DOCKET NO. 2018-0292

SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

STATE OF NEW HAMPSHIRE

Appellee.

v.

HENRY CARNEVALE

Appellant.

On Appeal From The Decision of the Sullivan County Superior Court

---

BRIEF FOR APPELLANT

Michael Shklar, Esq
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF STATUTES

QUESTION PRESENTED

1) Whether the Trial Court erred, as a matter of law in finding that the factual basis of this case could be construed as reckless conduct with a deadly weapon?

2) Whether Trial Counsel in this matter was constitutionally inadequate in their decision to not produce evidence, possibly including Appellant's testimony to rebut the Prosecution's case in chief.

JURISDICTION

The Appellant in this case is a New Hampshire resident. The Supreme Court of New Hampshire has jurisdiction over this case.

STATUTE INVOLVED

RSA 631:3 Reckless Conduct

I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.

II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11, V. All other reckless conduct is a misdemeanor.

III. A person convicted of a class B felony offense under this section shall not be subject to the provisions of RSA 651:2, II-g.

IV. (a) Upon proof that the victim and defendant were intimate partners or family or household members, as those terms are defined in RSA 631:2-b, III, a conviction under this section shall be recorded as "reckless conduct-domestic violence."

(b) In addition to any other penalty authorized by law, the court shall levy a fine of $50 for each conviction recorded as "reckless conduct-domestic violence" under this paragraph. The court shall not reduce or suspend any sentence or the payment of any fine imposed under this paragraph and no fine imposed under this paragraph shall be subject to an additional penalty assessment. If the court determines that the defendant is unable to pay the fine on the date imposed, the court may defer payment or order periodic payments thereof. The clerk shall forward all fines collected under this paragraph to the department of health and human services

for the purposes of RSA 173-B:15. The provisions of RSA 618:8 and RSA 618:9 shall not apply to a fine imposed under this paragraph.

STATEMENT OF THE CASE

On August 9, 2017 Henry (Rick) Carnevale was driving towards a medical appointment in Lebanon, New Hampshire on Interstate 89. He approached a car in the high speed lane, and wanted to pass it, which he did by moving into the right lane. At this point he found he had little time to move back to the left to avoid a vehicle in front of him. He misjudged the situation, and left less space than perhaps he ought to have between his vehicle and that of the victim. The victim's vehicle which then collided with a guardrail as Mr. Carnevale continued on his way. These facts are adduced not from a party (whether the State or Appellant) but from Exhibit 8, which recorded the events.

Appellant was arraigned on January 4th, 2017 in the Sullivan County Criminal Court in New Hampshire and charged with one count of felony reckless conduct with a deadly weapon. Appellant entered a plea of not guilty. The trial was held on June 15th, 2017. The jury returned a verdict of guilty. Appellant responded by filing a timely appeal to the Supreme Court of New Hampshire in June 2018.

This is a unique case as the actual events are preserved in a video recording (Exhibit 8) On August 9th, 2016 Appellant was traveling north on Interstate 89 from Newbury, New Hampshire to Lebanon, New Hampshire. The victim was traveling north on Interstate 89 at the same time near the town of Grantham, New Hampshire. Appellant was traveling in the left lane when he approached the victim's vehicle. Appellant then switched to the right lane and accelerated past the victim's vehicle. Appellant's vehicle was now approaching a third vehicle in the right lane and changed back into the left lane at a close distance to victim's vehicle. The two

vehicles did not make contact. Appellant continued driving and the victim had lost control of his vehicle and crashed into a guard rail. The investigating officer arrived on scene subsequent to the accident. The officer spoke with the victim, who handed him two small cameras. The cameras had been mounted on his dashboard and also at the rear of the vehicle. The cameras had been recording when the accident occurred. The officer learned the identity of Appellant by conducting a record check on his vehicle by obtaining the Appellant's license plate number from the video footage. The officer then contacted Newbury Police Department. Appellant was subsequently located at his residence by Newbury police officers. When Appellant spoke with the investigating officer he stated that he had no knowledge of any accident. Appellant was arrested, transported to the police barracks and denied having any knowledge of the accident again. Appellant was processed for jail.

SUMMARY OF ARGUMENT

The Superior Court erred in denying the Appellant/Defendant's Motion to Set Aside the Verdict at the conclusion of the trial. Concisely stated, the State did not present evidence that could support a finding of reckless conduct. No evidence was produced that showed Appellant/Defendant acted with the mental state required to convict for Reckless Conduct. No reasonable jury could conclude the Appellant/Defendant had the awareness and disregard of the risk of substantial bodily harm to the victim by watching the video (Exhibit 8) of the car accident. The verdict should be vacated as it was clear that the vehicle did not constitute a deadly weapon.

Appellant/Defendant also received ineffective assistance of counsel. Attorney Buckey did not call an accident reconstruction expert to support theory of pure accident. Appellant/Defendant was also not called as a witness. Perception is important for satisfying the intent element of

reckless conduct. There is a reasonable probability that, but for trial counsel's error the outcome of Appellant/Defendant's trial would have been different.

THE STATE FAILED TO SHOW THE DEFENDANT'S VEHICLE WAS A DEADLY WEAPON AS USED UNDER NEW HAMPSHIRE LAW

This is an unusual case, as this Court, while of course bound to give deference to the fact finding of the Trial Court can actually view the events at issue. It is respectfully suggested that while the Defendant may well have made an error of judgment while driving, his conduct did not involve the use of a deadly weapon. The State failed to produce evidence, when viewed in the light most favorable to the State, that Defendant demonstrated the requisite mental state for intent in using his vehicle as a deadly weapon against the victim. While the evidence might well support a conviction for Reckless Operation (RSA 279:1) that offense is a non-criminal violation intended for cases of exactly this nature as opposed to the felony offense charged.

The State charged Defendant with Felony Reckless Conduct with a deadly weapon, RSA 631:3 which states, in pertinent part:

I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.

II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11, V. All other reckless conduct is a misdemeanor.

According to RSA 631:3, the deadly weapon used must fall within the definition of RSA 625:11, V which defines deadly weapon as "any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury."

The definition of a deadly weapon includes the intent the user of it holds. The phrase "in the manner it is used, intended to be used, or threatened to be used" is inseparable from the rest of the definition. Therefore, the State must prove beyond a reasonable doubt Defendant intended to use his vehicle to cause the death or serious bodily injury to the victim.

According to *State* v. *Pratte*, 959 A.2d 200, 204 (2008), "it is the manner in which the other substance or thing is used, and the circumstances surrounding its use, that makes it a deadly weapon under RSA 625:11, V." Here, the New Hampshire Supreme Court affirms the intent element in using an object as a deadly weapon is essential. The Defendant in *Pratte* was convicted of possessing a deadly weapon as a convicted felon. Defendant had a bow and arrows at his residence and the State gathered further evidence that Defendant had used the bow and arrow to kill a porcupine. The Court held, "the State was required to prove not only that the Defendant possessed the bow and arrow, but that in the manner the Defendant used, intended to use, or threatened to use the bow and arrow, it was capable of producing death or serious bodily injury." (*Id.* at 203). The State in the matter before the Court should likewise be held to that same standard. Although the State could prove Defendant owned the vehicle, additional proof was required that it was used, intended to be used, or threatened to be used, to kill or seriously injure the victim. To the contrary, evidence of that nature is absent from the record.

Furthermore, the State during its closing argument suggested that Defendant was not road raging during the time the accident occurred. This suggestion by the State further supports Defendant's position that he did not use, intend to use or threaten to use his vehicle as a deadly weapon. The New Hampshire Supreme Court held whether the Defendant used an object in such a manner that it constituted a deadly weapon is a question for the jury based upon the totality of the circumstances. *State* v. *Kousounadis*, 986 A.2d 603 (2009). The suggestion there was no

road rage specifically goes to the totality of the circumstances weighing in favor of Defendant. The suggestion eliminates the possibility of using a threat to establish intent for using a vehicle as a deadly weapon. For example, the damage done to Defendant's car as a result of the contact was minimal according to the arresting officer. In addition, situations such as the one that led to the accident in this matter occur on an everyday basis. The evidence provided by the State is insufficient in so far as showing the totality of the circumstances demonstrating use of a vehicle as a deadly weapon.

Defendant submits that using a vehicle as a deadly weapon under RSA 625:11, should be construed only to include those actions where death or serious bodily injury is more than likely to occur as a result of the driving. The evidence on the record points to the contrary. When all the circumstances of the accident are considered, it's an impermissible stretch of logic to suggest that Defendant was trying to cause the death of the victim. Nothing in the State's case presented at trial can be used to show, beyond a reasonable doubt, that Defendant drove his vehicle in a manner that violates RSA 625:11.

Defendant did not drive his vehicle in a manner that qualifies as a deadly weapon under RSA 625:11 during the time of the accident. Although an object carries the potential to cause death or serious bodily injury, that potential by itself is not enough to classify it as a deadly weapon under New Hampshire law. The totality of the circumstances must be considered to establish the Defendant used, intended to use, or threatened to use his vehicle as a deadly weapon. It naturally follows that conduct that ultimately causes an accident does not always qualify as using a vehicle as a deadly weapon under RSA 625:11. Otherwise, every person who causes an accident could be charged with using their vehicle as a deadly weapon. We cannot assume that is what the legislature intended when enacting the Reckless Conduct statute. According to *Appeal of Local*

Gov't Ctr., "We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." 85 A.3d 388, 400 (2014).

THE EVIDENCE AT APPELLANT'S TRIAL DID NOT ESTABLISH, BEYOND A REASONABLE DOUBT, APPELLANT WAS AWARE OF AND CONSCIOUSLY DISREGARDED A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT SERIOUS BODILY INJURY WOULD OCCUR.

Alleged criminal conduct must be assessed on whether sufficient grounds exist to convict, that assessment is a function of the elements of the crime instead of the evidence presented, by itself. *See Jackson* v. *Virginia*, 443 U.S. 307, 324 n. 16 (1979). (challenging insufficient evidence is carried out "with explicit reference to the substantive elements of the criminal offense as defined by state law"). The elements of Reckless Conduct are examined below.

Reckless Conduct, RSA 631:3, states, "[a] person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury. II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11." According to the text, RSA 631:3 is violated when a person acts recklessly and thereby puts another person at risk of sustaining serious bodily injury. Conversely, the statute is ambiguous because it does not mention the mental state of the actor required to convict.

The New Hampshire Supreme Court has addressed this element. According to *State* v. *Hull*, "[t]o prove defendant acted in a reckless manner, the State had to show that the defendant's disregard for the risk of injury to another was a gross deviation from the regard that would be given by a law abiding citizen." 827 A.2d 1001, 1010 (2003). In *State* v. *McCabe*, the Court

held, "[t]he state also has to prove beyond a reasonable doubt that "the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that serious bodily injury would result from the charged conduct." 765 A.2d 176, 179 (2001) (quoting RSA 626:2, II (c)).

The level of recklessness in the alleged conduct that must be reached to convict a defendant is subjectively determined. According to *Hull*, "This is a subjective inquiry." 827 A.2d at 1010. The subjective inquiry into the defendant's awareness may be determined by a jury that considers the defendant's "subsequent actions and explanations of the of an incident to judge the defendant's credibility." *State* v. *Evans*, 594 A.2d 154, 160 (1991). In addition, "It does not depend upon the actual harm resulting from the defendant's conduct. Nor does it depend upon whether the defendant anticipated the precise risk or injury that resulted." 827 A.2d at 1010. Thus, in order for alleged conduct to be criminalized as reckless, that conduct must be subjectively determined to have deviated from how a law abiding citizen would act. Everyday conduct that is commonplace is not a deviation from law abiding citizens' regard for others and is not criminalized by RSA 631:3.

On the contrary, an endless amount of everyday conduct could be criminalized as reckless under RSA 631:3, in theory, if that conduct occurs under freak circumstances and causes someone substantial harm. Appellant was found to have maneuvered his vehicle in front of the other motorist at a close proximity, causing the other motorist to apply his brakes, lost control of his vehicle and crash. What was unforeseeable here, was the car behind Appellant losing control and crashing. When a wide-spectrum view of Reckless Conduct is taken, any act that causes substantially injury to another person can be called reckless and be subject to prosecution. For example, walking down a sidewalk with a heavy suitcase. Substantial injury could result if 1) a pedestrian doesn't notice the suitcase and trips and falls 2) the person holding the suitcase turns

around and smacks someone in the side of the head 3) someone bumps into the suitcase and spills their hot liquid on themselves. In other words, a law abiding citizen should foresee every contingency that could go wrong with taking an action and avoid it. Otherwise, if every contingency is not foreseen and a substantial injury results, that person has deviated from how a law abiding citizen would act. We cannot assume that is what the legislature intended when enacting the Reckless Conduct statute. According to *Appeal of Local Gov't Ctr.*, "We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. 85 A.3d 388, 400 (2014).

It naturally follows that conduct that ultimately causes someone harm is sometimes not reckless and not a crime under RSA 631:3. What makes such conduct criminal is deviation from commonplace conduct that places another person at a high risk for sustaining substantial bodily injury, combined with an awareness of the surrounding circumstances. The Reckless Conduct statute centers on conduct that is out of the ordinary and poses a real danger to another person.

Defendant did not demonstrate the requisite mental state of awareness.

Appellant's conduct subsequent to the incident does not suggest he had the culpable mental state at the time of the accident. First, when the officer found Appellant at his house, he denied having any knowledge of the accident earlier that day. Second, Appellant's car was parked in the driveway and not hidden from view. It seems unlikely that someone who knew that he fled an accident would park his vehicle in a conspicuous manner. This behavior is inconsistent with a person who has a guilty mind and is conscious of the fact that he caused substantial bodily harm to someone with his vehicle. These circumstances suggest Appellant lacked the realization that he committed a criminal act involving his vehicle. This would support that while his driving

may have left something to be desired, he had no consciousness of having used his vehicle as a deadly weapon.

Based on the foregoing reasons, there was insufficient evidence to establish, beyond a reasonable doubt, Appellant's awareness of his alleged unlawful conduct in violation of Reckless Conduct. Therefore, Appellant submits that his Reckless Conduct conviction should be vacated.

THE FIRST PRONG OF THE INEFFECTIVE ASSISTANCE OF COUNSEL TEST, CONSTITUTIONALLY DEFICIENT PERFORMANCE, CAN BE DEMONSTRATED

The New Hampshire State government and Federal government through the Constitution, the Sixth Amendment, guarantee a criminal defendant a reasonably competent assistance of counsel. *State* v. *Whitaker*, 973 A.2d 299 (2009). There are two prongs of this test. One, counsel's representation was constitutionally deficient, second, counsel's performance actually prejudiced the outcome of the case. The test for the first prong is that the "counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, 466 U.S. 668 (1984). The test for the second prong is "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* These two prongs of the ineffective assistance test are mixed questions of law and fact. *Id.* at 698.

"The proper measure of attorney performance remains simply reasonableness under the prevailing professional norms." *Id.* An essential element of reasonable effective assistance is the duty to investigate. *Id.* at 678. Professional decisions and informed legal choices allow for an

attorney to render reasonable effective assistance. *Id.* "If there is more than one line of defense…counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial." *Id.* at 681. "Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. *Id.* "Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." *Id.*

The heart of Defendant's ineffective assistance claim is the failure to retain an accident reconstruction expert by his trial counsel. According to the trial counsel's testimony, he did not hire the Crash Lab expert after discussion on the video of the accident because the expert opined he couldn't assist the Defendant. The Defendant criticizes trial counsel for not obtaining a second opinion. Defendant submits that only by deconstructing the video to determine the speed of the corresponding vehicles could the defense produce exculpatory evidence. That evidence has propensity to create reasonable doubt in regard to the intent element of reckless conduct. However, trial counsel did not request an accident reconstruction to be produced and neither was he advised that an accident reconstruction was unobtainable.

Therefore, trial counsel's performance under *Strickland* was constitutionally deficient. The decision to not pursue an accident reconstruction was not a strategic decision owed deference. When the Crash Lab expert opined that he could not assist the defense, the defendant was left without any viable support from that line of defense. It would be reasonable to pursue an accident reconstruction to replace the only line of defense lost. The prejudice from this unpursued line of defense was great. The Defendant was left without any exculpatory evidence

to prove Defendant did not act with the requisite intent. Without this evidence, the defense could only poke holes in the State's case. The factfinder at trial had to have some affirmative evidence that Defendant did not act with the requisite intent in order to find reasonable doubt. A reasonable professional judgment would be to provide a factfinder with some exculpatory evidence that allows to find reasonable doubt.

The ineffective assistance of counsel caused prejudice to the Defendant

The decision not to pursue an accident reconstruction caused prejudice to the Defendant. According to *Strickland*, the test for the second prong is "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Therefore, the second prong of ineffective assistance of counsel is met because the decision to not call the expert witness fell below an objective standard of reasonableness. It would have been reasonable if one of the two witnesses were called. The defense required a minimum of one to support the theory of the case. The result was that Defense could not prove to the factfinder that he lacked the awareness required in reckless conduct. It was necessary for this element to be disputed before the Court in order for a favorable verdict to be achieved.

Intent or perception is important to prove intent element of reckless conduct. An expert would be able to determine the speed of the vehicle through a reconstruction of the accident. The speed of the vehicles relative to each other could be used to cast doubt on whether Defendant acted with the requisite intent. The aggressive move that caused the accident could be shown as in part having been due to the victim's vehicle and thus, but for victim accelerating after

Defendant's vehicle was in front of him the subsequent loss of control would not have occurred. This could create reasonable doubt on Defendant's intent to commit reckless conduct or contribute to the theory of pure accident.

The factfinder at trial had to have affirmative evidence that cast doubt on whether Defendant acted with intent. If the expert didn't testify about the accident reconstruction, then the Defendant had to testify about his action in order to produce such evidence. When neither the expert or Defendant testified, prejudice was created because the jury couldn't support a finding of reasonable doubt.

CONCLUSION

According to all the premises contained herein, the Court should reverse the decision of the Superior Court.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests 15 minutes for Oral Argument in this matter.

Respectfully Submitted,
HENRY CARNEVALE
By His Attorney

/s/ Michael C. Shklar #2334
Michael Shklar, Esq.
Elliott Jasper Auten Shklar & Ranson, LLP
35 Main St
Newport, NH 03773
603-863-4105

APPENDIX

APPENDIX – TABLE OF CONTENTS

TITLE LXII
CRIMINAL CODE

CHAPTER 631
ASSAULT AND RELATED OFFENSES

Section 631:3

631:3 Reckless Conduct. –
I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.
II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11, V. All other reckless conduct is a misdemeanor.
III. A person convicted of a class B felony offense under this section shall not be subject to the provisions of RSA 651:2, II-g.
IV. (a) Upon proof that the victim and defendant were intimate partners or family or household members, as those terms are defined in RSA 631:2-b, III, a conviction under this section shall be recorded as "reckless conduct-domestic violence."
(b) In addition to any other penalty authorized by law, the court shall levy a fine of $50 for each conviction recorded as "reckless conduct-domestic violence" under this paragraph. The court shall not reduce or suspend any sentence or the payment of any fine imposed under this paragraph and no fine imposed under this paragraph shall be subject to an additional penalty assessment. If the court determines that the defendant is unable to pay the fine on the date imposed, the court may defer payment or order periodic payments thereof. The clerk shall forward all fines collected under this paragraph to the department of health and human services for the purposes of RSA 173-B:15. The provisions of RSA 618:8 and RSA 618:9 shall not apply to a fine imposed under this paragraph.

Source. 1971, 518:1. 1994, 187:1. 2006, 163:2. 2014, 152:5, eff. Jan. 1, 2015. 2017, 90:7, eff. Jan. 1, 2018.

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS

NO 220-2016-CR-00150
CID# 1260987C

At the Sullivan County Superior Court held at Newport, within and for the County of Sullivan, ON THE 21st DAY OF DECEMBER, IN THE YEAR 2016,

The Grand Jurors for the State of New Hampshire, Upon Their Oath, Present That:

21-DEC '16 AM09:25

HENRY CARNEVALE
DOB: 02/23/1951
Lkn: 885 Route 103
Newbury, NH 03255

On or about August 9, 2016, at Grantham, in the County of SULLIVAN, did:

1. Recklessly;

2. Engages in conduct which places or may place another in danger of serious bodily injury, to wit: the said Henry Carnevale, by operating a moving Ford Expedition in an erratic manner, and by aggressively "cutting off" and making contact with a Volkswagen motor vehicle operated by Robert Mitchell-Hartson, on Interstate 89, in the town of Grantham, placed Robert Mitchell-Hartson and/or the motoring public and/or any persons in close proximity to said vehicle in danger of serious bodily injury;

3. Using a deadly weapon as defined in RSA 625:11, V, to wit: the aforementioned Ford Expedition, as operated by Henry Carnevale, being a deadly weapon as defined in RSA 625:11, V, and is known to be capable of producing death or serious bodily injury.

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

Erik Lavoie
.....
Foreperson
This is a true bill.

.....
Deputy County Attorney

Jury Verdict: Guilty
6/15/17 at 4:16 PM
Hon. Brian Tucker
Peale, Clerk
Neill, Monitor

INFORMATION ONLY:
(Not a part of the Indictment)

RSA 631:3; RSA 625:11

Reckless Conduct, Deadly Weapon – Class B Felony Offense

Penalty: 3 ½ -7 years NHSP
$4,000.00

Arraigned and plead 2016

.....Clerk (Court Reporter :)

Gender – Male
Height – 6'00"
Weight – 220
Race – Black
Hair - Brown
Eyes – Blue

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS

SUPERIOR COURT
NO: 220-2016-CR-00150
CID 13633530

2017 MAY -5 AM 08:06

INFORMATION

NOW COMES Justin S. Hersh, Deputy Sullivan County Attorney, upon oath, and complains that

HENRY CARNEVALE
DOB: 2/21/1951
Lkn: 885 Route 103
Newbury, NH 03255

On or about August 9, 2016 at Grantham, in the County of SULLIVAN, did:

1. Having known and/or should have known;

2. That he has just been involved in any accident resulting in damage to property, to wit: while operating a Ford Expedition motor vehicle, the said Henry Carnevale made contact with another vehicle, operated by Robert Mitchell-Hartson, causing said vehicle to ultimately collide with a guardrail resulting in damage to the property of Robert Mitchell-Hartson

3. Fail to immediately stop such vehicle at the scene of said accident and give to any person injured, and to the owner of any property damaged, the driver's name, address, driver's license number, and registration information, or fail to provide such information to any police officer at the nearest police station, to wit: the said Henry Carnevale failed to immediately stop the Ford Expedition after causing damage to the property of Robert Mitchell-Hartson's vehicle, and provide the owner of said property or any police officer at the Grantham Police Department and/or the New Hampshire State Police with his name, address, driver's license number and/or registration information.

WHEREFORE, the said Justin S. Hersh, Deputy Sullivan County Attorney, prays that the said **Henry Carnevale** may be held to answer this complaint, and that justice may be done in the premises.

May 5, 2017

Deputy County Attorney

THE STATE OF NEW HAMPSHIRE **SULLIVAN, SS**

Personally appeared the above named Justin S. Hersh, Deputy County Attorney, and made oath that the above complaint by him subscribed is true to the best of his knowledge and belief. Before me.

28

May 5., 2017

Sherry Waters
Justice of the Peace
My commission expires
SHERRY A. WATERS
Justice of the Peace - New Hampshire
My Commission Expires September 16, 2020

INFORMATION ONLY:
(Not part of the Complaint)

_____, 2017 Arraigned

And Plead_____

RSA 264:25

Conduct After Accident

Penalty: 1 year
$2,000.00

(Stenographer: _____)

Gender – Male
Height – 6'00"
Weight – 220
Race – Black
Hair - Brown
Eyes – Blue

Jury Verdict: Guilty
6/15/17 @ 4:16 PM
Hon. Brian Tucker
Peck, Clerk
Neill, Monitor

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Sullivan Superior Court
22 Main St.
Newport NH 03773

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

RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

Case Name: **State v. Henry Carnevale**
Case Number: **220-2016-CR-00150**

Name: **Henry Carnevale**, PO BOX 142 NEWBURY NH 03255
DOB: February 21, 1951

Charging document: Indictment

Offense:	**Charge ID:**	**RSA:**	**Date of Offense:**
Reckless Conduct - Deadly Weapon	1260987C	631:3	August 09, 2016

Disposition: Jury Verdict: Guilty

A finding of GUILTY/CHARGEABLE is entered.
Conviction: Felony

Sentence: see attached

May 09, 2018 — Date
Hon. Brian T. Tucker — Presiding Justice
Catherine J. Ruffle — Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **Sullivan County House of Corrections**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: _____
Clerk of Court

SHERIFF'S RETURN

I DELIVERED THE DEFENDANT TO THE **Sullivan County House of Corrections** and gave a copy of this order to the Superintendent.

_____ Date
_____ Sheriff

J-ONE: ☒ State Police ☐ DMV

C: ☒ Dept. of Corrections ☐ Offender Records ☐ Sheriff ☐ Office of Cost Containment
☒ Prosecutor ☐ Defendant ☒ Defense Attorney Daniel J. Corley, ESQ
☐ Sex Offender Registry ☐ Other _____ ☐ _____ Dist Div. _____

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

Court Name: **Sullivan Superior Court**

Case Name: **State v. Henry Carnevale**

Case Number: **220-2016-cr-150** (if known) Charge ID Number: **1260987C**

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: **Guilty**	Clerk: **Catherine J. Ruffle**
Crime: **Reckless Conduct/Deadly Weapon**	Date of Crime: **08/09/2016**
Monitor:	Judge: **Brian Tucker**

A finding of GUILTY/TRUE is entered.

This conviction is for a ☑ Felony ☐ Misdemeanor ☐ Violation of Probation

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

☐ The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:
☐ (1) Current or former spouse ☐ (2) Parent ☐ (3) Guardian ☐ (4) Child in common
OR Cohabiting or cohabited with victim as a ☐ (5) spouse ☐ (6) parent ☐ (7) guardian
OR A person similarly situated to ☐ (8) spouse ☐ (9) parent ☐ (10) guardian

☑ 1. The defendant is sentenced to the House of Corrections for a period of **12 months**

☑ 2. This sentence is to be served as follows:
☑ Stand committed ☑ Commencing **05/21/2018 AT 9:00 a.m.**
☐ Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____
☑ **10 months** of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends **2** years from ☑ today **or** ☐ release on _____.
(Charge ID Number)

☐ _____ of the sentence is deferred for a period of _____.
The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____.
Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.
☐ Other: _____

☐ 3. The sentence is ☐ consecutive to _____
(Charge ID Number)
☐ concurrent with _____
(Charge ID Number)

☑ 4. Pretrial confinement credit: **1** days.

☐ 5. The court recommends to the county correctional authority:
☐ Work release consistent with administrative regulations.
☐ Drug and alcohol treatment and counseling.
☐ Sexual offender program.
☐ _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State v. Henry Carnevale
Case Number: 220-2016-cr-150
HOUSE OF CORRECTIONS SENTENCE

PROBATION

☑ 6. The defendant is placed on probation for a period of 1 year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: ☐ Forthwith ☑ Upon Release _____
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office. Upon release

☑ 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☑ 8 **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☑ 9. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____, plus statutory penalty assessment of $ _____
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for ___ year(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☑ B. The defendant is ordered to make restitution of $ 11,851.10 to See attached.
☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☑ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

☑ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. The defendant's ☐ license ☐ privilege to operate in New Hampshire is revoked for a period of _____ effective _____

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the ☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.

☑ H. Law enforcement agencies may ☐ destroy the evidence ☑ return evidence to its rightful owner.

☑ I. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☑ J. Other:

See attached.

05/09/2018
Date

Presiding Justice

ATTACHMENT TO SENTENCE IN CID 1260987C

1. *Condition of Probation*

As a condition of probation, the defendant shall be confined to his place of residence for 60 days, to commence upon release. During this time, the defendant shall remain at his place of residence except for employment, medical appointments, religious services, and other activities approved in advance by the probation/parole officer. In the discretion of the probation/parole officer, monitoring may be supplemented by electronic monitoring to verify compliance.

2. *Condition of Probation and the Suspended Sentence*

As conditions of probation and the suspended sentence, the defendant shall enter into and meaningfully participate in mental health treatment as recommended, and shall meaningfully participate in the HUD/VASH Programming as recommended by clinical staff and/or Veterans Justice Outreach Re–entry specialist personnel at the Manchester VA Medical Center.

3. *Restitution*

Restitution shall be paid as follows

- **$5,683.60 to Robert Hartson, 56 Faxon Hill Road, Washington, NH 03280.**
- **$5,417.50 to Harvard Pilgrim Health, P.O. Box 6918, Quincy, MA 02269 (Re: ID# HP2599131–00).**
- **Not more than $750.00 to Amy Mitchell, 189 Woodhaven Drive, Unit 3L, White River Junction, VT 05001.**

STATE OF NEW HAMPSHIRE

SULLIVAN COUNTY, S.S. SUPERIOR COURT

Docket No. 220-2016-CR-00150

State of New Hampshire

v.

Henry Carnevale

23-JUN-17 PM 03:06

MOTION TO SET ASIDE VERDICT, MOTION FOR NEW TRIAL, and MOTION FOR RECONSIDERATION

NOW COMES, defendant, Henry Carnevale, by and through counsel, McGrath Law Firm, PA, and hereby files this Motion to Set Aside Verdict, Motion for New Trial, and Motion for Reconsideration.

In support thereof, we provide as follows:

SET ASIDE VERDICT AND RECONSIDERATION

1. Pursuant to Rule 25, a motion to set aside a jury verdict shall be filed within ten (10) days of the jury verdict.

2. Pursuant to Rule 43,

> within ten days of the date on the clerk's written notice of the order or decision...The motion shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present.

3. That Defendant, Henry Carnevale was convicted by a jury on June 15, 2017, of reckless conduct (RSA 631:3) and conduct after an accident (RSA 264:25).

4. The only witnesses to testify in the jury trial were the victim and the State police.

5. The burden was on the State to prove beyond a reasonable doubt that the Defendant knowingly and intentionally committed reckless conduct and conduct of leaving the scene of an accident, as alleged

6. The State presented the testimony of the victim who stated that he did not know whether contact was made between his vehicle and the Defendant's vehicle. The video presented shows no contact.

7. The victim testified that he was traveling on Interstate 89 in the left passing lane at 68 miles per hour while on cruise control. The Defendant was behind his vehicle and turned into the right lane to pass victim's vehicle, then turned into the left lane in front of the victim's vehicle. The victim lost control of his vehicle.

8. When the Defendant entered the lane of travel in front of victim's vehicle, the victim testified, "I am preparing to use my brakes" at that point. There is no proof of contact. The only evidence presented was that the victim had lost control of his vehicle while traveling northbound on Route 89.

9. The victim's vehicle had a front and rear video camera with audio installed as a result of an accident he had the year before.

10. The State suggested to the jury that the picture of the Defendant's vehicle in front of victim's vehicle suggested that the Defendant braked in front of victim's vehicle. The picture does not show Defendant braking. The picture of the light from the left rear side of Defendant's vehicle could have been his turning signal or glare from the sun, but not a brake light.

11. Further, the rearview video shows that at no time while following victim's vehicle, did Defendant act aggressively. The State has convinced the jury that the negligent behavior of Defendant rises to criminal reckless conduct pursuant to RSA 631:3.

12. The State failed to prove beyond a reasonable doubt that Defendant did intentionally and recklessly brake or act aggressively while entering victim's lane of travel with the intent to place the victim in danger of a serious injury.

13. Further, the State has failed to provide the information from victim's vehicle, i.e., the event data recorder which would have shown "freeze frame" data when it saves fault codes due to a problem or an accident picked up by sensors on a airbag during deployment.

14. That the victim's airbag did in fact deploy. However, the State has lost this evidence which effected Defendant's ability to have a fair trial which may have provided additional evidence supporting the defense.

15. Defendant did move to dismiss the case, which the Court denied.

16. It is respectfully submitted that the Court reconsider the request for dismissal in this case based on the weight of evidence presented and lack of evidence to support the verdict beyond a reasonable doubt.

17. That with regard to leaving the scene of an accident, there was no evidence that Defendant was aware of an accident until a trooper knocked on his door at home. Defendant is 50% deaf and was traveling to Dartmouth Hitchcock for an appointment with his hearing doctor when the accident occurred. He was not aware that the victim's vehicle lost control after he passed him.

INEFFECTIVE COUNSEL: CRASH RECONSTRUCTION INVESTIGATION AND RETENTION OF EXPERT WAS NECESSARY FOR DEFENSE

18. Counsel for Defendant failed to investigate and present an accident reconstruction expert, which was necessary for this difficult case and would have provided proof that Defendant did not knowingly or intentionally cause an accident or leave the scene of an accident. That the expert could have examined the victim's vehicle and data as described in paragraph 13, herein. Defendant had requested that an expert examine the vehicle and the computer of the vehicle. However, there was no follow through to conduct an appropriate investigation by an expert, which may have resulted in a different result at trial.

19. In State v Whittaker, 158 NH 762 (2009), the Supreme Court reversed and remanded to the trial court based upon defense counsel's failure to investigate and consult with an appropriate accident reconstruction expert, resulting in a constitutionally defective performance to give defendant a fair trial. The court held:

> Based upon all of these factors, even with the presumption that his performance was constitutionally sufficient, we conclude that the decision of the defendant's trial counsel not to consult with an accident reconstruction expert was constitutionally defective performance. Contrary to trial counsel's conjecture, the testimony of an expert, such as Lakowicz, *could* have been admissible, even if it was based upon assumptions. Under the unique circumstances of this case, it was not sufficient for trial counsel merely to " poke holes" in the State's case. Rather, because he knew that the State's case relied upon expert testimony that used certain assumptions, it was constitutionally deficient performance for trial counsel not to consult with an expert to learn what the expert could conclude based upon these same or similar assumptions. Had he done so, he might have been able to present an affirmative case that the defendant's impairment did not cause Hegerich's death. Under the

circumstances of this case, it was constitutionally infirm performance for trial counsel to fail, at the very least, to explore this possibility with an expert in accident reconstruction. Id at 774.

Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence." *Gersten,* 426 F.3d at 610. " [F]ailing to present exculpatory evidence is not a reasonable trial strategy." *Id.* at 611. Id at 775.

20. Similarly, defense counsel's failure to investigate and/or retain an accident reconstruction expert in the instant case resulted in a constitutionally defective performance which prevented defendant from having a fair trial and to present other defenses highly relevant to the cause of the incident and charges pursued, which defenses may have resulted in a different conclusion.

THE PUBLIC DEFENDER DID NOT OBJECT TO ARGUMENT, TESTIMONY AND EVIDENCE RESULTING IN INEFFECTIVE COUNSEL

21. Counsel has failed to present the phone records of the victim, which may have shown that the victim was distracted while operating his vehicle, as he had used his phone prior to the accident.

22. Counsel had failed to cross examine the victim regarding his behavior immediately prior to applying his brakes before the accident.

23. Such examination may have determined that the victim was distracted prior to the accident, which questions would have been relevant to Defendant's defense.

24. It has been acknowledged prior to the trial that the victim did in fact suffer from Narcolepsy and it is unclear whether his condition effected his ability to operate the

vehicle immediately prior to the accident. There was no inquiry regarding same.

25. During the presentation of the video, several questions were asked by the video computer after the accident occurred, which victim failed to respond to, e.g., "do you want to call sato?" It is unclear what the relevance was to the accident but there was no inquiry regarding same.

GROUNDS FOR MISTRIAL

26. It was brought to defense counsel's attention after polling the jury, that during lunchtime a juror who was in Pizza Village Restaurant during the trial and was speaking to another patron. The juror stated something to the effect, "it is too close to call in this trial". The juror was talking to another patron at the restaurant about the case after being instructed by the Court not to discuss the testimony or evidence with anyone during the trial. This is grounds for immediate mistrial. Defendant brought this to his counsel's attention. Upon information and belief, Defendant's counsel may have filed a motion for mistrial prior hereto.

27. Further, counsel failed to object to the closing argument of the prosecutor when the prosecutor insisted that the evidence proved that the Defendant intentionally and knowingly engaged in "road rage" with intent to harm the victim. The prosecutor showed the picture of Defendant's vehicle while in front of the victim's vehicle and made the jury believe that there was some contact between the vehicles, although the victim himself admitted he was not aware of any contact. Specifically, the prosecutor suggested that the Defendant braked in front of the victim. There is no clear evidence that Defendant applied his brakes. There was no objection raised. See State v. Thompson, 161 N.H. 507 (N.H. 2011, 2009-345).

28. For the foregoing reasons, the verdict must be set aside, a new trial held, in order to give the Defendant a constitutionally protected fair trial.

WHEREFORE, Defendant prays that this court:

A. Grant the within motion to set aside the verdict;

B. Grant the within motion for new trial;

C. Grant the within motion for a mistrial; or in the alternative,

D. Schedule a hearing for this motion to be heard; and

E. Grant such other and further relief as is just and proper.

[INTENTIONALLY LEFT BLANK]

Dated: June 23, 2017

Henry Carnevale

Dated: June 23, 2017

McGRATH LAW FIRM, PA
Counsel for Defendant, Henry Carnevale

By: _____
Daniel J. Corley/16932
20 Montgomery Street
Concord., NH 03301
Phone: (603) 224-7111

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK, S.S.

Personally appeared before me, Henry Carnevale, known to me or satisfactorily proven and made oath that the within and foregoing statements are true to the best of his knowledge and belief.

Before me,

Dated: June 23, 2017

DANIEL J. CORLEY JUSTICE OF THE PEACE NEW HAMPSHIRE MY COMMISSION EXPIRES NOV. 16, 2021

_____
~~Notary Public~~/Justice of the Peace
My Commission Expires:

CERTIFICATE OF SERVICE

I, Daniel J. Corley, hereby certify that a copy of the foregoing MOTION TO SET ASIDE VERDICT, MOTION FOR NEW TRIAL, and MOTION FOR RECONSIDERATION has been mailed first class, postage prepaid, this day, to the following parties:

Jay Buckey, Esq.
NH Public Defender
PO Box 36
Newport, NH 03773

Marc B. Hathaway, Esq., County Attorney
Sullivan County Attorney's Office
14 Main Street
Newport, NH 03773

Dated: June 23, 2017

By: _____
Daniel J. Corley

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SULLIVAN SS,

DOCKET 220-2016-CR-150

STATE OF NEW HAMPSHIRE

V.

HENRY CARNEVALE

23-JUN-17 PM03:42

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND ENTER A JUDGMENT OF ACQUITTAL (JNOV)

NOW COMES the defendant, Henry Carnevale, by and through counsel, and respectfully moves this Honorable Court to set aside the jury's verdict and enter a judgment of acquittal due to insufficiency of the evidence pursuant to R. Crim. Pro.43. In support of this motion, the defendant states as follows:

1. At a trial on June 15, 2017, the Defendant was found guilty through jury verdict of the charges of Reckless Conduct with a Deadly Weapon and Conduct after an Accident.
2. There was not sufficient evidence to support the jury's verdict, and no rational trier of fact could find guilt beyond a reasonable doubt, considering all of the evidence and reasonable inferences therefrom in a light most favorable to the State. See State v. Spinale, 156 N.H. 456, 463 (2007) (outlining the sufficiency standard). In determining whether there is sufficient evidence to support the jury's verdict, "When the State's case rests upon circumstantial evidence, as it does here, such evidence must exclude all rational conclusions except that the defendant was guilty." State v. Hopps, 123 N.H. 541, 544 (1983).
3. There was not sufficient evidence to prove that the Defendant had the requisite mental state of recklessness.

60

4. The State relied on circumstantial evidence, the video , to demonstrate that the Defendant had the requisite mental state. There was no direct evidence presented or testimony from any witness as to the Defendant's mental state. While circumstantial evidence is often used to prove criminal mental state, see State v. Sharon, 136 N.H. 764, 765—66 (1993) ("Because persons rarely explain to others the inner workings of their minds or mental processes, culpable mental state must, in most cases, as here, be proven by circumstantial evidence."), when the state relies solely on circumstantial evidence to prove the requisite element of mental state, "such evidence must exclude all rational conclusions except guilt." Id.
5. In this case, the evidence could support a number of rational conclusions, including: that Mr. Carnevale was not aware of the distance between himself and Mr. Hartson's vehicle, that Mr. Hartson's vehicle changed speeds, that the other vehicles surround Mr. Carnevale and Mr. Hartson changed speeds, that this incident between the two cars was an accident, that Mr. Carnevale was reckless, or that Mr. Hartson's driving was unpredictable in some manner not shown on case.
6. The evidence in support of the necessary element of recklessness is purely circumstantial. The evidence does not exclude all rational conclusions except guilt. Therefore, the evidence is not sufficient to support a finding of guilt as a matter of law.

WHEREFORE, Mr. Carnevale respectfully requests that this Honorable Court:

1. Enters a judgment of acquittal, notwithstanding the verdict (JNOV); or
2. That the Court schedules this matter for a hearing.

Dated this 23nd day of June, 2017.

Respectfully submitted,

Jay Buckey, Bar # 20553
Laura Breda #20344
New Hampshire Public Defenders
44 N. Main St.
Newport, NH 03773
(603) 865-1460

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 23rd day of June, 2017 to Deputy Sullivan County Attorney Justin Hersh, Esq.

Jay Buckey, Bar # 20553

ORIGINAL

THE STATE OF NEW HAMPSHIRE

SULLIVAN COUNTY

SUPERIOR COURT
DOCKET NO: 220-2016-CR-00150

STATE OF NEW HAMPSHIRE

VS.

HENRY CARNEVALE

05-SEP -17 PM 2:44

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR A NEW TRIAL DUE TO WEIGHT OF THE EVIDENCE AND MOTION TO SET ASIDE VERDICT

NOW COMES the State of New Hampshire, by and through Deputy Sullivan County Attorney Justin S. Hersh, and hereby respectfully OBJECTS to the Defendant's Motion for a New Trial Due to Weight of the Evidence and Motion to Set Aside the Verdict, and in support thereof, states as follows:

1. On December 21, 2016, the defendant was indicted for one (1) felony count of reckless conduct with a deadly weapon. The defendant was subsequently charged, by information, for one (1) misdemeanor count of conduct after an accident.

2. The trial in the above referenced docket was held on June 15, 2017.

3. The defendant, through counsel, moved this Honorable Court to dismiss at the conclusion the State's case in chief. This Honorable Court denied the defendant's motion.

4. The defendant rested after his motion to dismiss was denied.

5. The jury, after a period of deliberation, returned a verdict of guilt beyond a reasonable doubt.

6. On June 23, 2017, the Sullivan County Attorney's Office received the defendant's Motion for a New Trial Due to Weight of the Evidence. The defendant's sole argument, rests upon the assertion that the defendant's mental state of

recklessness, having been proven by circumstantial evidence, is insufficient as a matter of law. Such an argument must fail.

7. The facts relied upon in support of this State's pleading are generated from undersigned counsel's recollection, and the review of the attached record. Exhibit A. Undersigned counsel further relies upon the evidence introduced at trial in its entirety.

A. THE DEFENDANT CANNOT SATISFY HIS BURDEN THAT NO RATIONAL TIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT, BECAUSE THE EVIDENCE INTRODUCED AT TRIAL AND ALL REASONABLE INFERENCES FROM IT IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILT BEYOND A REASONABLE DOUBT THIS DEFENDANT COMMITTED THE CRIME OF RECKLESS CONDUCT INVOLVING THE USE OF A DEADLY WEAPON AND CONDUCT AFTER AN ACCIDENT.

8. The defendant argues that "[t]he weight of the evidence suggests that [the defendant] did not have the requisite criminal mens rea to be found guilty of reckless conduct." See paragraph 7, defendant's pleading. The defendant's argument must fail.

9. "To prevail upon [a] challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Belleville, 166 N.H. 58, 61 (2014). "Determining whether evidence is sufficient requires both quantitative and qualitative analysis; 'quantitatively,' evidence may fail only if it is absent, that is, only where there is none at all, while 'qualitatively,' it fails when it cannot be said reasonably that the intended inference may logically be drawn therefrom." State v. Spinale, 156 N.H. 456, 463 (2007). "The defendant bears the burden on

demonstrating that the evidence was insufficient to prove guilt." State v. Zubhuza, 166 N.H. 125, 128 (2014).

10. This Court must first determine whether the evidence was sufficient to establish this defendant engaged in reckless conduct involving a deadly weapon pursuant to RSA 631:3, and RSA 625:11, V. In doing so, New Hampshire Courts "...first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." See Zubhuza, 166 N.H. at 128. Legislative intent is derived from the statute as written and New Hampshire Courts "will not consider what the legislature might have said or add language the legislature did not see fit to include." Id.

11. In this case, the State's presented sufficient evidence to establish the elements of reckless conduct involving a deadly weapon. RSA 631:3 provides: "[a] person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury." RSA 631:3, I. Reckless conduct becomes a class B felony offense when the conduct involves the use of a deadly weapon as defined in RSA 625:11, V. See RSA 631:3; RSA 625:11, V (defining deadly weapon). The mental state required for said offense is recklessness. "A person acts recklessly...when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." RSA 626:2, II (c). In such a case, the "risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct a law abiding person would observe in the situation." Id.

12. At trial, the State entered certain evidence through the testimony of New Hampshire State Police Trooper Michael Catalfamo, and the victim, Robert Mitchell-Hartson. Additionally, the State entered certain audio and visual evidence, along with photographic evidence. The audio and visual evidence was gathered from the victim's cameras, which were mounted within the interior of his vehicle, and which captured the defendant engaged in the conduct underlying

the criminal offenses in real time. Exhibit B. Mr. Hartson had positioned two (2) cameras, one facing out the drivers windshield, the other facing out of the rear windshield area.

13. The defendant, at trial, stipulated to the fact that he was the registered owner of the Ford Expedition, that he was the operator of the Ford Expedition motor vehicle on the day in question, August 9, 2016, and that he operated said motor vehicle on Interstate 89 that day.

14. Trp. Catalfamo testified that he responded to the scene of a motor vehicle collision on Interstate 89 near the Grantham/Enfield town line. Trp. Catalfamo described his observations upon arrival, that he identified Robert Mitchell-Hartson as the operator of the Volkswagen motor vehicle, and that he observed Mr. Hartson's young son in the rear passenger area of the vehicle. Trp. Catalfamo testified that he obtained cameras from Mr. Hartson, and that he and Trp. McLaughlin were able to download and view the footage while on scene. The State entered into evidence, and played the video footage for the jury. See Exhibit B. The rear facing video footage depicts the defendant's motor vehicle, a Ford Expedition, following behind Mr. Hartson's. At one point, the video shows the defendant's vehicle cut to the right and pass ahead of Mr. Hartson's vehicle in the right lane, Mr. Hartson's passenger side. The defendant's vehicle then disappears from the cameras lens range. See Exhibit B.

15. The front facing camera depicts Mr. Hartson operating his vehicle in a rather unremarkable manner for a period of time. Exhibit B. As the vehicle approaches a construction area, near the Enfield/Grantham town line, the defendant's vehicle emerges into view from the right hand lane. The defendant's vehicle, having just traveled behind Mr. Hartson's while in the left hand lane, begins encroaching upon Mr. Hartson's lane of travel almost immediately upon coming into view. The video footage also shows a vehicle ahead of the defendant's, in the right hand travel lane, as well as a vehicle further ahead of Mr. Hartson's and the defendant's vehicle, in the left hand travel lane. The defendant's vehicle, can subsequently be

observed entering completely into the left hand lane in extremely close proximity to Mr. Hartson's. The video further appears to depict the hood of Mr. Hartson's vehicle moving to the left, consistent with the defendant's vehicle's line of travel, and then the hood appears to move to the right. Mr. Hartson's vehicle ultimately comes into contact with the guard rail on the right hand side of Interstate 89. The defendant's vehicle is depicted continuing in the left hand lane and ultimately leaving the scene without stopping. See Exhibit B. The defendant's vehicle, prior to leaving the front camera's view, appears to apply its brakes as it encroaches on a vehicle in front of it. See Exhibit B.

16. Mr. Hartson testified that the defendant's vehicle was traveling behind him. Mr. Hartson stated he was traveling approximately 68 miles per hour in the left hand lane. Mr. Hartson testified that he uncertain as to whether any contact with the defendant's vehicle occurred; however, he stated he felt as if the vehicle was tracking to the left and/or stuck in a rut. Mr. Hartson provided that he had applied the brakes and tried to turn right to avoid the defendant's vehicle. Prior to impact, Mr. Hartson testified he was concerned for his son's safety, a concern that continued after impact.

17. Trp. Catalfamo also testified that he obtained a search warrant for the defendant's vehicle, which was executed on August 15, 2016. During the execution of said warrant, Trp. Catalfamo testified that he documented the exterior of the defendant's vehicle with his state issued camera. The photographic evidence, obtained by Trp. Catalfamo, was included within the evidence admitted at trial. Trp. Catalfamo described certain photograph(s), depicting the lower left bumper area of the defendant's vehicle, as containing a dark scratch, which appeared to be in contrast to the rest of the bumper. Trp. Catalfamo acknowledged that is what drew his attention to said area. Trp. Catalfamo testified that he touched that mark, that it was "rough", and had a gouge. Exhibit A.

18. While Trp. Catalfamo testified that it is possible that drivers in general can make mistakes, that they may be unaware of distances between respective vehicles on

the road, and that accidents are possible due to operator mistakes, he also testified that motor vehicles are capable of causing death or serious bodily injury. Said testimony was predicated upon his training, experience, and prior responses to various motor vehicle collisions.

19. Based upon the evidence offered at trial, the State presented sufficient evidence to establish the defendant operated the motor vehicle, that his motor vehicle, as operated by him, was capable of causing death or serious bodily injury, and the defendant's conduct itself was reckless in nature. See RSA 631:3; See also RSA 625:11, V; See e.g. State v. Thompson, 2015 N.H. Lexis 141 (June 9, 2015).

20. The State's burden at trial, also required proving the defendant's conduct was coupled with the requisite mental state of recklessness. See RSA 631:3; See also 626:2, II (c). The defendant's primary argument is his conduct was not coupled with recklessness mens rea. See paragraph 5, defendant's pleading. The defendant, in support of his position, argues the State's proof of said mental state was entirely circumstantial. See paragraph 4, defendant's pleading. Yet, "...[P]roof of mens rea will usually depend entirely upon circumstantial evidence." State v. Germain, 165 N.H. 350, 359 (2013). "When evidence as to one or more of the elements of the charged offense is solely circumstantial, it must exclude all reasonable conclusions except guilt." See Belleville, 166 N.H. at 62. "Under this standard, however, [New Hampshire Courts] still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation." Id.

21. In this case, the evidence adduced at trial established that the defendant engaged in the requisite conduct, while maintaining the essential mental state of "recklessly". The defendant takes issue with reliance, in part, upon the video to establish the defendant's mental state. However, the video is the primary evidence in support of the State having met its burden. The video clearly shows the defendant traveling behind Mr. Hartson's vehicle for a period of time. Exhibit B. In the video, the defendant appears to be looking forward, presumably aware

of his surroundings in his line of sight. Exhibit B. The rear camera depicts the defendant moving his vehicle into the right hand lane of traffic. Exhibit B. The video does not appear to show the defendant using his turn signal while changing lanes. Exhibit B. The defendant's vehicle is then seen passing Mr. Hartson's vehicle on the right hand side. Exhibit B.

22. The front view camera then shows the defendant's vehicle appearing on the right hand side of Mr. Hartson's, and immediately encroaching upon his lane of travel. The video also shows a vehicle directly in front of the defendant's in the right hand lane, which provides a reasonable inference as to the defendant's motivation and/or decision to switch lanes when he did. Exhibit B. "It is a well-established rule of criminal law in this State that circumstantial evidence may be sufficient to warrant the finding by a jury of guilt beyond a reasonable doubt." Germain, 165 N.H. at 356. "The law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of a fact may be inferred." Id. at 356-357. The defendant's decision to change lanes was made irrespective of the positioning of Mr. Hartson's vehicle, a fact the jury could reasonably extrapolate based upon the sequence of events documented in the video evidence. Exhibit B.

23. The crux of the required mental state being the "awareness of and consciously disregard[ing] a substantial and unjustifiable risk..." See RSA 626:2, II (c). Here, the video footage from the rear camera, along with the subsequent apparent application of the brakes, after having passed Mr. Hartson's vehicle, suggests the defendant's attention was on the road – where one would expect it to be. Exhibit B. The "risk" in this case being a motor vehicle collision, which was apparent from Trp. Catalfamo's testimony, the video, and the jury's common sense application of life experiences. It is entirely possible that the jury inferred the defendant was aware of the risk of a collision, and disregarded it, by selfishly changing lanes at the exact moment a law abiding person would have recognized the danger and applied their brakes, rather than try to get ahead of Mr. Hartson. See RSA 626:2, II (c); Exhibit B. The jury was well within its province, as trier

of fact, to "draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences..." Germain, 165 N.H. at 355. Collectively, the evidence introduced at trial establishes the defendant possessed the applicable mental state, and acted recklessly. Zubhuza, 166 N.H. at 130 ("Intent may be inferred from the defendant's conduct under all the circumstances.").

24. Therefore, the State in its case in chief, carried its burden of production with respect to the charged conduct. See Spinale, 156 N.H. at 463 ("Where evidence is insufficient, it is 'so lacking that [the case should not...even be [ ] submitted to the jury.'"). Thus, the defendant has failed to meet his burden "that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." Belleville, 166 N.H. at 61.

B. THE COURT SHOULD NOT SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THE VERDICT IS NOT UNREASONABLE NOR WAS IT RETURNED AS CONCLUSIVELY AGAINST THE WEIGHT OF THE EVIDENCE

25. The defendant alternatively appears to argue, this court should disregard the jury's verdict of guilt beyond a reasonable doubt, because said verdict was entered against the weight of the evidence. This argument should also fail.

26. "Although a verdict may be supported by sufficient evidence, a trial 'court may nevertheless conclude that the judgement is against the weight of the evidence.'" Spinale 156 N.H. at 465. "The weight of the evidence...is a somewhat more subjective concept than that of sufficiency." Id. "The weight given to any evidence depends upon the particular circumstances and is generally not relevant to the question of sufficiency." Id. "The weight of the evidence is its weight in probative value, not the quantity or amount of evidence. It is not determined by mathematics, but depends on its effect in inducing belief." Id.

27. In determining whether the verdict is contrary to the weight of the evidence, the trial court essentially acts as a 'thirteenth juror', and disagrees with the jury's resolution of conflicting testimony. Id.; See also State v. Durgin, 165 N.H. 725, 734 (2013). "[A] verdict conclusively against the weight of the evidence is 'one no reasonable jury could return.'" Spinale, 156 N.H. at 465. "[B]ecause a jury verdict must be one that that no reasonable jury could have returned, the trial court must 'exercise its discretion with caution and invoke its power to grant a new trial only in exceptional cases in which the evidence preponderates heavily against the verdict…'" Durgin, 165 N.H. at 734. "The trial court should not disturb the jury's findings unless the jury clearly failed to give the evidence its proper weight." Id.

28. In this case, the jury was primarily presented with uncontroverted evidence regarding the defendant's actions, and his reckless mental state. The defendant seems to acknowledge the utter lack of support for his position, by his tenuous reliance upon Trp. Catalfamo's testimony as articulated within his pleading. See paragraph 5, defendant's pleading. "[A] motion addressed to the weight of the evidence primarily presents a question of fact for the trial court, and the court has much more discretion when considering such a motion." Spinale, 156 N.H. at 465. The evidence articulated in paragraph(s) 12-18, *supra*, also supports the State's assertion that the guilty verdict was not against the weight of the evidence. At the conclusion of the State's case, this Honorable Court denied the defendant's motion to dismiss, thus the evidence presented was sufficient for the case to go to the jury. The defendant's reliance, upon Trp. Catalfamo's acknowledgement that "accidents can happen due to driver mistakes", as a basis for this Court to disregard the jury's resolution of conflicting testimony, to the extent Trp. Catalfamo's testimony be considered as such, does not merit disturbing the jury's verdict in this case. See Id. at 463 ("…if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied."); Durgin, 165 N.H. at 734.

29. Aside from Trp. Catalfamo's acknowledgements, as articulated in paragraph 5 of the defendant's pleading, the evidence negating the defendant's mental state is scant. The State appreciates the circumstantial nature of the proof in support of the defendant's mental state. However, "[a] defendant's intent often must be proven by circumstantial evidence." Zubhuza, 166 N.H. at 130. "It is within the province of the jury to draw reasonable inferences from the facts proved, as well as from facts which they found as a result of other inferences provide they can reasonably be drawn therefrom." Germain, 165 N.H. at 359.

30. The defendant argues the "evidence elicited in regards to [the defendant's] mental state is conflicting, but preponderates towards a finding of not guilty. In other words the weight of the evidence suggests that [the defendant] did not have the requisite criminal mens rea to be found guilty of reckless conduct" See paragraph 7, defendant's pleading. While this court correctly instructed the jury, with respect to circumstantial evidence, that if it's reasonable to arrive at two conclusions, one consistent with guilt and one consistent with innocence, they must choose that consistent with innocence. See e.g. Germain, 165 N.H. at 361. For the jury to acquit in that instance, the alternative conclusion must first be deemed reasonable. See Id. The jury's verdict suggests they did not determine the alternative explanation, to the extent Trp. Catalfamo's cited testimony can be considered an alternative explanation, to be reasonable a reasonable one. See e.g. Zubhuza, 166 N.H. at 131; See also Germain, 165 N.H. at 362 ("a conjecture consistent with the evidence becomes less and less conjecture, and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely."). "[T]he jury verdict must be an unreasonable one before the [trial court] may set it aside[]", which is not the case here. Spinale, 156 N.H. at 466. The jury was properly instructed in this case, defense has not argued the instructions were amiss, and this court should presume the jury followed its instructions. See State v. Marshall, 162 N.H. 657, 670 (2011).

31. Therefore, for the above reasons, the verdict should not be disturbed in this case because it was not unreasonable or against the weight of the evidence. Durgin, 165 N.H. at 734.

32. The defendant does not challenge the sufficiency of the evidence, with respect to the misdemeanor conviction for conduct after an accident, nor does the defendant argue that verdict should be set aside by this Court. However, the above analysis also applies to the evidence in support of the conduct after an accident conviction. See RSA 264:25.

WHEREFORE, the State prays that this Honorable Court grant the following relief:

A. DENY the defendant's Motion to Set Aside the Verdict for want of sufficient evidence and/or as against the weight of the evidence; AND

B. GRANT such other and further relief as justice requires;

Dated September 5, 2017

Justin S. Hersh (Bar #20094)
Sullivan County Attorney
14 Main Street
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing pleading to Dan Corley, Esquire, counsel for the Defendant this 5th day of September, 2017.

Justin S. Hersh

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220-2016-CR-150

STATE OF NEW HAMPSHIRE

V.

HENRY CARNEVALE

ORDER

A jury found Henry Carnevale guilty of felony Reckless Conduct and the crime of Conduct after an Accident. RSA 631:3; RSA 264:25. The evidence showed that Mr. Carnevale was in the passing lane while driving on Interstate Route 89, behind a vehicle driven by Robert Mitchell-Hartson. Carnevale passed Mitchell-Hartson on the right, and then moved back into the passing lane in front of Mitchell–Hartson. As he moved left, he left little room between the vehicles and the evidence was susceptible of a finding that he was so close he bumped Mitchell–Hartson's car. Mitchell-Hartson applied his brakes, but his car — carrying him and his young son — crashed into a guardrail. Mr. Carnevale didn't stop.

The form of the evidence was unique in that Mr. Mitchell-Hartson had mounted video cameras on his vehicle, which recorded activity to its front and rear. This allowed the

79

jury to see first–hand the conduct of both operators at the time in question. In addition to the video evidence, the jury heard testimony from Mr. Mitchell-Hartson.

After his convictions, Mr. Carnevale retained new counsel who filed several post–trial motions. They challenge the verdicts based on the weight and sufficiency of the evidence, the purported misconduct of a juror during the trial, and ineffective representation by his trial attorneys.

I. Sufficiency and Weight of the Evidence

Mr. Carnevale asks that the verdicts be set aside or for a new trial because the evidence supporting them was insufficient or because they are against the weight of the evidence.

In addressing a motion to set aside a verdict due to insufficient evidence, "the trial court uphold[s] the jury's verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State. In considering [the] motion . . . the [trial] court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied." *State v. Spinale*, 156 N.H. 456, 463 (2007) (citation and quotation omitted).

To convict Mr. Carnevale of reckless conduct, the State had to prove he recklessly engaged in conduct, "which placed or may have placed another in danger of serious bodily injury." RSA 631:3. The State alleged in the indictment that he did so by "operating a

moving Ford Expedition in an erratic manner and by aggressively 'cutting off' and making contact with a Volkswagen . . . operated by Robert Mitchell–Hartson." It also charged that Mr. Carnevale's vehicle was a deadly weapon. To establish the element of recklessness, the State "had to prove beyond a reasonable doubt that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that serious bodily injury would result from the charged conduct." *State v. Hull*, 149 N.H. 706, 712 (2003) (quotation omitted).

Mr. Carnevale emphasizes what he sees as the lack of evidence supporting recklessness. Because there was no direct evidence of his thinking at the time, the jury necessarily had to base its decision about his intent on the inferences drawn from other evidence. "When the challenged evidence of an element of the charged offense is circumstantial, the evidence must exclude all rational conclusions except guilt. Under this standard, however, we still consider the evidence in the light most favorable to the State, and we examine each evidentiary item in the context of all of the evidence, not in isolation. *Id.* (citation omitted).

With the video evidence, the jury could have reasonably concluded that Mr. Carnevale followed closely behind Mr. Mitchell–Hartson in the highway's passing lane. After both vehicles passed a car in the right–hand lane, Carnevale swung into the right lane, passed Mitchell–Hartson on the right, and then moved in front of Mitchell–Hartson. From

the video evidence, the jury could have concluded that Carnevale's maneuvers were sudden and made in close proximity to Mitchell-Hartson's car.

Also on the video, Mitchell–Hartson's vehicle appears to move to the left as Carnevale returns to the passing lane. Mitchell–Hartson testified he didn't know whether the Carnevale vehicle struck him, but they appear close enough that the jury could have concluded it did. Whether there was contact or not, however, the jury could have justifiably found that Carnevale's driving was aggressive.

The evidence also supported finding that in returning abruptly to the passing lane on a high–speed highway in close proximity to a vehicle he felt he had to pass on the right, Mr. Carnevale was "aware of and consciously disregarded the substantial and unjustifiable risk" that Mitchell–Hartson would have to apply his brakes while driving at a high rate of speed (68 miles per hour according to Mitchell–Hartson), and that the sudden braking action could cause him to lose control of the vehicle. "A rational trier of fact could have concluded that the risk that another driver would suffer serious injury in this situation was 'substantial and unjustifiable.'" *State v. Belleville*, 166 N.H. 58, 63 (2014).

The State Supreme Court has found that driving too close to other traffic can support a finding of recklessness. In one case, the defendant acted recklessly by driving close to a police officer on a traffic stop. The Court found a

> rational jury could conclude from the evidence that the defendant's conduct was a gross deviation from that of a law-abiding citizen, because a law-abiding citizen would have waited for traffic to pass to avoid driving too close to a police officer engaged in a traffic stop. Likewise, a rational jury could conclude that

> driving too close to a police officer engaged in a traffic stop created a substantial, unjustifiable risk of injury to either the police officer or the other driver.

State v. Hull, 149 N.H. at 714. And in *State v. Pelky*, 131 N.H. 715, 719 (1989), the Court determined there was a sufficient allegation of recklessness in an indictment alleging that a defendant drove near the fog line and struck a bicyclist riding near the same line. Viewing the evidence and the reasonable inferences from it in the light most favorable to the State, a rational jury could have concluded Mr. Carnevale acted recklessly.

On the conduct after an accident charge, Mr. Carnevale contends there wasn't enough evidence that he knew or should have known of Mitchell-Hartson's crash and the resulting property damage. RSA 264:25. But the jury could have inferred from the video evidence that the two vehicles were so close just before the crash that Carnevale had to have known or should have known from the movement and the noise that an accident occurred and of his involvement with it. Reasonable inferences drawn from the direct evidence on the video support the jury's finding on the element of knowledge.

His related motion is that even if the evidence was sufficient, the verdicts were against the *weight* of the evidence. The question raised by this pleading is whether the verdicts were ones "no reasonable jury could return." *State v. Durgin*, 165 N.H. 725, 734 (2013) (quotation omitted). Having seen the same video and heard the same testimony as the jury, I find this is not one of the "exceptional cases in which the evidence preponderates heavily against the verdict" and "where a miscarriage of justice may have resulted." *Id.* (quotation omitted).

The motions to set aside the verdict based on the sufficiency of the evidence or to grant a new trial due to the weight of the evidence are DENIED.

II. Juror Misconduct

Before trial began and during breaks in the trial, the jurors were told not to discuss the case with each other or with persons not on the jury. In a post–trial motion, Mr. Carnevale revealed for the first time that he had evidence a juror violated this instruction during the trial.

At a hearing on the motion, Mr. Carnevale's daughter testified that while at a local restaurant during a lunch break in the case, she saw a juror walk in and speak with someone who appeared to work there. She overheard the juror say it was "really hard to tell." Her impression was that he was discussing this case. Mr. Carnevale's girlfriend also testified that she saw a juror (apparently the same one discussed by his daughter) speaking with a person holding a drill. The juror made a hand motion and said it was "hard to tell." She testified that she wasn't sure the juror was discussing the case, but thought so. In his motion, Mr. Carnevale contends the juror said, "There's a video, but you can't really tell." As noted, the witnesses' descriptions of what they heard were not so explicit.

It wasn't until after the jury returned its verdicts that anyone told Mr. Carnevale's trial attorney about the incident. State's Hearing Exhibit 1 (Transcript of Deposition Testimony of Attorney Jay Buckey), p. 97, lines 5–7. Presumably for that reason, Mr. Carnevale withdrew his original claim that his trial attorneys were ineffective in not

moving for a mistrial based on the juror's unauthorized contact. See Order, Aug. 11, 2017 (doc. no. 70).

Mr. Carnevale concedes the witnesses didn't hear much, so "the prejudicial impact of this prohibited communication is unknown." *Motion for New Trial Due to Juror Misconduct*, ¶ 4 (document no. 58). Nevertheless, "unauthorized communications between jurors and others about the case are presumptively prejudicial. When presumptively prejudicial communication occurs, the State has the burden to establish that the communication was harmless." *State v. Rideout*, 143 N.H. 363, 366 (1999). (emphasis omitted). The degree of prejudice to the defendant is assessed by considering the circumstances surrounding the communication, including

> (1) whether the matter pending before the court was discussed; (2) whether the party involved was connected with the case and whether the juror knew of the connection; (3) whether the party involved had a substantial role in the case; (4) whether other jurors became aware of the communication or contact; (5) whether the communication or contact extended over a prolonged period of time; and (6) the point in deliberations the communication or contact occurred. Finally, the court should consider the effect of any pertinent instructions.

Id.

As a whole, the factors militate in favor of finding the communication harmless. For purposes of the motion, I assume the subject of the juror's comment was "the matter pending before the court." There is, however, no indication the party to whom the juror spoke knew anything about the case that could have influenced the juror or even that the person said anything in response. This is the only reported instance of unauthorized communication, and it doesn't indicate the

juror's view of the evidence, except that at the time of the comment the juror wasn't sure what to make of it.

The oral and written instructions at the close of the case told jurors "[a]nything you may have seen or heard when the court was not in session is not evidence. You must decide the case solely on the evidence received at trial." True, the juror didn't follow the preliminary instruction to avoid mentioning the case to others. But there is no reason to disregard the well–known presumption that jurors follow instructions, and that (assuming the juror deliberated and was not an alternate), the juror followed the more formal instruction on confining consideration to the evidence. See *State v. Neeper*, 160 N.H. 11, 15 (2010).

There is no reason to think outside influences affected the verdicts. Based on the information provided, any prejudice from the juror's comment to the third party was harmless.

III. Ineffective Assistance of Counsel

Lastly, Mr. Carnevale contends the quality of his trial attorneys' work fell below constitutional standards. To prevail on this claim, he must make two showings — first, that his attorneys' representation fell below an objective standard of reasonableness, and second, their deficiencies prejudiced the defense. *State v. Eschenbrenner*, 164 N.H. 532, 539 (2013).

In reviewing whether the representation was objectively reasonable, an attorney's strategic decisions are afforded a high degree of deference to reflect the strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Collins*, 166 N.H. 210, 212-13 (2014). "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.* (quoting *State v. Thompson*, 161 N.H. 507, 529 (2011) (quotation and brackets omitted)).

> The Supreme Court has recognized that there are "countless ways to provide effective assistance in any given case," "the best criminal defense attorneys would not defend a particular client in the same way," and "[r]are are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." [*Harrington v. Richter*, 562 U.S. 86,] 106 (quoting *Strickland [v. Washington*, 466 U.S. 668,] 689 (1984)). As a result, the Court has held that "[c]ounsel [i]s entitled to formulate a strategy that [i]s reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." [562 U.S.] at 107.

Ellis v. Raemisch, 872 F.3d 1064, 1083–84 (10th Cir. 2017).

Confronted with a video recording showing exactly what transpired, Mr. Carnevale's lead trial counsel, Jay Buckey, made a strategic decision to frame the felony charge of reckless conduct as a pure accident, devoid of the intent the jury would need to find in order to convict. See Buckey Dep. Tr., p. 16, lines 10–16. That is, he endeavored to show that at worst, when he returned to the passing lane Mr. Carnevale simply misjudged where he was in relation to Mr. Mitchell–Hartson's vehicle. Attorney Buckey testified to his view that "the video is of good quality, and it shows pretty clearly what happened, and unfortunately, that video doesn't show that there's any contribution by the alleged victim to the crash." *Id.*, p. 23, lines 11–15. Understanding the jury would see the same video,

Attorney Buckey had to assess how the jury was likely to view it, and so eschewed a defense based on blaming Mr. Mitchell–Hartson.

This is not to say Attorney Buckey didn't explore avenues other than his client's conduct to explain the incident. He obtained Mitchell–Hartson's phone records to look for evidence of distraction by texting or by other use of his phone. The records did not show texting activity at the time. Buckey Dep. Tr., p. 27, line 23 to p. 28, line 1. And, since the vehicle–mounted cameras recorded sound as well as video, it was evident that Mitchell–Hartson wasn't talking to anyone near the time of the crash. *Id.* p. 28, lines 1–4.

Mr. Carnevale contends that what his case lacked was testimony from an accident reconstruction expert. After the trial, Mr. Carnevale retained such a witness, who reported the accident sequence as follows: after passing the Mitchell–Hartson vehicle on the right,

> Mr. Carnevale saw that a car in the left travel lane ahead of Mr. Mitchell–Hartson's car was slowing down. Mr. Carnevale applied his brakes lightly and moved into the left travel lane behind the car that was slowing and in front of Mr. Mitchell–Hartson's car.
>
> * * *
>
> Mr. Mitchell–Hartson saw Mr. Carnevale pass him and saw Mr. Carnevale[] pull back into the left travel lane. When Mr. Mitchell–Hartson saw Mr. Carnevale's brake lights, he reacted by hitting his brakes and steering first to the left and then to the right. The sudden application of the brakes and aggressive steering caused Mr. Mitchell–Hartson to lose control of his car . . . and crash his car into the northbound lane guardrails.

Def. Hearing Exhibit C (Report of Northpoint Crash Reconstruction, Oct. 30, 2017), p. 3. The expert places fault for the accident with Mitchell–Hartson, speculating his reaction to Mr. Carnevale's slowing vehicle was extreme because he might have "nodded off" due to his

diagnosed condition of narcolepsy. *Id.* p. 16. (Mr. Carnevale withdrew a claim that trial counsel was ineffective for not investigating whether Mr. Mitchell–Hartson's narcolepsy was a cause of the accident. See Order, Aug. 11, 2017 (doc. no. 70)).

This is not a case where defense counsel failed to consult an expert. To the contrary, he obtained funds from the court and retained a specialist on accident reconstruction to review the video and other information. The expert didn't testify because after seeing the video, he advised Attorney Buckey that nothing he could say would be helpful. Buckey Dep. Tr., p. 42, lines 2–9.

Even if the opinion was favorable, the jury wouldn't have to accept it, *State v. Labranche*, 156 N.H. 740, 744 (2008), and here the video evidence introduces a factor that makes it seemingly superfluous for someone else to explain to the jurors what they can see for themselves. The expert that Mr. Carnevale retained post–trial describes him as making a measured return to the passing lane in front of Mr. Mitchell–Hartson, and explains that Mitchell–Hartson could have avoided crashing by not overreacting to Mr. Carnevale's vehicle. His report, however, is not as much a technical reconstruction of the accident as it is a narrative of trial testimony and speculation woven together to present a theory of why Mr. Carnevale is innocent. Whether or not the theory is plausible, the important thing is that trial counsel had a theory of defense based on sound reasons that simply was different from the "blame the victim" premise constructed post–trial. See Buckey Dep. Tr. p. 94, lines 2–22.

Mr. Carnevale cites related omissions that his trial attorney should have explored, such as the fact that the State Police didn't try to reconstruct the accident through technical investigation and inadequately documented the condition of Mr. Mitchell–Hartson's car. But he offers no reason to think he was prejudiced by the failure of his counsel to argue these points, and so has not made the required showing of prejudice under the second prong of the two–pronged standard. Mr. Carnevale argues his attorney should have challenged the State's assertion that he applied his brakes once he got in front of Mr. Mitchell–Hartson — an act the jury might find to constitute recklessness under the circumstances. But according to the defendant's post–trial expert, Mr. Carnevale *did* apply his brakes, and his trial counsel's own investigation did not contradict that conclusion. See Buckey Dep. Tr., p. 56, lines 3–18; p. 58, lines 5–12.

Mr. Carnevale claims his attorneys should have objected to the prosecutor's arguments that his vehicle struck Mitchell–Hartson's car and that his driving resulted from "road rage." "[A] prosecutor may draw reasonable inferences from the facts proven and has great latitude in closing argument to both summarize and discuss the evidence presented to the jury and to urge them to draw inferences of guilt from the evidence." *State v. Bisbee*, 165 N.H. 61, 68 (2013) (quotation omitted). Mr. Carnevale notes the reconstruction expert he retained post–trial opined there was no contact between the two vehicles. Contact wasn't a prerequisite to a guilty finding. Even so, there was evidence — a mark shown by photographs of the left rear bumper of Mr. Carnevale's vehicle and the leftward movement of the Mitchell–Hartson vehicle on the video as Mr. Carnevale also moved left to get in

front of him — that permitted an inference of contact. And it was not unfair for the prosecutor to argue Mr. Carnevale drove aggressively out of annoyance with Mitchell–Hartson's slower moving vehicle in the passing lane. Objections to these arguments were unwarranted.

Mr. Carnevale has not shown that his "counsel's representation fell below an objective standard of reasonableness" (the performance prong), and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (the prejudice prong). *State v. Cable*, 168 N.H. 673, 680–81 (2016) (quotations omitted).

IV. Conclusion

For the reasons given, the defendant's

- Motion for New Trial Due to Weight of the Evidence (document no. 57);
- Motion to Set Aside the Verdict and Enter Judgment of Acquittal (document no. 60);
- Motion for New Trial Due to Juror Misconduct (document no. 58);
- Motion to Set Aside Verdict, Motion for New Trial, and Motion for Reconsideration (document no. 59); and

- the Amended Motion for Reconsideration (document no. 74), are

DENIED.

SO ORDERED.

DATE: APRIL 10, 2018

BRIAN T. TUCKER
PRESIDING JUSTICE