order issued on _____ shall remain in full force and effect.
15. ☐ See attached pretrial services bail order.
16. ☐ Other: _____

2/10/2017
Date

Amy L. Ignatius
Presiding Justice

☐ County Attorney's Office/ Attorney General's Office
☐ Defense Counsel
☐ Defendant
☐ _____ County House of Corrections
☐ Sheriff's Department
☐ NH Department of Corrections
☐ Surety
☐ Other _____

NHJB-2789-S (09/04/2015)

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.-So. OCTOBER TERM, 2017

STATE OF NEW HAMPSHIRE

V.

JONATHAN MARDEN

226-2017-CR-29

DEFENDANT'S MOTION TO SET ASIDE VERDICT

NOW COMES the defendant, Jonathan Marden, by and through counsel, Donna J. Brown, and hereby requests this Honorable Court set aside the verdict in the above-captioned matter as trial counsel for Mr. Marden was ineffective in failing to object to the testimony from Dr. Gwendolyn Gladstone regarding certain symptoms exhibited by the alleged victim in this case that were significant to her findings regarding sexual assault. As this testimony was clearly inadmissible under State v. Cressey, 137 N.H. 402 (1993) and State v. Collins, 166 N.H. 210 (2014), trial counsel was ineffective in failing to object to this testimony. Further, trial counsel was also ineffective in failing to file timely notice regarding the admissibility of the prior sexual activity of the alleged victim and the cumulative effect of this error was to deny the defendant his right to counsel under Part 1, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

As grounds for this Motion, it is stated:

1. On September 8, 2017 Jonathan Marden was found guilty of Aggravated Felonious Sexual Assault. Mr. Marden was represented at trial by Attorney Timothy J. Goulden.

2. After the trial, Jonathan Marden retained undersigned counsel. Undersigned counsel has listened to an audio recording of the trial in this matter and has ordered a copy of the transcript of the trial, and the transcript is due to be completed at the end of October.

3. During the trial of this case the State called Dr. Gladstone as a witness. After questioning Dr. Gladstone about her lengthy qualifications regarding the treatment and diagnosis of childhood sexual assault, the State qualified her as an expert. After she was qualified as an expert witness, Dr. Gladstone testified about a meeting that she had with the alleged victim that occurred three weeks after the alleged assault. Dr. Gladstone testified that one of the purposes of the meeting was to see how the alleged victim was doing, both physically and emotionally, since the time of the alleged assault and whether the alleged victim had been "connected with a counselor." During her testimony, Dr. Gladstone testified to the following "symptoms of significance" that she noted during her meeting with the alleged victim:

    - "She had some emotional symptoms"
    - "Difficultly with her appetite and had lost weight"
    - "She had difficulty sleeping"
    - "She felt sad and was crying"
    - "She described having [inaubile] ability to go outside her house – to play outside with her brother, to go to school, to socialize"
    - "She 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 could not concentrate on her school work and had gotten some bad grades whereas previously she had been on the honor roll"

4. Dr. Gladstone further testified that based upon the information that she gathered from the alleged victim during this meeting, she recommended that the alleged victim seek counseling.

5. The only objection that trial counsel made to this testimony was a hearsay objection, which was without merit as the doctor was testifying about statements that the alleged victim made for the purpose of medical diagnosis and treatment. *See* N.H. Rules of Evid. 803(4). There was a bench conference prior to the testimony of Dr. Gladstone where the parties noted that they had agreed that Dr. Gladstone would not use the term "Post-traumatic Stress Disorder" during her testimony.

6. The above-described testimony, by an esteemed expert in the field of child sexual assault, about "symptoms of significance" regarding the alleged victim's emotional and mental state three weeks following the alleged assault is exactly the type of evidence that is precluded by State v. Cressey, 137 N.H. 402 (1993).

7. The conviction in State v. Cressey was reversed, in part, because the State introduced evidence that the alleged victim exhibited certain behavioral characteristics that were consistent with sexual abuse. Id. 407.

8. The above-mentioned testimony of Dr. Gladstone had absolutely no relevance whatsoever to the issues to be determined in this case, other than to suggest to the jurors that the alleged victim had "significant symptoms" that were consistent her being sexually assaulted[1], which is an improper purpose.

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[1] There was no evidence in this case that would have merited testimony from Dr. Gladstone on Child Abuse Accommodation Syndrome, such as delayed reporting. The alleged victim reported being sexually assaulted shortly after being found by security and therefore Child Abuse Accommodation Syndrome testimony would not have been relevant to explain the behavior of

9. Dr. Gladstone's testimony at the trial in this case was a clear example of the type of unreliable testimony that should be excluded from criminal trials. *See* State v. Luce, 137 N.H. 419, 421 (1993).

10. The testimony of Dr. Gladstone "crossed the line into the impermissible realm of vouching for the [alleged] victim's credibility." *See* State v. Decosta, 146 N.H. 405, 409 (2001).

11. In light of the abundant case law on this subject, there could not have been any strategic or tactical reason for counsel's failure to object to Dr. Gladstone's improper expert testimony. State v. Collins, 166 N.H. 210 (2014); State v. Thompson, 161 N.H. 507, 530 (2011).

12. This case, as in most sexual assault cases, turned on the alleged victim's credibility. State v. Montgomery, 144 N.H. 205, 209 (1999). Due to defense counsel's failure to object to the testimony of Dr. Gladstone, the credibility of the alleged victim in this case was impermissibly bolstered. Because defense counsel failed to object, the jury heard testimony from an expert in the field of child sexual assault that the alleged victim had "significant symptoms" related to her sexual assault that included intrusive thoughts, difficulty concentrating, loss of appetite, insomnia and difficulty socializing. A juror would not need a doctorate in psychology to know that the State was offering evidence that the alleged victim had emotional and psychological symptoms consistent with her being the victim of some sort of trauma. Just because the State did not connect the dots and offer testimony that these symptoms are "consistent with sexual abuse" does not make the evidence any less damaging or inadmissible.

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the alleged victim. *See* Cressey at 411. Further, the evidence was not introduced for that purpose.

13. Expert testimony that indirectly conveys to the jury that the alleged victim is telling the truth is impermissible vouching. *See* State v. Brown, 856 N.W.2d 685, 689 (Iowa 2014).

14. In a very similar case, Hellstrom v. Commonwealth, 825 S. W. 2d 613 (1992) the expert testified about symptoms that the victim had that were consistent with Child Abuse Accommodation Syndrome, though the expert did not actually give an opinion that the symptoms were consistent with Child Abuse Accommodation Syndrome. The court found that this evidence still amounted to impermissible vouching. Id. 614.

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

16. As State v. Collins demonstrates, trial counsel's failure to object to the State's expert's testimony that vouched for the victim's credulity constitutes error that requires this court set aside the verdict in this case without further evidence of error.

17. There are also substantial additional errors that compounded this error. One such error is that Dr. Gladstone testified that the alleged victim was having irritation in her genital area and was fearful that she had an infection.

18. The failure to object to evidence that the alleged victim was having irritation in her genital area and was fearful that she had an infection was error on trial counsel's part for two reasons. The first point of error is that the victim's concern about having an infection was not relevant to any issue at trial as there was no evidence that the defendant had any sexually transmitted disease. *See* State v. Smith, 135 N.H. 524 (1992).

19. A more significant error is that trial counsel failed to file a notice of intent to elicit evidence regarding the prior sexual activity of the alleged victim pursuant to N.H. Rules

of Criminal Procedure 14 (b)(1)(2)(B). Where there was testimony that the alleged victim was concerned about redness and irritation in her genital area, evidence of prior sexual activity two days earlier was relevant to the issue of the source of this irritation. *See* State v. LaClair, 121 N.H. 743 (1981).

20. The medical records in this case indicate that the alleged victim was asked if she had had any other sexual activity in the five days prior the alleged assault and she responded that she had sexual activity two days earlier. The testimony from Dr. Gladstone that the alleged victim had irritation in her genital area and that the alleged victim had concerns about whether she may have an infection clearly opened the door for the defense to introduce evidence that the alleged victim had sexual activity with another person two days before she had sexual activity with the defendant.

21. Trial counsel's error was further compounded on this issue during trial counsel's cross-examination of the Sexual Assault Nurse Examiner (SANE), Jenny Ruiz. Ms. Ruiz testified that the alleged victim had redness in her vaginal area. 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?" In response to this question, the State made an objection citing the "rape shield law." 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." Counsel's response seems to indicate his lack of understanding as to the "rape shield law."[2] Counsel's response to the State's objection to this question suggests

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[2] 1. By using the term "rape shield law" the State is referring to N.H. Rule of Evidence 412, which states:

(a) Except as constitutionally required, and then only in the manner provided in b), below, evidence of prior consensual sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in any prosecution or in any

that trial counsel believed that the rape shield law only applied to questioning the alleged victim about her prior sexual activity and that the rule did not apply to the introduction of evidence about her prior sexual activity through other witnesses. This misapprehension as to the scope of the rape shield law might explain why trial counsel did not file a notice of intent to introduce evidence of the alleged victim's prior sexual activity[3] where counsel had clearly made a tactical decision to question Ms. Ruiz about this evidence.

22. As defense counsel had made a strategic decision to question Ms. Ruiz about the prior sexual activity of the alleged victim and trial counsel failed to file timely notice of his intent to introduce this evidence, counsel was ineffective.

23. During the bench conference regarding the State's objection, the court correctly noted that evidence of prior sexual activity of the alleged victim may be relevant to explain any injuries to the alleged victim. *See* State v. LaClair, 121 N.H. 743, 746 (N.H., 1981) (Evidence of prior sexual activities might explain physical injuries of the alleged victim). After the trial court's remarks, defense counsel says, "There were no injuries..." and then he withdrew the question.

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pretrial discovery proceeding undertaken in anticipation of a prosecution under the laws of this state.

(b) Upon Motion by the defense filed in accordance with the then applicable Rules of Court, the defense shall be given an opportunity to demonstrate, during a hearing in chambers, in the manner provided for in Rule 104.

[3] Under N.H. Rules of Criminal Procedure 14 (b)(1)(2)(B), defense counsel is required to file a notice with the court if he intends to introduce evidence of prior sexual activity of the victim with a person other than the defendant:

(B) *Prior Sexual Activity of Victim.* Not less than forty-five days prior to the scheduled trial date, any defendant who intends to offer evidence of specific prior sexual activity of the victim with a person other than the defendant shall file a motion setting forth with specificity the reasons that due process requires the introduction of such evidence and that the probative value thereof to the defendant outweighs the prejudicial effect on the victim. If the defendant fails to file such motion, the defendant shall be precluded from relying on such evidence, except for good cause shown.

24. As stated previously, even though the SANE nurse said that there were no "injuries" the State introduced substantial evidence that the alleged victim had redness in her genital area, she was physically uncomfortable during the physical exam, and that she reported irritation in her genital area three weeks after the alleged assault. The State's introduction of this evidence clearly required defense counsel to introduce evidence that the alleged victim had sexual activity with someone else only two days before the date she claimed the defendant sexually assaulted her. *See* People v. Shaw, 892 N.W.2d 15, 24 (Mich.App.,2016)(The rape-shield law does not prohibit defense counsel from introducing specific instances of sexual activity ... to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged.)

25. Trial counsel's failure to articulate a basis for questioning the SANE nurse about the prior sexual activity is critical to the analysis of counsel's error in this case for two reasons. First of all, the fact that counsel asked Ms. Ruiz about the alleged victim's prior sexual activity shows that the failure to file notice under N.H. Rules of Criminal Procedure 14 (b)(1)(2)(B) of the defendant's intent to ask questions about the prior sexual activity was not a tactical decision on the part of trial counsel.

26. Secondly, counsel's judgment that the prior sexual activity was not relevant because there were "injuries" was error. At the relevant point in the trial, the jury had already heard evidence that the alleged victim went to Dr. Gladstone three weeks later 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 introducing this evidence for a purpose, i.e., to prove that

the discomfort, redness and irritation experience by the alleged victim, were consistent with non-consensual sexual activity. Evidence that the alleged victim engaged in sexual activity two days earlier would be an explanation for these symptoms that was consistent with the defendant's theory that his encounter with the alleged victim was consensual.

27. Counsel's failure to object to the testimony of Dr. Gladstone in and of itself is 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. Bodden, 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 of the errors cumulatively.

WHEREFORE, Jonathan Marden requests this court make a finding that trial counsel was ineffective for the above stated reasons[4] and set aside this verdict as counsel's errors denied to him his right to counsel under Part 1, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

Jonathan Marden

[4] Counsel for Mr. Marden is currently investigating other errors that are not readily apparent from the trial record including trial counsel's failure to file a motion to suppress the defendant's statement, failure to call a defense expert regarding the effects of Zoloft on the defendant's ability to make a knowing and intelligent waiver of his right to remain silent and trial counsel's failure to call other witnesses who may have explained the defendant's mental condition when he gave a statement to the police in this case. Undersigned counsel is filing a motion to set aside the verdict at this point based upon the error that is readily apparent from the record.

By his attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: October 11, 2017

By: _____

Donna J. Brown, NH Bar No. 387
95 Market Street
Manchester, NH 03101
(603) 669-4140

CERTIFICATION

I hereby certify that a copy of this Motion has been forwarded to Catherine Devine of the Hillsborough County Attorney's Office on this 11th day of October, 2017.

_____

Donna J. Brown

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2017-CR-00029

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

JONATHAN MARDEN

STATE'S OBJECTION TO SET ASIDE VERDICT

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Motion to Set Aside Verdict, stating in support as follows:

1. Defendant's motion arrived at counsel's office on October 17, 2017. It is the State's position that the defendant's motion is without merit.

2. The State requests an extension of time to file a more substantive objection. The State has been unable to do so due to the additional work load created by the Felonies First program as well as the departure of a staff attorney which has created a crushing workload for the Assistant County Attorneys in the Southern District.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the Defendant's Motion to Set Aside Verdict;

B. Grant the State additional time to respond adequately to said motion;

C. Schedule a hearing thereon, and

D. Grant the State any such other relief as may be just and proper.

DATED: October 27, 2017

Respectfully Submitted,

Catherine M. Devine #629
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Donna Jean Brown, Esq., counsel for the defendant.

Catherine M. Devine

File

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2017-CR-00029

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

JONATHAN MARDEN

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SET ASIDE VERDICT
(ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL)

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Motion, stating in support as follows:

1. Defendant was convicted of one count of Aggravated Felonious Sexual Assault after trial. Subsequent to the guilty verdict but prior to sentencing defendant fired trial counsel and hired new counsel.

2. Defendant was charged under RSA 632-A: 2, I (m) which alleged lack of consent conveyed by to defendant by the victim by speech or conduct. The Court instructed the jury that the elements of this offense are:

> [T]he State must prove, one, that the Defendant engaged in sexual penetration with another person. And two, the other person indicated by conduct or speech that [s]he did not freely consent to the performance of the sexual act. And three, that the Defendant acted knowingly. (Trial transcript (TT) at 415).

In addition, the Court instructed the jury that:

> The Defendant is not required to prove consent. Lack of consent is part of the definition of the crime of aggravated felonious sexual assault. Therefore, the State must prove that there was no consent. (TT at 412).

3. Defendant alleges that trial counsel was ineffective in failing to object to testimony from Dr. Gladstone regarding certain symptoms the victim was experiencing approximately three weeks after the defendant assaulted her as said testimony "impermissibly

bolstered" the credibility of the victim. Defendant also claims that trial counsel should have attempted to admit prior sexual activity of the victim. Defendant's claims are without merit.

4. This case was charged as what may be termed "no means no" in that the victim conveyed to the defendant by speech or conduct that she did not consent to the sexual act. Defendant disregarded the victim's speech and conduct which conveyed to him that she did not consent and proceeded to sexually assault her.

5. At trial, Defendant relied on a consent defense. As noted above, the burden is on the State to disprove consent beyond a reasonable doubt. Defendant's theory was that the victim fabricated the rape allegations because she was afraid she would lose her job. The testimony of Dr. Gladstone was introduced to refute the Defendant's claim of consent. The State elicited the testimony of Dr. Gladstone to show that some three weeks after the assault the victim was still experiencing a number of symptoms after the assault.

5. The Defendant's reliance on State v. Cressey, 137 NH 402 (1993) is misplaced as Cressey is inapposite on its facts. Indeed, all the cases cited by Defendant are inapposite on their facts. Dr. Gladstone was never asked and did not offer an opinion on whether the victim was sexually assaulted or that the symptoms the victim described were consistent with someone being sexually assaulted. In fact, the parties reached an agreement that Dr. Gladstone would not mention post-traumatic stress disorder in her testimony. (TT at 165).

6. In Defendant's motion at Paragraph 6, he claims that Dr. Gladstone's testimony about "symptoms of significance" regarding the victim's emotional and mental state three weeks following the assault is "exactly the type of evidence that is precluded by Cressey" citing to page 407 of the opinion.

7. Presumably, Defendant is making reference to the Court stating, "We hold that Dr. Bollerud's expert testimony is not sufficiently reliable to be admitted in a criminal trial as

evidence that Lisa and Julie were sexually abused."

8. The issue with the expert testimony in Cressey was that the expert went too far in offering an opinion on the ultimate issue; that is whether the two minor victims displayed behavior consistent with sexual abuse. Dr. Gladstone never offered an opinion as to whether the victim was sexually assaulted or whether the symptoms were consistent with someone who had been sexually assaulted; thus there was no Cressey violation. In fact, the Cressey Court also recognized that some of the challenged expert testimony had value for the purpose of educating the jury.

9. In recognition of the fact that some expert testimony may assist the jury in determining the credibility of the minor witnesses, the Court stated:

> "[W]e hold that the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or **rebut any inferences that a child victim witness is lying**. This expert testimony may not be offered to prove that a particular child has been sexually abused."

Id. at 412 (Emphasis added).

10. Defendant claims in paragraph 10 of his motion that the testimony of Dr. Gladstone "crossed the line into the impermissible realm of vouching for the victim's credibility" citing State v. Decosta, 146 NH 405, 409 (2001). Upon reading Decosta however, it is clear that Decosta supports the State's position, not the Defendant's.

11. Referencing Cressey, the Decosta court stated,

> "The defendant also contends that Dr. Strapko's testimony was inadmissible because it was designed to reinforce the victim's credibility and not designed to educate the jury. The defendant argues that Dr. Strapko's extensive testimony regarding the tendency of victims to delay disclosure of abuse equates to vouching for the truthfulness of the victim. We disagree. Dr. Strapko testified about child sexual abuse in general and did not offer an opinion as to whether this victim had been abused."

Id. at 408- 409.

12. Defendant also cites State v. Collins, 166 N.H. 210 (2014) in support of his claim that Dr. Gladstone's testimony was not admissible and that trial counsel should have objected to it. Again, Defendant's reliance on this case is misplaced as the facts are completely different from the facts present in the instant case. The expert testimony admitted without objection by defendant's counsel in Collins was, in fact, exactly the type of testimony prohibited by Cressey.

13. The Collins court found that,

> "[B]ecause of defense counsel's errors, [the credibility of the victim] was impermissibly bolstered. Because defense counsel failed to object, the jury heard from an expert, with forty-two years of experience, that the complainant's behaviors "fit perfectly" with those of a child sexual abuse victim and that she suffered from post-traumatic stress disorder caused by alleged sexual assault. Because defense counsel failed to object, the jury heard that, in the expert's view, the fact that the complainant's disclosure "came out of the blue," made her allegations more credible."
>
> Id. at 214-215.

14. Accordingly, it is clear that Dr. Gladstone's testimony was properly admitted to rebut the inference that the victim was lying about the assault because she was afraid she was going to lose her job.

15. Defendant also alleges error by trial counsel for not pursuing evidence of the victim's prior sexual activity through the testimony of the SANE nurse. Again, Defendant's reliance on his cited case, People v. Shaw, 892 N.W.2d 15, 24 (Mich. App., 2016) is misplaced because Shaw is also factually inapposite to the case at bar. While the rape shield law may not prohibit defense counsel from introducing "specific instances of sexual activity ... to show the origin of a physical condition **when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged** provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value." Id. (Emphasis added).16.

16. The disputed evidence was not offered by the State to prove an element of the

crime charged. The three elements of the crime the State had to prove in the instant case are that the Defendant 1) Knowingly; 2) Engaged in sexual penetration with the victim; and 3) the victim indicated by conduct or speech that she did not freely consent to the performance of the sexual act. There was no dispute as to whether the defendant knowingly engaged in sexual penetration with the victim. The only issue was whether she indicated by speech or conduct that she did not consent. Thus, to prove lack of consent the State needed to prove beyond a reasonable doubt that the victim conveyed her lack of consent to the defendant.

17. The SANE nurse testified that there were no injuries to the victim. She merely described her physical findings and never offered, and indeed could not offer, an opinion as to whether the presence of redness indicated that the sexual contact with defendant was consensual or not. Dr. Gladstone did not offer any opinion on consent or lack of consent either nor did the State make any attempt to adduce such testimony. Accordingly, any evidence of the victim's prior sexual activity 2 days prior to the assault had no probative value and would have been inflammatory and unduly prejudicial.

18. Defendant claims that trial counsel's performance was ineffective and that the verdict should be set aside. "To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. Id. at 212. (Citations omitted)

19. "To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness. To meet this prong of the test, the defendant must show that counsel made such egregious errors that she failed to function as the counsel the State Constitution guarantees. We afford a high degree of

deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make. The defendant must overcome the presumption that trial counsel reasonably adopted her trial strategy. Accordingly, " a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."" Id. at 213. (Citations omitted)

20. "To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making this determination, we consider the totality of the evidence presented at trial." Id. (Citations omitted).

21. In determining whether or not an attorney's performance is reasonably competent, a high degree of deference is given to the decisions of trial counsel given the "limitless variety of strategic and tactical decisions that counsel must make." State v. Dewitt, 143 N.H. 24, 30 (1998). The Supreme Court has also ruled that "broad discretion is permitted trial counsel in determining trial strategy" and, as such, there is a presumption that the strategies adopted and decisions made by trial counsel were reasonable and met constitutional muster. State v. Flynn, 151 N.H. 378, 389 (2004).

22. Under New Hampshire law, a reasonable probability is present only if that probability is so great that it undermines confidence in the accuracy of the case's outcome. Flynn, supra at 389.

23. "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact Therefore, we will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and

we review the ultimate determination of whether each prong is met de novo." Collins, supra at 213.

24. It is the State's position that Defendant's Motion is actually a Motion for New Trial Due to Ineffective Assistance of Counsel and should therefore have been heard after sentencing. Regardless of the procedural posture of this matter however it is clear that Defendant has failed to meet his burden with regard to either the performance or prejudice prong of the ineffectiveness inquiry. While present counsel may have had a different strategy or done things differently that is not the standard that must be met by Defendant to support his claim of ineffective assistance of counsel. Accordingly, Defendant's Motion to Set Aside the Verdict should be denied.

WHEREFORE, the State respectfully requests that this Honorable Court:

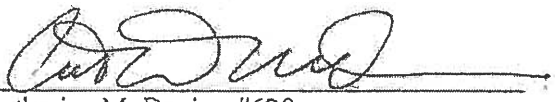
A. Deny the Defendant's Motion to Set Aside Verdict;

B. Conduct a hearing thereon; and

C. Grant the State any such other relief as may be proper and just.

DATED: November 16, 2017

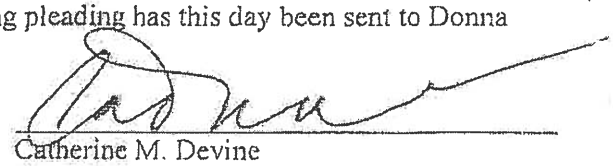
Respectfully Submitted,



Catherine M. Devine #629
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Donna Jean Brown, Esq., counsel for the defendant.



Catherine M. Devine

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2017-CR-00029

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

JONATHAN MARDEN

STATE'S MOTION TO RECONSIDER

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and moves to Reconsider, stating in support as follows:

1. The defendant was convicted after jury trial of one count of Aggravated Felonious Sexual Assault. After a post-conviction hearing on defendant's request to set aside the verdict alleging ineffective assistance of trial counsel, defendant's motion to set aside was granted.

2. The State's seeks reconsideration of the court's ruling. In the Court's discussion of the evidence in support of its ruling, the Court completely disregarded the State's arguments as well as limiting its focus solely to the testimony of Dr. Gladstone, the SANE nurse and also engaged in a detailed analysis of defendant's statements to the police and at trial.

3. It is the State's position that in failing to consider the trial record in its entirety the Court reached an erroneous conclusion as to the admissibility of the testimony of Dr. Gladstone.

4. At trial, Defendant relied on a consent defense. The burden is on the State to disprove consent beyond a reasonable doubt. Defendant's theory was that the victim fabricated the rape allegations because she was afraid she would lose her job. The testimony of Dr. Gladstone was introduced to refute the Defendant's claim of consent. The State elicited the testimony of Dr. Gladstone to show that some three weeks after the assault the victim was still experiencing a number of symptoms after the assault.

5. In its detailed analysis of both the defendant's pre-trial statement to police as well as his trial testimony, the Court failed to consider the fact that defendant's trial testimony was inconsistent with the actual video of the Target employees approaching his vehicle and knocking on the window. Defendant testified that he had "pulled out" of the victim prior to "finishing" himself on the front seat of his vehicle. In fact, the Target security video clearly shows defendant still on top of the victim when the Target employee knocked on the window.

6. In fact, the jury requested to view that video again at about 3:43 pm (T p.429-431) and came back with their guilty verdict at 4:26 pm. This evidence clearly shows that the jury did not give undue weight to Dr. Gladstone's testimony but decided the case on all the evidence presented.

8. The Court's reliance on State v. Cressey, 137 NH 402 (1993) is misplaced as Cressey is inapposite on its facts. Indeed, all the cases cited by Defendant are inapposite on their facts. Dr. Gladstone was never asked and did not offer an opinion on whether the victim was sexually assaulted or that the symptoms the victim described were consistent with someone being sexually assaulted. In fact, the parties reached an agreement that Dr. Gladstone would not mention post-traumatic stress disorder in her testimony. (TT at 165).

9. In Defendant's motion at Paragraph 6, he claims that Dr. Gladstone's testimony about "symptoms of significance" regarding the victim's emotional and mental state three weeks following the assault is "exactly the type of evidence that is precluded by Cressey" citing to page 407 of the opinion.

10. Presumably, Defendant is making reference to the Court stating, "We hold that Dr. Bollerud's expert testimony is not sufficiently reliable to be admitted in a criminal trial as evidence that Lisa and Julie were sexually abused."

11. The issue with the expert testimony in Cressey was that the expert went too far in

offering an opinion on the ultimate issue; that is whether the two minor victims displayed behavior consistent with sexual abuse. Dr. Gladstone never offered an opinion as to whether the victim was sexually assaulted or whether the symptoms were consistent with someone who had been sexually assaulted; thus there was no Cressey violation. In fact, the Cressey Court also recognized that some of the challenged expert testimony had value for the purpose of educating the jury.

12. In recognition of the fact that some expert testimony may assist the jury in determining the credibility of the minor witnesses, the Court stated:

> "[W]e hold that the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or **rebut any inferences that a child victim witness is lying**. This expert testimony may not be offered to prove that a particular child has been sexually abused."
>
> Id. at 412 (Emphasis added).

13. Defendant claims in paragraph 10 of his motion that the testimony of Dr. Gladstone "crossed the line into the impermissible realm of vouching for the victim's credibility" citing State v. Decosta, 146 NH 405, 409 (2001). Upon reading Decosta however, it is clear that Decosta supports the State's position, not the Defendant's.

14. Referencing Cressey, the Decosta court stated,

> "The defendant also contends that Dr. Strapko's testimony was inadmissible because it was designed to reinforce the victim's credibility and not designed to educate the jury. The defendant argues that Dr. Strapko's extensive testimony regarding the tendency of victims to delay disclosure of abuse equates to vouching for the truthfulness of the victim. We disagree. Dr. Strapko testified about child sexual abuse in general and did not offer an opinion as to whether this victim had been abused." Id. at 408- 409.

15. Defendant also cites State v. Collins, 166 N.H. 210 (2014) in support of his claim that Dr. Gladstone's testimony was not admissible and that trial counsel should have objected to it. Again, Defendant's reliance on this case is misplaced as the facts are completely different

from the facts present in the instant case. The expert testimony admitted without objection by defendant's counsel in Collins was, in fact, exactly the type of testimony prohibited by Cressey.

16. The Collins court found that,

> "[B]ecause of defense counsel's errors, [the credibility of the victim] was impermissibly bolstered. Because defense counsel failed to object, the jury heard from an expert, with forty-two years of experience, that the complainant's behaviors "fit perfectly" with those of a child sexual abuse victim and that she suffered from post-traumatic stress disorder caused by alleged sexual assault. Because defense counsel failed to object, the jury heard that, in the expert's view, the fact that the complainant's disclosure "came out of the blue," made her allegations more credible." Id. at 214-215.

17. Accordingly, it is clear that Dr. Gladstone's testimony was properly admitted to rebut the inference that the victim was lying about the assault because she was afraid she was going to lose her job.

18. Defendant also alleges error by trial counsel for not pursuing evidence of the victim's prior sexual activity through the testimony of the SANE nurse. Again, Defendant's reliance on his cited case, People v. Shaw, 892 N.W.2d 15, 24 (Mich. App., 2016) is misplaced because Shaw is also factually inapposite to the case at bar. While the rape shield law may not prohibit defense counsel from introducing "specific instances of sexual activity ... to show the origin of a physical condition **when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged** provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value." Id. (Emphasis added).16.

19. The disputed evidence was not offered by the State to prove an element of the crime charged. The three elements of the crime the State had to prove in the instant case are that the Defendant 1) Knowingly; 2) Engaged in sexual penetration with the victim; and 3) the victim indicated by conduct or speech that she did not freely consent to the performance of the sexual act. There was no dispute as to whether the defendant knowingly engaged in sexual

penetration with the victim. The only issue was whether she indicated by speech or conduct that she did not consent. Thus, to prove lack of consent the State needed to prove beyond a reasonable doubt that the victim conveyed her lack of consent to the defendant.

20. The SANE nurse testified that there were no injuries to the victim. She merely described her physical findings and never offered, and indeed could not offer, an opinion as to whether the presence of redness indicated that the sexual contact with defendant was consensual or not. Dr. Gladstone did not offer any opinion on consent or lack of consent either nor did the State make any attempt to adduce such testimony. Accordingly, any evidence of the victim's prior sexual activity 2 days prior to the assault had no probative value and would have been inflammatory and unduly prejudicial.

21. Defendant claims that trial counsel's performance was ineffective and that the verdict should be set aside. "To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. Id. at 212. (Citations omitted)

22. "To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness. To meet this prong of the test, the defendant must show that counsel made such egregious errors that she failed to function as the counsel the State Constitution guarantees. We afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make. The defendant must overcome the presumption that trial counsel reasonably adopted her trial strategy. Accordingly, " a fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" Id. at 213. (Citations omitted)

23. "To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making this determination, we consider the totality of the evidence presented at trial." Id. (Citations omitted).

24. In determining whether or not an attorney's performance is reasonably competent, a high degree of deference is given to the decisions of trial counsel given the "limitless variety of strategic and tactical decisions that counsel must make." State v. Dewitt, 143 N.H. 24, 30 (1998). The Supreme Court has also ruled that "broad discretion is permitted trial counsel in determining trial strategy" and, as such, there is a presumption that the strategies adopted and decisions made by trial counsel were reasonable and met constitutional muster. State v. Flynn, 151 N.H. 378, 389 (2004).

25. Under New Hampshire law, a reasonable probability is present only if that probability is so great that it undermines confidence in the accuracy of the case's outcome. Flynn, supra at 389.

26. "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact Therefore, we will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and we review the ultimate determination of whether each prong is met de novo." Collins, supra at 213.

27. It is the State's position that Defendant failed to meet his burden with regard to either the performance or prejudice prong of the ineffectiveness inquiry. While present counsel

may have had a different strategy or done things differently that is not the standard that must be met by Defendant to support his claim of ineffective assistance of counsel. Accordingly, Defendant's Motion to Set Aside the Verdict should have been denied.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Grant the State's Motion to RECONSIDER;

B. Reinstate the jury's verdict;

C. Schedule this matter for sentencing; and

D. Grant the State any such other relief as may be proper and just.

DATED: January 8, 2018

Respectfully Submitted,

Catherine M. Devine #629
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Donna Jean Brown, Esq., counsel for the defendant.

Catherine M. Devine

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.-So. JANUARY TERM, 2018

STATE OF NEW HAMPSHIRE

V.

JONATHAN MARDEN

226-2017-CR-00029

DEFENDANT'S RESPONSE TO STATE'S MOTION TO RECONSIDER COURT'S ORDER ON MOTION TO SET ASIDE THE VERDICT

NOW COMES the defendant, Jonathan Marden, by and through counsel, Donna J. Brown, and hereby responds to the State's Motion to Reconsider this Court's Order on the Defendant's Motion to Set Aside the Verdict.

As grounds for this Motion, it is stated:

1. Jonathan Marden is charged with one count of Aggravated Felonious Sexual Assault.
2. On December 14, 2017, this court issued an Order granting the Defendant's Motion to Set Aside the Verdict in this matter on the grounds of ineffective assistance of counsel. This court issued this Order after both sides had an opportunity to file pleadings on this issue, interview trial counsel and present evidence at a hearing on the matter.
3. N.H. Rules of Crim. Procedure Rule 43 states that a motion to reconsider shall state points of law or fact that the court has overlooked or misapprehended. The State's motion does not set forth any new points of law or facts, but instead restates the same arguments that the State made in the State's Objection to Defendant's Motion to Set Aside Verdict and this court should therefore deny the State's Motion to Reconsider.

4. There is no new case law that has been handed down on this issue since the court's Order and the court's Order considers all of the relevant facts and law on this issue.

5. Further, in their Motion to Reconsider, the State argues that this Court's Order granting the defendant's request to set aside the verdict in this matter "failed to consider the trial record in its entirety." *See* State's Motion to Reconsider ¶ 3. Prior to issuing an Order on this issue, the court received and reviewed a copy of the transcript of the trial. Further, in addition to analyzing the testimony of Dr. Gladstone, the court also analyzed the testimony of SANE nurse Jenny Ruiz and Det. Caleb Gilbert, as well as the testimony of the defendant. *See* Order at 5-13. Therefore, the State's argument that this court failed to consider the record of the trial in its entirety is without merit.

6. Further, not only did the court review and consider the transcript of the trial in its entirety, the court was also the trial judge in this case and personally observed all of the evidence and witnesses who were the subject of the defendant's motion to set aside verdict.

7. The State's Motion to Reconsider merely repeats the same exact arguments that were set forth in their original motion filed on November 16, 2017 and at the hearing on the defendant's motion. *See* State's Objection to Defendant's Motion to Set Aside Verdict. In that original objection filed by the State to the defendant's request for a new trial, the State made the following arguments:

   - "...Defendant's reliance on State v. Cressey, 137 NH 402 (1993) is misplaced..." (¶ 5)
   - "...[State v.] Decosta supports the State's position..." (¶ 10)

- "...Defendant's reliance on [State v. Collins, 166 N.H. 210 (2014)] is misplaced as the facts are completely different from the facts present in the instant case." (¶ 12)
- "...Defendant's reliance on his cited case, People v. Shaw, 892 N. W.2d 15, 24 (Mich. App., 2016) is misplaced because Shaw is also factually inapposite to the case at bar." (¶ 15)
- "The Supreme Court has also ruled that 'broad discretion is permitted trial counsel in determining trial strategy' and, as such, there is a presumption that the strategies adopted and decisions made by trial counsel were reasonable and met constitutional muster. State v. Flynn, 151 N.H. 378,389 (2004)." (¶ 21)

8. On January 8, 2018, the State filed State's Motion to Reconsider. In their motion to reconsider, the State cites the exact same cases and makes the exact same arguments, in some cases word for word, as they made in their original objection:
   - "The Court's reliance on State v. Cressey, 137 NH 402 (1993) is misplaced as Cressey is inapposite on its facts." (¶ 8)
   - "...[State v.] Decosta supports the State's position..." (¶ 13)
   - "...Defendant's reliance on [State v. Collins, 166 N.H. 210 (2014)] is misplaced as the facts are completely different from the facts present in the instant case." (¶ 15)
   - "...Defendant's reliance on his cited case, People v. Shaw, 892 N. W.2d 15, 24 (Mich. App., 2016) is misplaced because Shaw is also factually inapposite to the case at bar." (¶ 15)

- "The Supreme Court has also ruled that 'broad discretion is permitted trial counsel in determining trial strategy' and, as such, there is a presumption that the strategies adopted and decisions made by trial counsel were reasonable and met constitutional muster. State v. Flynn, 151 N.H. 378,389 (2004)." (¶ 21)

9. This Court issued a 22-page Order, where it carefully analyzed the transcript of the trial and, specifically, four key witnesses whose testimony were central to the issues raised by the Defendant's Motion to Set Aside Verdict. The State was not able to cite to any law or facts that the court overlooked or misapprehended in its Order. The State's Motion to Reconsider merely rehashed the exact same arguments that they made in their original motion objecting to the defendant's request to set aside the verdict, which the State filed on November 16, 2017.

10. As the Court's Order is supported by the case law, by the transcript and by the evidence presented at trial, and the State has failed to cite to any law or facts that this Court has overlooked or misapprehended, this Court should deny the State's Motion to Reconsider and this matter should be scheduled for trial.

WHEREFORE, Jonathan Marden hereby objects to the State's Motion to Reconsider the court's Order on the Defendant's Motion to Set Aside Verdict and requests this court deny the State's motion and schedule this matter for trial.

Respectfully submitted,

Jonathan Marden

By his attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: January 17, 2018

By: _____
Donna J. Brown, NH Bar No. 387
95 Market Street
Manchester, NH 03101
(603) 669-4140

CERTIFICATION

I hereby certify that a copy of this Motion has been forwarded to Catherine Devine of the Hillsborough County Attorney's Office on this 17th day of January, 2018.

_____
Donna J. Brown

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **State v. Jonathan J Marden**
Case Number: **226-2017-CR-00029**

Enclosed please find a copy of the court's order of January 22, 2018 relative to:

Motion to Reconsider

January 23, 2018

Marshall A. Buttrick
Clerk of Court

(568)

C: Catherine M. Devine, ESQ; Donna Jean Brown, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

226-2017-CR-00029

STATE OF NEW HAMPSHIRE

v.

JONATHAN MARDEN

ORDER ON STATE'S MOTION TO RECONSIDER

On December 14, 2017 the Court entered an order granting defendant's motion to set aside the verdict in the above encaptioned Aggravated Felonious Sexual Assault matter in which the defendant had been found guilty after a trial by jury. The State moves for reconsideration of that order. The defense objects to that request.

"A motion for reconsideration allows a party to present 'points of law or facts that the Court has overlooked or misapprehended.'" Barrows v. Boles, 141 N.H. 382, 397 (1996); N.H. Rule of Criminal Procedure 43. The Court does not conclude that that the State has established grounds for reconsideration. The Court also concludes that its order of December 14, 2017 had appropriately addressed the post trial issues in this matter. Accordingly, the State's Motion to Reconsider is denied.

(CmD) | MDB | MR

D.O.B. 03/12/1996
NPD# 16-72516-OF
Cir. Ct. #
Sup. Ct. #

RSA Ch. 632-A:2,I(m)
AFSA - No Consent
A Special Felony
10 to 20 years NHSP, $4000 fine

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT

INDICTMENT

At the Superior Court, holden at **Nashua**, within and for the County of Hillsborough aforesaid, in the month of **January** in the year **2017** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE**, on their oath, present that

JONATHAN MARDEN 226-2017-CR-29

5 BLACKSTONE DRIVE, #27
NASHUA, NH 03060 1312855C

on or about the **26th** day of **October 2016**,

at **Nashua** in the County of Hillsborough, aforesaid, **did commit the crime of AGGRAVATED FELONIOUS SEXUAL ASSAULT in that he knowingly engaged in sexual penetration of A.G. by inserting his penis into her genital opening when at the time of the sexual assault A.G. indicated by speech or conduct that she did not freely give consent to performance of the sexual act by telling him to stop and trying to push him off her,**

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

1-17-17
Date

Robert a Robbins
Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by: Catherine M. Devine
Catherine M. Devine #629
Assistant County Attorney

HSCCSJAN1817 PM12:49