THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0292

The State of New Hampshire

v.

Henry Carnevale

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
The Office of the Attorney General

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ISSUES PRESENTED

1. Whether the evidence was sufficient to prove that the defendant's driving was reckless and his SUV was a deadly weapon where it showed that he followed a VW going 67–68 miles per hour in the left lane on I-89, went around the VW on the right, and started braking as he entered the left lane within feet of the front of the VW.

2. Whether the trial court properly found that the defendant failed to prove his trial counsel were constitutionally ineffective where his lead counsel testified that he did not hire an accident reconstruction expert or get an accident reconstruction because the court had precluded the State from offering expert testimony, there were videos of the incident, and the expert he consulted agreed with the State's conclusion that the defendant had driven recklessly and caused the VW to crash.

STATEMENT OF THE CASE

The defendant, Henry Carnevale, was indicted on one class B felony count of reckless conduct with a deadly weapon, *see* RSA 631:3, I–II (Supp. 2018), and charged by information with one class A misdemeanor count of conduct after an accident, *see* RSA 264:25 (2014). DB A2–A5.[1] During the defendant's one-day jury trial in the Sullivan County Superior Court (*Tucker*, J.), he moved to dismiss for insufficient evidence, and the court denied the motion. JT 105–07, 111–12. The jury then convicted the defendant, as charged, on both counts. JT 166–71.

After trial, the defendant filed motions for reconsideration, to set aside the verdicts, for judgment notwithstanding the verdicts (JNOV), and for a new trial. DB A10–A18. The State objected. DB A21–A32; ASB 43−54. The court denied the motions after a hearing. DB A33–A46. The defendant filed a motion for reconsideration. ASB 55–62. The State objected. ASB 63–66. The court then denied the motion. ASB 67–68.

On May 29, 2018, the court sentenced the defendant on the felony conviction to 12 months of incarceration, 10 months of which was

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[1] "APX" refers to the separately filed appendix to the State's brief. The page numbers cited are those on the lower right corner.
"ASB" refers to the attached appendix to the State's brief.
"DB" refers to the defendant's brief and the attached appendix.
"HPTM" refers to the sequentially paginated transcripts of the hearing on post-trial motions on November 9, 2017, and January 5, 2018.
"JT" refers to the transcript of the jury trial on June 15, 2017.
"SH" refers to the transcript of the sentencing hearing on May 9, 2018.
"V441" refers to video "2016_0809_072349_072349_441" on the thumb drive transferred to this Court. The times cited are those on the Windows Media Player.
"V757" refers to video "rear-2-2016_0809_072826_757" on the thumb drive transferred to this Court. The times cited are those on the video clock.

suspended for 2 years; 1 year of probation, the first 60 days of which was on home confinement; and $11,851.10 of restitution. DB A7–A9. The court sentenced the defendant on the misdemeanor conviction to a concurrent term of 6 months of incarceration, all but 1 day of which was suspended for 2 years. ASB 69–70. On both convictions, the court gave the defendant 1 day of pretrial confinement credit. DB A8; ASB 69. This appeal of the defendant's reckless conduct conviction followed.[2]

[2] The defendant has not raised any issues concerning his conduct after an accident conviction in his brief, so he has waived any such issues. *See State v. Ayer*, 150 N.H. 150 N.H. 14, 34 (2003); *State v. Blackmer*, 149 N.H. 47, 49 (2003).

STATEMENT OF FACTS

A. The State's case at trial.

On August 9, 2016, at 7:28 a.m., the victim was driving his Volkswagen Jetta (the VW) in the left lane on I-89 North in Grantham, and his three-year-old son was sleeping in a child's safety seat on the right rear seat. JT 85–88. The speed limit was 65 miles per hour, but the victim had the VW's cruise control set at 68 miles per hour. JT 82, 90.

The defendant was driving his 7,200-pound Ford Expedition SUV behind the VW, and he was "following [it] too closely." JT 50; *see also* JT 52, 70–71; V757 at 7:28:25–7:28:30. After several seconds, the defendant made a hand gesture, went by a slower moving car in the right lane, and then moved into the right lane without signaling and accelerated. V757 at 7:28:25–7:28:43; V441 at 03:54–04:17. At the same time, the car in front of the VW caught up to the car in front of the SUV, both cars passed a sign that said, "Shoulder work 500 feet," and both drivers started braking to slow down for the construction zone. V441 at 4:17–4:23. The victim reduced the VW's cruise control speed and focused on maintaining a safe distance between his VW and the car ahead of it. JT 100.

The defendant continued accelerating, and as soon as the front of the SUV cleared the front of the VW, he started to enter the left lane. V441 at 4:17–4:18. The victim considered trying to "maneuver to the left," but he knew there were concrete barriers up ahead on that side, so he "held [his] ground" and prepared to brake. JT 93. The cars in front of the VW and the SUV were still slowing, the car in front of the VW was braking, and the distances between them and the VW and the SUV were decreasing. The

defendant started braking and abruptly cut in front of the VW, which was still travelling about 65 miles per hour. JT 94, 100; V441 at 4:18−4:20. The victim depressed the clutch, braked "heavily," and steered right, but the VW hit the SUV's back bumper, "was unresponsive for a split second," and then was pulled left. JT 94–85, 100; V441 at 4:18–4:20; V757 at 7:28:50. The defendant then stopped braking and accelerated, so the VW veered sharply to the right. JT 94–95; V 757 at 7:28:50–52; V441 4:20−4:21.

The victim lost control of the VW and prayed because he knew it was going to hit the concrete guardrail on the bridge over the underpass, and he was concerned for the safety of his son and the men who were working on the bridge. JT 94–95. The VW skidded for 3 seconds, the front end hit the guardrail at a 45-degree angle going 65–70 miles per hour, the air bags deployed, the minor victim awoke and started crying, and the VW then skidded down the right lane for 7 seconds before it came to a stop. JT 49, 90, 96–97, 100–01; V757 at 7:28:50–7:29:00; V441 at 4:20–4:30.

The VW had "heavy front end damage," and there were VW parts, fluids, and tire marks all over the highway. JT 44; *see also* JT 40–43; ASB 71. The victim had air bag dust in his eyes and respiratory system. JT 97, 102. He cleared his eyes, unbuckled his seat belt, got out, and ran to the passenger's side to see if his son was okay. JT 97. Other drivers stopped to help, but the defendant kept driving. JT 52, 98; V757 7:29:02; ASB 71.

The VW had GoPro cameras in the front and rear windows. JT 44−45, 92, 96. The front camera recorded video, and the rear camera recorded video and sound. JT 91–92, 96. When Trooper Michael Catalfamo arrived, the victim gave him the cameras. JT 44–45, 91. Trooper Michael McLaughlin then connected them to his laptop, and he and Catalfamo

watched the recordings. JT 45; V441 (the front camera recording); V757 (the rear camera recording). They concluded that the SUV's driver had operated recklessly and caused the VW to crash, so Catalfamo looked up the SUV's license plate number and determined that the defendant owned it. JT 45, 47, 50, 53. The troopers also photographed the scene and the VW. JT 47–49; ASB 71. An ambulance then took both victims to the Dartmouth-Hitchcock Medical Center. JT 51, 97.

At 1:00 p.m., Catalfamo obtained a warrant to arrest the defendant. JT 53. Around 3:00 p.m., Catalfamo went the defendant's residence, and the SUV was in the driveway. JT 55. Catalfamo arrested the defendant and seized the SUV. JT 56. Catalfamo later searched and photographed the SUV pursuant to a warrant. JT 56–73; ASB 72–74. There was a "dark scratch" with a "gouge mark" in it on the left side of the rear bumper. JT 59–60; *see also* JT 62, 67–68; ASB 72–74. There were also other scratches on the lower left part of the bumper, but the scratch with the gouge mark stood out because it was darker and rougher than they were. JT 81–82.

B. Relevant events before and during trial.

Before trial, the defendant's attorney, Jay M. Buckey, filed a motion to preclude McLaughlin from giving expert testimony, and the court granted it "by agreement." ASB 75. Buckey also filed a motion to preclude Catalfamo from offering an expert "opinion that the damage [on the SUV's bumper] matched with the contact of the [VW]." ASB 76 (quotation and brackets omitted). The court held that it was a lay opinion, but was inadmissible because Catalfamo was "in no better position to draw the

conclusion than a juror with the same evidence." ASB 76 (quotation and brackets omitted). Attorney Lauren M. Breda later joined the defense. JT 1.

At trial, Catalfamo and the victim testified for the State. Catalfamo testified that he had investigated numerous motor vehicle collisions in which people had sustained serious bodily injuries or died, and that based on his training and experience, he knew motor vehicles were capable of injuring and killing people. JT 40–42. Buckey then objected, arguing that it was an expert opinion and was irrelevant because the defendant's "manner of operation" was the issue at trial. JT 42. The court said, "I think it is commonly know[n] that motor vehicles are capable of causing death or serious bodily injury, so I'll sustain the objection …." JT 43.

After the State rested, Buckey told the court that he was going to move to dismiss, and that he needed a few minutes before he could tell the court whether he was going to call witnesses. JT 103. The court asked Buckey if he was "going to have any evidence to present," and Buckey answered, "Of course." JT 104. The court took a recess and then told Buckey to make his motion. JT 105. Buckey argued[3] that the evidence was insufficient to prove that the defendant drove the SUV recklessly, JT 105, or that "the way it[was] used" and the "manner of [its] operation" made it a deadly weapon, JT 106, because the evidence did not prove he "was aware of the distance between the vehicles," JT 105; or his "driving was above and beyond normal," JT 106. The State objected. JT 107–12.

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[3] The State has included only the portions of the defendant's arguments, the trial court's rulings, and the witnesses' post-trial testimony that are relevant to the arguments the defendant has briefed on appeal.

The court held that the evidence was "largely circumstantial, … but in a light most favorable to the State," JT 112–13, it showed the defendant "passing on the right and then cutting abruptly … in front of [the VW]," and "[a] jury could find, under those circumstances, that he was aware … operating a vehicle in close quarters like that could cause [the victim] to brake and … result in serious bodily injury," and "that the [SUV], in the way it was operated, was a deadly weapon," JT 113. The court then asked Buckey if he was "going to call any witnesses," and he said no. JT 113.

C. Relevant events after trial.

Buckey filed a motion to set aside the verdicts and for JNOV. DB A18–A20. He argued that the court had to set aside the reckless conduct conviction because "[t]he evidence … of recklessness [was] purely circumstantial," and it did "not exclude all rational conclusions except guilt …." DB A19. The same day, the defendant's new attorney, Daniel J. Corley, filed a motion to set aside, for new trial, and for reconsideration. DB A10–A17. He argued that the conviction had to be set aside because the evidence did not prove the "Defendant did intentionally and recklessly brake or act aggressively while entering [the] victim's lane of travel with the intent to place [him] in danger of serious injury." DB A12. Corley argued, in the alternative, that a new trial had to be granted because Buckey "failed to investigate and present an accident reconstruction expert," DB A12, and his constitutionally defective performance prevented the defendant from having a fair trial and … present[ing] other defenses … [that] may have resulted in a different conclusion," DB A14 (citing *State v. Whittaker*, 158 N.H. 762 (2009)).

The State objected to Buckey's motion. DB A21–A32. The State and Corley then deposed Buckey and Breda, who testified as follows: Buckey watched the videos several times and concluded they showed the defendant "following [the VW] a little too closely," "going in front of [it] very closely," "putting on brake lights," APX 70, and "a collision … between the vehicles," APX 11, but they did not "show … any contribution by the alleged victim," APX 25. The defendant disagreed, and articulated theories that the victim either provoked him into an accident in order to use the videos to collect insurance, sped up and deliberately caused the accident because he was angry with the defendant and wanted to get back at him, was distracted, or had some sort of medical issue. APX 16–17, 34–35.

Buckey consulted two experts from The Crash Lab, one of whom was "a former State Police officer who did accident reconstruction for a long time." APX 112; *see also* APX 39. Buckey had previously used the accident reconstruction expert (the expert) in a manslaughter and negligent homicide case and had been happy with his work. APX 40–41, 102. Buckey told the expert the case was unusual "because … there was no technical accident reconstruction done by the State Police," but "there was a video." APX 41; *see also* APX 42. Buckey also gave the expert "a brief synopsis of what the case was about," APX 42, and said that he wanted to know "[w]hether it was, in fact, reckless conduct by [the defendant]," APX 43–44, and "whether there was some avenue that [Buckey] was[not] aware of in looking at the video," APX 111. Buckey then asked the expert if he would be willing to "watch the video and give [Buckey] feedback to see if it[was] something [the expert] could help him with," APX 41, and the expert said he would be happy to do so, AXP 43, 45.

Buckey sent the expert the videos and some discovery, including a police report with McLaughlin's measurements of the "yaw mark" and speed calculations. APX 41–42, 108, 110, 126. The expert reviewed everything and then told Buckey "[h]e did not think he would be of assistance because he essentially thought that the video portrayed reckless conduct" by the defendant. APX 44. The expert also explained that he watched the video several times and "was very concerned because he saw brake lights on the [SUV] go on … as [it] was cutting in front of [the VW]." APX 49; *see also* APX 50–51. Buckey decided not to hire the expert because that "was obviously a piece of information [he] did[not] want highlighted at trial," APX 49, the expert's "observations were pretty much consistent with the State's theory," APX 129, and the court had already precluded the State from presenting the troopers' expert opinions, APX 103–04, 123, 131–33. Buckey did not request an accident reconstruction because the videos were not helpful and he had asked the State to preserve the VW, but it had not done so. APX 48, 71, 130. The Crash Lab never billed Buckey for the expert's work. APX 119–20, 142–43.

Buckey repeatedly told the defendant why he made the foregoing decisions and why his "defense would be accident." APX 65; *see also* APX 50, 52, 54, 64. The defendant did not understand, and he "was still very interested in having an expert testify in the case or presenting evidence of the [VW] speeding up." APX 50. At one point, the defendant gave Buckey "the number of another place." APX 111. Buckey did not get a second opinion because he had "spoken to one expert[, t]he video was there, and there was no State Police Expert testifying, so it did[not] seem like a fruitful avenue." APX 114. However, the defendant kept insisting that he

"did[not] think he applied the brakes, APX 58, so Buckey twice "had [an] investigator … take video of [the SUV] to see" whether it was "a turn signal" or "a brake light" everyone saw on the video, APX 53–54; *see also* APX 51, 56, 192. He then decided not to use the videos because they were not helpful, APX 72, and they showed that the defendant had gotten the SUV painted after the collision, APX 59.

Eventually, "the issue with the brake lights and things like that had become such an issue that [Buckey] told [the defendant] … [they] could have a status-of-counsel hearing if he wanted to do that." The defendant never did, so Buckey "presumed he was okay with the [accident] theory [they had] developed … in consultation with his family." APX 79.

Buckey also had several meetings with the defendant "to talk about him potentially testifying," APX 66, and Breda "did several mock cross-examination sessions," APX 68. Buckey was hoping the defendant would testify, AXP 67, 70, but he repeatedly "went off track" and said things like, "I know I did[not] do that, or, I know something happened that did[not] happen, which was inconsistent with [their] theory of an unremarkable drive with an accident that he did[not] know happened," APX 136–37. Eventually, Buckey and Breda "advised [the defendant] not to testify," but they also "told him that it was his decision." APX 135; *see also* APX 162.

After the State rested at trial, Buckey and Breda asked the defendant if he was going to testify. The defendant wanted to "go through a mock direct and cross-examination," and Buckey told him they did not "really have time for that." The defendant then "spoke with his family and decided not to testify." APX 90; *see also* APX 135, 172, 176.

After the depositions, Corley filed an amended motion for reconsideration. ASB 44. The State then objected to all his motions. ASB 43-54.

At a hearing on the motions, Corley's accident reconstruction expert, Carl Lakowicz, testified as follows: Lakowicz viewed the videos and the scene, listened to excerpts of trial testimony, and reviewed the discovery Corley sent him, which did not include an accident report or the troopers' photographs of the scene and the SUV. HPTM 6–7, 18–21. Lakowicz asked Corley for the rest of the discovery, but Corley told him it was unavailable. HPTM 114–15, 218. Lakowicz did not know the court had precluded the State from presenting expert testimony at trial, and he thought McLaughlin had testified. HPTM 75, 152–53. Lakowicz relied on the vehicle speeds McLaughlin calculated from the yaw marks left by the VW and the victim "validated" at trial. HPTM 9–10, 118. He could not do his own speed calculations or an accident reconstruction because the yaw marks had remained visible on the highway for only a short time. HPTM 285–87.

Lakowicz reached the following conclusions: (1) the defendant made "a non-aggressive low speed passing maneuver and accelerated … to about 69 to 70 miles per hour," HPTM 11; (2) the SUV's brake lights were on when he "return[ed] to the high speed lane," HPTM 11; (3) his return was "uneventful," HPTM 11, 13, and "normal," HPTM 16, and his braking was "appropriate," HPTM 41; (4) the victim braked and disengaged the cruise control a "second or two" later, HPTM 11–12; (5) he could have done so sooner, HPTM 17, 40; (6) the vehicles never came into contact and the distances between them "increased," but the victim overreacted and made a "very violent left turn" and then "a hard … and sustained right swerve" that

"induced a critical speed scuff or yaw," HPTM 12; *see also* HPTM 14; (7) the victim panicked and "did not attempt to steer out of or correct" it, HPTM 12; (8) the victim caused the VW to hit the bridge, HPTM 15–17, 39–41; and (9) the SUV's brake lights were still on after that, HPTM 13.

The most important factors in the analysis were that the victim was using cruise control, and that he failed to brake and disengage it within 1.5 seconds, which was the normal reaction time for the 85th percentile of men. HPTM 139, 142, 166, 168–69, 230. Although Buckey did not know the victim was using cruise control until trial, if he had retained Lakowicz for the trial, Lakowicz would have told him that the information was critical and then testified that the victim caused the collision. HPTM 200–01, 224.

During Lackowizc's testimony, Corley admitted Lackowicz's written report. HPTM 54. The parties also admitted transcripts of Buckey's and Breda's depositions. HPTM 238–39, 246. Corley then conceded that the jury could have concluded the defendant "cut off the [the VW] and that[was] what caused the [victim] to lose control." HPTM 254. Corley then said, "[D]id he intend to harm that other person? There[was] no testimony to that effect. I know there was a motion to dismiss on that issue, but that was without an expert witness." Corley then argued that the defendant was "highly prejudiced by [counsel's failure] to present th[e] other defenses" Lakowicz raised because they could have changed the verdicts. HPTM 254.

The court asked Corley how many experts counsel had to consult to be effective, and Corley answered that the defendant asked for a second opinion. HPTM 257. The court noted that it consulted experts to determine what to look at, and if they said the issue was "open and shut," it relied on their opinions. HPTM 257. Corley argued that Buckey should have asked

the expert if he could do "an accident reconstruction" instead of relying on the videos. The court asked what Buckey was supposed to do when the expert said he could rely on the videos and could not help. HPTM 258. Corley answered that Buckey had an obligation to ask because the defendant had always said, "I did not deliberately do this." HPTM 259. The court responded, "He … was[not] charged with doing it intentionally…. [T]he allegation was that his driving was reckless." HPTM 259–60.

Corley then argued that "nobody ha[d] told … Buckey that an accident reconstruction could not … or should not be done," and that not having one done was "a major failure." HPTM 260. The court noted that Lakowicz's opinion differed from those of the State's experts and Buckey's expert, but he also relied on the videos. The court then held that Buckey could have reasonably concluded the jurors would consider an expert's opinion superfluous because they had the video. HPTM 261. Corley argued that there was "a perception of what [it]" showed, but it was misleading, and an expert could have testified that the victim "was on cruise control" and failed to "react … in an emergency situation." HPTM 262.

The court later issued a written order denying the motions. DB A33–A46. In rejecting the sufficiency of the evidence claim, the court held that "the jury could have reasonably concluded [from the videos] that … the defendant's maneuvers were sudden and made in close proximity to the [VW]," that the vehicles made contact, and that, even if they did not, his "driving was aggressive." The court also held that

> [t]he evidence … supported [a] finding that … [the defendant] was "aware of and consciously disregarded the substantial and unjustifiable risk" that [the victim] would

> have to apply his brakes while driving at a high rate of speed …, and that [doing so] could cause him to lose control ….

DB A36. The court then noted that this Court has held "that driving too close to other traffic can support a finding of recklessness." DB A36–A37 (citing *State v. Hull*, 149 N.H. 706, 714 (2003); *State v. Pelky*, 131 N.H. 715, 719 (1989)).

In rejecting the ineffective assistance of counsel claim, the court held that 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," and that he "endeavored to show that at worst, when [the defendant] returned to the passing lane[, he] simply misjudged where he was in relation to the [VW]" DB A41. The court also held that Buckey "retained a specialist on accident reconstruction," but did not have him "testify because after seeing the video, he advised … Buckey that nothing he could say would be helpful." DB A43. The court further held that even if an expert's opinion had been "favorable, the jury would [not] have to accept it," and that "the video evidence introduce[d] a factor that [made] it seemingly superfluous for someone else to explain to the jurors what they [could] see for themselves." DB A43.

The court next held that Lakowicz's report was "not as much a technical reconstruction of the accident as it [was] a narrative of trial testimony and speculation woven together to present a theory of why [the defendant was] innocent," and that "the important thing [was] that [Buckey] had a theory of defense based on sound reasons that simply was different from the 'blame the victim' premise …." DB A43. The court also held that although the defendant "argue[d] that [Buckey] should have

challenged the State's assertion that he applied his brakes … in front of [the VW]," Lakowicz also concluded the defendant "*did* …, and [Buckey's] own investigation [had not] contradict[ed] that conclusion." DB A44. The court then held that the defendant had "not shown that his 'counsel's representation fell below an objective standard of reasonableness,'" or "that 'there [was] a reasonable probability that, but for counsel's … errors, the result of the proceeding would have been different ….'" DB A45 (quoting *State v. Cable*, 168 N.H. 673, 680–81 (2016)).

Corley moved for reconsideration, arguing that: (1) the court erred in finding Lakowicz's "testimony was simply a narrative of the trial testimony and speculation" because he said he "conducted an accident reconstruction, measured every aspect of the course of travel between the two vehicles, markings on the roadway, and considered the facts … in police reports," ASB 60; (2) the court erred in finding the defendant failed to demonstrate prejudice because Lakowicz "provide[d] a completely different picture as to how this accident occurred," ASB 61; and (3) the court erred in finding the defendant failed to demonstrate counsel were ineffective because "[f]ailing to present exculpatory evidence [was] not a reasonable trial strategy," ASB 61 (quoting *Whittaker*, 158 N.H. at 775). The State objected. ASB 63–66.

The court held that: (1) the videos "informed [Buckey's] trial strategy," "caused him to frame it as an accident," and "support[ed his] conclusion that the jury was unlikely to find fault with the victim," ASB 67; (2) "it was[not] necessarily worthwhile to advance an alternative theory," ASB 67; and (3) the expert's opinion "explain[ed] … [Buckey's] decision to address the video head-on and argue it reflect[ed] an accident rather than criminal conduct," ASB 67-68. The court then denied the motion. ASB 68.

SUMMARY OF THE ARGUMENT

1. This Court will not address the substance of the defendant's argument that the State had to prove he intended to use his SUV as a deadly weapon because it is based on statutory interpretation arguments he waived at trial, and he has not invoked the plain-error rule on appeal. Furthermore, the defendant cannot meet that strict standard of review because there was no error, and, even if there was, it was not plain. Moreover, the evidence was sufficient to prove beyond a reasonable doubt that the manner in which the defendant used his SUV and the circumstances surrounding that use rendered it a deadly weapon, and that he drove it recklessly.

2. The defendant's arguments that Buckey was ineffective because he failed to get a second opinion and an accident reconstruction and failed to have the defendant testify are fundamentally flawed. The State did not have to prove the defendant intended to drive recklessly, and the evidence at the hearing showed that an accident reconstruction was not possible, the victim did not accelerate, and the defendant decided not to replace Buckey or testify. Furthermore, Buckey did not have to get a second opinion, and, even if he did, the defendant has not proved that the State was able to prove its case only because Buckey failed to do so. Therefore, for all the foregoing reasons, this Court must affirm the conviction.

ARGUMENT

1. THE DEFENDANT DID NOT PRESERVE HIS ARGUMENT THAT THE STATE HAD TO PROVE HE INTENDED TO USE HIS SUV AS A DEADLY WEAPON, AND THE EVIDENCE PROVED BEYOND A REASONABLE DOUBT THAT THE MANNER IN WHICH HE DROVE THE SUV RENDERED IT A DEADLY WEAPON AND THAT HE ACTED RECKLESSLY.

The jury convicted the defendant of violating RSA 631:3 (Supp. 2018), which provides, in relevant 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.

RSA 625:11, V (2016) defines a "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." RSA 626:2, II(c) (2016) then provides:

> A person acts recklessly with respect to a material element when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. 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 that a law-abiding person would observe in the situation ….

On appeal, the defendant argues that the evidence at trial was insufficient to prove that his SUV was a deadly weapon, V, DB 4–6, or that he operated it recklessly, DB 7–10. "Because a challenge to the sufficiency

of the evidence raises a claim of legal error, [this Court's] standard of review is *de novo*." *State v. Collyns*, 166 N.H. 514, 517 (2014).

> When the evidence [of an element] is solely circumstantial, it must exclude all reasonable conclusions except guilt. However, [this Court] does *not* determine whether another *possible* hypothesis has been suggested by the defendant which *could* explain the events in an exculpatory fashion. Rather, [it] evaluates the evidence in the light most favorable to the State and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.

State v. Zubhuza, 166 N.H. 125, 130 (2014) (quotation omitted). This Court also "assume[s] all credibility resolutions in favor of the State …." *State v. Saunders*, 164 N.H. 342, 351 (2012). "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. Stanin*, 170 N.H. 644, 648 (2018). The defendant has not met that burden.

A. This Court will not address the substance of the defendant's arguments that the State had to prove he intended to use his SUV as a deadly weapon because he waived them in the trial court and has not invoked the plain error rule on appeal.

The defendant argues that the evidence was insufficient to prove he drove "in a manner that violated RSA 625:11,[V]" because: (1) it should be construed to require proof: (a) that a "Defendant intended to use his vehicle to cause death or serious bodily injury to the victim," and (b) that "death or serious bodily injury [was] more than likely to occur," and (2) "[w]hen all

the circumstances … are considered, it[was] an impermissible stretch of logic to suggest that [he] was trying to cause the death of the victim." DB 6. The defendant did not preserve those arguments in the trial court. In fact, he waived them.

"A motion to dismiss must state the specific ground on which it is based on order to preserve the issue for appeal." *State v. Guay*, 162 N.H. 375, 380 (2011). "Any objection not raised *at trial* is deemed waived." *State v. Dodds*, 159 N.H. 239, 244 (2009) (emphasis added). An exception to that rule applies if the "issues … could not have been presented to the trial court before its decision," in which case, they "must be presented to it [by the appellant] in a motion for reconsideration." *In re Sweatt & Sweatt*, 170 N.H. 414, 424 (2017) (quotation omitted).

At trial, the defendant argued that the court had to dismiss the charge because the State had to prove that "the way [the SUV] was used," and "the manner of operation" made it "capable of producing death or serious bodily injury," and it failed to do so. JT 106. However, the defendant did not raised the statutory interpretation arguments he is now advancing on appeal. Therefore, he waived those arguments. *See Dodds*, 159 N.H. at 243–44 (holding that because Dodds did not specify at trial that his motion to dismiss for insufficient evidence was based on statutory interpretation, the statutory interpretation arguments he advanced on appeal were waived).

Furthermore, even if the defendant could have preserved his arguments in his post-trial motion, he did not do so. Instead, he merely argued, "The State failed to prove beyond a reasonable doubt that [he] did intentionally and recklessly brake or act aggressively while entering [the] victim's lane of travel with the intent to place [him] in danger of serious

injury." DB A12. Thus, because the defendant never specified that his challenge to the sufficiency of the evidence was based on statutory interpretation, he waived the statutory interpretation arguments he is now advancing on appeal. *See Dodds*, 159 N.H. at 243–44.

Moreover, the defendant has not invoked this Court's plain error rule. Therefore, this Court will decline to address the substance of his arguments. *See State v. Brum*, 155 N.H. 408, 417 (2007) (declining to consider Brum's argument because he did not preserve it in the trial court or invoke the plain error rule on appeal).

B. Even if this Court addresses the defendant's arguments under the plain error rule, there was no error, and even if there was, it was not plain.

> [This Court will] apply the [plain error] rule sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. To reverse a trial court decision under the plain error rule: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). Here, the defendant cannot meet that strict standard because there was no error and even if there was, it was not plain.

i. The trial court did not err in failing to find that the State had to prove the defendant intended to use his vehicle to cause death or serious bodily injury because the plain language of RSA 625:11, V and this Court's interpretation of an analogous statute demonstrate that the State did not have to do so.

This Court has never explicitly addressed whether "[t]he definition of a deadly weapon includes the intent the user of it holds," DB 5, or whether it applies only when "death or serious bodily injury is more than likely to occur," DB 6. Thus, the resolution of the issues requires statutory interpretation. "The interpretation of a statute is a question of law, which [this Court] will review *de novo.*" *State v. Lantagne*, 165 N.H. 774, 777 (2013).

> When examining the language of the statute, [this Court will] construe [it] according to its plain and ordinary meaning. [This Court will] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [This Court will also] construe the Criminal Code "according to the fair import of [its] terms and to promote justice." RSA 625:3 [(2016)].

Id. (citations omitted).

The defendant argues that RSA 625:11, V "includes the intent the user of it holds" because [t]he phrase 'in the manner it is used, intended to be used, *or* threatened to be used' is inseparable from the rest of the definition." DB 5 (emphasis added). However, the "[t]he word 'or' is defined as 'a function word to indicate an alternative between different or unlike things.'" *Merrill v. Great Bay Disposal Serv.*, 125 N.H. 540, 543 (1984) (ellipsis omitted) (quoting *Webster's Third New International*

Dictionary 728 (1961)). Therefore, the definition of the word "or" alone supports a finding that the legislature created three separate or alternative means of proving an object is a deadly weapon, only one of which includes "the intent the user of it holds." *See Merrill*, 125 N.H. at 543 (holding that the definitions of "either" and "or" "alone support[ed] the conclusion that the legislature created two separate or alternative classes").

Furthermore, this Court has repeatedly "emphasize[d] that the specific manner of use *or* intended use and the circumstances surrounding that use *or* intended use determine whether an object is a deadly weapon under RSA 625:11, V." *State v. Duran*, 162 N.H. 369, 374 (2011) (emphasis added). In addition, this Court has held that an unloaded gun can be a deadly weapon if a defendant threatens to shoot someone with it, *State v. Hatt*, 144 N.H. 246, 248 (1999), and a defendant who did so could not possibly have intended to cause death or serious bodily injury with the gun.

Moreover, this Court has interpreted RSA 631:4 (2016), and has held that "[a]lthough use of a deadly weapon is an element of the crime of felony criminal threatening, it is not a material element as defined in RSA 625:11, V," so "the State [is] not obligated to prove a specific *mens rea* with respect to that element." *State v. McCabe*, 145 N.H. 686, 691 (2001). RSA 631:3 is analogous to RSA 631:4 because in both, "[t]he only statutory reference to the use of a deadly weapon is contained in the penalty section," and it "classifies [the offense] as a misdemeanor, except when a deadly weapon is used," in which case, "the offense is increased to a class B felony." *Id.* at 692 (citing RSA 631:4, II(a)); *see also* RSA 631:3, II. Thus, this Court's case law also supports a finding that RSA 631:3, just like

RSA 631:4, "does not require that the weapon's use be accompanied by a culpable mental state." *Id.* Therefore, the trial court did not err.

ii. Even if the trial court erred, the error could not have been plain because the defendant's arguments turn upon interpretations of the statute that this Court has never adopted.

"When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error. 'Plain' as used in the plain error rule is synonymous with clear or, equivalently, obvious." *Pennock*, 168 N.H. at 310. (quotations, citations, and parentheticals omitted). An error cannot be plain if the defendant's argument "turns upon an interpretation of [a statute] that [this Court] has never adopted." *Depanphilis v. Maravelias*, No. 2017-0139, order at 3 (N.H. July 28, 2017) (non-precedential).

Here, the defendant's arguments concerning the sufficiency of the evidence that his SUV was a deadly weapon turn upon interpretations of RSA 625:11, V that this Court has never adopted. Therefore, any error by the trial court could not have been plain.

C. The evidence was sufficient to prove that the specific manner in which the defendant used the SUV and the circumstances surrounding that use rendered it a deadly weapon.

The defendant also argues, in the alternative, that the evidence was insufficient to prove he used his SUV as a deadly weapon, DB 5, because "the damage done to [it] as a result of the contact was minimal," and "situations such as the one that led to the accident … occur on an everyday

basis," DB 6. However, to prove that the SUV was a deadly weapon, the State had to prove only that "the manner in which [it] was used was capable of causing death or serious bodily injury." *State v. Mayo*, 167 N.H. 443, 456 (2015). The State met that burden.

As demonstrated in the statement of facts, viewed in the light most favorable to the State, the evidence proved the following: The defendant was driving a 7,200-pound SUV in the left lane on I-89 North and was following too closely to a much smaller VW Jetta that was traveling 67 or 68 miles per hour. After several seconds, the defendant made a hand gesture. Then, after the VW and the SUV passed a slower moving vehicle that was in the right lane, the defendant moved into that lane without signaling and accelerated. At that time, there were vehicles in front of and behind the SUV and the VW.

While the defendant was accelerating to pass the VW, the cars in front of the VW and the SUV started braking and slowing down for the construction zone. However, the defendant continued accelerating, and, as soon as the front of the SUV cleared the front of the VW, he started braking to avoid hitting the car in front of him, abruptly cut in front of the VW, and continued braking to avoid hitting the car that was now in front of him. The back of the SUV was less than a car length from the front of the VW as the defendant crossed in front of the VW, so the victim braked hard and tried to turn right, but the VW hit the SUV's back bumper and the bumper pulled the VW to the left. The defendant then stopped braking and accelerated, which caused the VW to veer to the right and the victim to lose control. The VW skidded for 3 seconds, went across the right lane, hit a concrete bridge

guardrail over an underpass, and then skidded down the right lane and breakdown lane for another 7 seconds before it finally stopped.

A crew had been working on the bridge for months, and the VW was going 65 to 70 miles per hour when it hit the guardrail. The impact caused extensive damage to the VW's front and passenger's side, and there were VW parts and fluids all over the highway. The victim had airbag dust in his respiratory system and eyes, and his three-year-old son, who was in a child's safety seat in the rear seat, was crying. Other drivers stopped to help, but the defendant just kept driving. An ambulance later took both victims to the Dartmouth Hitchcock Medical Center.

The only reasonable conclusion a jury could have reached from the foregoing evidence was that the defendant used his SUV in a manner that was capable of producing death or serious bodily injury to the victims, other drivers, and the work crew. Therefore, the evidence was sufficient to prove beyond a reasonable doubt that the SUV was a deadly weapon.

D. The evidence was also sufficient to prove that the defendant drove recklessly.

The defendant argues that the evidence was insufficient to prove that he drove recklessly because he could not have foreseen the victim "losing control and crashing," DB 8, and his subsequent conduct supports a finding that "he had no consciousness of having used his vehicle as a deadly weapon," DB 9–10. However, "[w]hether a defendant acted recklessly does not depend upon …. whether [he] anticipated the precise risk …." *State v. Belleville*, 166 N.H. 58, 63 (2014).

Furthermore, the State had to prove only "that the defendant was aware of but consciously disregarded a substantial, unjustifiable risk that serious bodily injury would result from his conduct," and "that [his] disregard for the risk of injury to another was a gross deviation from the regard that would be given by a law-abiding citizen." *Hull*, 149 N.H. at 713. In other words, the State had to prove that the defendant's abruptly entering the left lane less than a car length in front of the VW while braking and then continuing to brake right in front of the VW created a substantial and unjustifiable risk of injury to the victims or other drivers, that he was aware of the risk, that he consciously disregarded it, and that a law-abiding citizen would not have done so. The State met that burden.

As demonstrated in the statements of facts, when viewed in the light most favorable to the State, the evidence proved the facts set out in § C, above, and also proved the following facts: The defendant started braking because the car in front of the SUV was slowing down and the SUV was getting very close to it. At that time, the car in front of the VW was also slowing down, its brake lights were clearly visible, and the distance between it and the VW was rapidly decreasing. However, the defendant did not stay in the right lane. Instead, he abruptly cut in front of the VW while he was braking and then continued braking in order to avoid hitting the car that had been in front of the VW and was now in front of the SUV.

Based on all the evidence, the only reasonable conclusions the jury could have reached were that: (1) the defendant knew the car in front of the VW was braking and the distance between them was decreasing before he crossed the centerline, (2) he entered the left lane abruptly and close to the VW only because he wanted to get in front of it before he lost the

opportunity to do so, (3) he was braking when he did so because he knew the car in front of the VW was still braking, (4) he knew the VW was right behind him when he did so, (5) he knew the victim might have to brake suddenly or take other evasive action to avoid hitting the SUV, (6) he knew doing so could create a substantial and unjustifiable risk of injury to the driver of the VW or the other cars, (7) he consciously disregarded the risk, and (8) a law-abiding citizen would not have done so.

The defendant argues, however, that his "conduct subsequent to the incident does not suggest he had the culpable mental state at the time of the accident" because "when the officer found [him] at his house, he denied having any knowledge of the accident" and his SUV was "not hidden from view." DB 9. However, the defendant has not made any citations to the trial record, and the State could not find any place in it where a witness testified that the defendant "denied having any knowledge of the accident."

Furthermore, a reasonable jury could have concluded that: (1) the defendant stopped braking and accelerated because he knew the VW hit the SUV, and (2) he did not stop, report the collision, or hide his SUV because he knew the VW crashed and he caused it to do so, but he did not know it had cameras that recorded him doing so. Therefore, the evidence was also sufficient to prove that the defendant drove recklessly.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE HE FAILED TO DEMONSTRATE THAT HIS TRIAL COUNSEL WERE INEFFECTIVE OR THAT, BUT FOR THE ERRORS, HE WOULD NOT HAVE BEEN FOUND GUILTY.

The defendant argues that the trial court erred in denying his motion for a new trial because he was deprived of his Sixth Amendment right to the "reasonably competent assistance of counsel." DB 10. "The Sixth Amendment guarantees criminal defendants … 'the right to the effective assistance of counsel.'" *Garza v. Idaho*, 139 S. Ct. 738, 743–44 (2019) (quotation omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). In order to prevail on an ineffective assistance of counsel claim, the defendant must prove: (1) that "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 687–88; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

"*Strickland*'s first prong sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). Counsel "has discharged his constitutional responsibility so long as his decisions fall within the 'wide range of professionally competent assistance.'" *Id.* (quoting *Strickland*, 466 U.S. 690). "[T]here is a "strong presumption" that counsel's strategy and tactics [did so]," and "courts should avoid second-guessing counsel's performance with the use of hindsight." *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006) (quoting *Strickland*, 466 U.S. at 689). "It is only where, given the facts known at the time, counsel's 'choice was so patently unreasonable that no competent

attorney would have made it,' that the ineffective assistance prong is satisfied." *Id.* (quoting *Strickland*, 466 U.S. at 693–94).

> Under the prejudice prong, not all errors by counsel are sufficient to meet the standard of a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different. Rather, a reasonable probability is a probability sufficient to undermine confidence in the outcome. This is a highly demanding and heavy burden. A defendant's failure to satisfy one prong of the *Strickland* analysis obviates the need for a court to consider the remaining prong.

Knight, 447 F.3d at 15 (quotations, citations, and brackets omitted). Here, the defendant has not met his burden under either prong.

The defendant first argues that Buckey's "decision to not pursue an accident reconstruction was not a strategic decision owed deference" because (1) "only by deconstructing the video to determine the speed of the corresponding vehicles could [he] produce exculpatory evidence" that "had the propensity to create reasonable doubt in regard to the intent element of reckless conduct," (2) Buckey was never "advised that an accident reconstruction was unobtainable," and (3) "[i]t would [have been] reasonable to pursue [one] to replace the only line of defense lost" when The Crash Lab expert said he could not assist Buckey. DB 11.

The defendant then argues that Buckey's errors actually prejudiced him because: (1) "[a]n expert would be able to determine the speed of the [VW] through a reconstruction of the accident," DB 12; (2) the evidence could show that "but for [the] victim accelerating after [the SUV] was in front of [the VW] the subsequent loss of control would not have occurred," DB 12; (3) it "could create reasonable doubt on [his] intent to commit

reckless conduct or contribute to the theory of pure accident," DB 12–13; and (3) in the absence of an expert, "he had to testify … to produce such evidence," but he did not do so, which left him without "affirmative evidence that cast doubt on whether [he] acted with intent," DB 13.

The defendant's arguments are fundamentally flawed for several reasons. First, "reckless conduct requires no purposeful *mens rea* …." *State v. Thomas*, 154 N.H. 189, 192 (1989). Therefore, affirmative evidence of his lack of intent could not have changed the outcome of the trial.

Second, as demonstrated in the statement of facts, Lakowicz testified that he could not determine the speed of the VW or recreate the accident because the yaw marks had been visible for only a short time. Lakowicz also testified that the victim waited too long to disengage the VW's cruise control after the SUV entered his lane, and that after he did so, the distance between the vehicles increased. Therefore, Lakowicz's testimony belies the defendant's claims that an expert could have recreated the accident, and that doing so could have shown that the victim accelerated.

Third, as demonstrated in the statement of facts, trial counsel gave the defendant the opportunity to have a status of counsel hearing if he disagreed with their theory of defense or their decision to forgo getting an expert, and the defendant did not do so. Therefore, because the defendant was "fully informed of the reasonable options before him" and "agree[d] to follow a particular strategy," he cannot complain of ineffective assistance of counsel. *United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir.), *cert. denied*, 493 U.S. 968 (1989).

Fourth, as demonstrated in the statement of facts, defense counsel offered the defendant the opportunity to testify and told him it was his

decision, and the defendant then decided not to testify. Therefore, any prejudice caused by his failure to testify was of his own making.

Furthermore, even if those fundamental flaws were not fatal to the defendant's claims, as demonstrated in the statement of facts, The Crash Lab expert reviewed and listened to the videos and agreed with the State's experts' conclusions that the defendant drove recklessly and caused the VW to crash. "Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir.1995) (quotation omitted). Therefore, the defendant's "[c]ounsel [was] not ineffective for failing to shop around for additional experts." *Smulls v. State*, 71 S.W.3d 138, 156 (Mo. 2002).

In any event, it cannot be said that Buckey's failure to get a second opinion or an accident reconstruction "was so patently unreasonable that no competent attorney would have made it,'" given the facts known to Buckey at the time. *Strickland*, 466 U.S. at 693–94. It also cannot be said "that the State was able to prove its case only because of [Buckey's] failure" to do so. *State v. Thompson*, 161 N.H. 507, 532 (2011). Therefore, the trial court properly denied the defendant's motion for a new trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
By its attorneys,
The Office of the Attorney General

June 13, 2019

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CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 9,233 words, which is less than the total permitted by the rule. Counsel has relied on the word count of the computer program used to prepare this brief.

June 13, 2019 /s/ *Susan P. McGinnis*

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that a copy of the State's brief will be served on counsel for the defendant, Michael Shklar, through the New Hampshire Supreme Court's electronic filing system.

June 13, 2019 /s/ *Susan P. McGinnis*

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COPY

THE STATE OF NEW HAMPSHIRE

SULLIVAN COUNTY

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

STATE OF NEW HAMPSHIRE

VS.

HENRY CARNEVALE

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR A NEW TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

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 Ineffective Assistance of Counsel, 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 to set aside the verdict, motion for a new trial, and motion for reconsideration. In his pleading, the defendant argues that trial counsel was

deficient because they "failed to investigate and present an accident reconstruction expert..." See paragraph 18, defendant's pleading. The defendant further argues trial counsel failed to "present the phone records of the victim", did not inquire about the victims "narcolepsy" and/or any distracted driving, and that trial counsel neglected to inquire about a "computer" that could be heard after the accident. See paragraph(s) 22-25, defendant's pleading. Additionally, the defendant also included within said pleading an assertion of juror misconduct, and a failure by trial counsel to object to the State's "closing argument." Such arguments must fail.

7. On October 5, 2017, the Sullivan County Attorney's Office received the defendant's pleading titled "Amended Motion For Reconsideration." It is unclear exactly what manner the defendant seeks to advance the arguments contained within his pleading; however, out of an abundance of caution and in the interest of preserving any arguments, the State will treat said assertions as if they underlie the defendant's claim of ineffectiveness.

8. The facts relied upon in support of this State's pleading are generated from undersigned counsel's recollection and the review of the record. Additionally, the State has depended upon the attached transcripts of depositions taken of both Attorney Jay Buckey, and Attorney Lauren Breda. See Appendix A and B. The parties have further agreed to introduce the depositions in lieu of live testimony. Undersigned counsel further relies upon the evidence introduced at trial in its entirety.

A. THE DEFENDANT CANNOT SATISFY HIS BURDEN THAT THE REPRESENTATION PROVIDED BY THE NEW HAMPSHIRE PUBLIC DEFENDER WAS CONSTITUTIONALLY DEFICIENT.

9. Both the United States Constitution, and the New Hampshire Constitution, provide criminal defendant's with the right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Sharkey, 155

N.H. 638, 640-641 (2007). New Hampshire Courts first review claims for ineffective assistance of counsel under the State Constitution. State v. Ball, 124 N.H. 266, 231 (1983). Under New Hampshire law, a successful claim of ineffective assistance of counsel requires a criminal defendant establish, "first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. Sharkey, 155 N.H. at 640-641. "A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective." State v. Candello, 2017 N.H. Lexis 138 (2017) (citation omitted).

10. As a threshold matter, the defendant does not appear to specifically raise the "prejudice" issue in either of his two pleadings. "[T]he preferable course in a challenge based upon ineffective assistance of counsel is to require the defendant to prove as a threshold mater that the alleged error by counsel prejudiced his case." Candello, 2017 N.H. Lexis 138. With respect to the second prong, "the defendant must establish that there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See State v. Collins, 166 N.H. 210, 213 (2014). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id. "In making this determination, [courts] consider the totality of the evidence presented at trial." Id.

11. While the defendant suggests the trial results may have been different had an "appropriate investigation by an expert" been conducted, the defendant appears to place all his emphasis on the fact that trial counsel, through their failure to explore certain avenues as alleged, was constitutionally deficient in their performance. See paragraph 18, defendant's pleading. Attorney Buckey testified, during his deposition, that the expert he consulted with would not be helpful. Buckey Dep. pg. 42, 6-12. Specifically, the expert suggested "that the video portrayed reckless conduct." Buckey Dep. pg. 42, 6-9. The defendant continually asserts the need for an accident reconstruction as being vital in this case. However, he does not state how the presence of an accident reconstruction would have materially

altered the outcome in this trial. Nor does he suggest the accident reconstruction would have been able to address the content of the video evidence in any meaningful manner. The defendant's inability to articulate how the outcome in his case would be different, had his suggestions been adopted by trial counsel, is fatal to his ineffective claim. Collins, 166 N.H. at 213. Additionally, the State would respectfully direct the court to the arguments made in its objection to the defendant's motion to set aside the verdict, dated September 5, 2017, regarding the status of the evidence introduced at trial, and for consideration in whether the defendant's "prejudice" argument has merit. See Id. ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

12. The defendant, having failed to establish whether the outcome of his trial would have been any different, thus has failed to show the requisite "prejudice" necessary to prevail on his claim of ineffective assistance of counsel. Candello, 2017 N.H. Lexis 138; Collins, 166 N.H. at 213. Consequently, this Court need not consider whether trial counsel's performance was constitutionally deficient. Candello, 2017 N.H. Lexis 138 ("[I]f the defendant cannot demonstrate such prejudice, we need not even decide whether counsel's performance fell below the standard of reasonable competence.").

13. In the event this Court determines, as a threshold matter, the defendant has shown certain prejudice, the defendant cannot meet his burden as to trial counsel's performance. "To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standards of reasonableness." Collins, 166 N.H. at 212. The reasonableness of counsels performance is assessed "under prevailing professional norms." State v. Whittaker, 158 N.H. 762, 768 (2009). "To meet this prong of the test, the defendant must show that counsel made such egregious errors that [they] failed to function as the counsel the State Constitution guarantees." Collins, 166 N.H. at 212. New Hampshire courts "afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must take." Candello, 2017 N.H. Lexis 138. "The

defendant must overcome the presumption that trial counsel reasonably adopted [their] trial strategy." Collins, 166 N.H. at 213. "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.

14. As an initial matter, the defendant received representation from both Attorney Jay Buckey and Attorney Lauren Breda. Attorneys Buckey and Breda worked on the defendant's case pretrial, as well as appearing on his behalf at the trial. Breda Dep. pg. 38, 12-23, pg. 40, 19-23, pg. 41, 1-3. Attorney Buckey has been employed as a staff attorney with the New Hampshire Public Defender for approximately 6 years. Buckey Dep. pg 99, 7. Attorney Buckey is an experienced attorney having been involved in "about a dozen" jury trials. Buckey Dep. pg 99, 10. Attorney Buckey has utilized two (2) experts during his trial experience, one being in a negligent homicide case. Buckey Dep. pg 99, 14-8. Undersigned counsel, having been at the Sullivan County Attorney's Office for six (6) years, is aware that Attorney Buckey has likely defended a significant number of clients, against a variety of criminal charges, during his tenure.

15. Attorney Breda has been a staff attorney at the New Hampshire Public Defender since 2013. Breda Dep. pg. 38, 6. Prior to joining the Public Defender's Office, Attorney Breda, after graduating from the University of New Hampshire, served as a clerk with the New Hampshire Superior Court, a position that affords clerks a unique understanding of the trial court process. Breda Dep. pg. 38, 4-5. See **https://www.courts.state.nh.us/superior/sulawclerkprogram.htm**. ("Law clerks will gain a keen understanding of the workings of the trial courts of New Hampshire.").

16. In addition to having two attorneys represent him, the defendant had the resources of the investigative unit at the Public Defender's Office as well. See e.g. Buckey Dep. pg 26, 19-23 and pg. 139, 14-21. Furthermore, Attorney Jennifer Cohen, the

managing attorney for the Newport Office, was also consulted regarding the defendant's case. Buckey Dep. pg 128, 14-23 and pg. 129, 8-9. As noted above, the defendant appears to have been afforded significant, and competent resources to assist in his defense of these matters.

17. The defendant's primary argument, with respect to his claim of ineffective assistance of counsel, appears to be trial counsel's election not to utilize an accident reconstruction expert in this case. However, the defendant's reliance on the import of an accident reconstruction, and the use of an expert to opine on the same, is entirely misplaced. Although Attorney Buckey was not required to consult with an expert, or to rely upon an expert, he did in fact consult two (2) experts on two (2) separate issues in this case. Buckey Dep. pg 37, 22-23, pg. 41, 17-23, pg. 42, 13-23. See Whittaker, 158 N.H. at 769 ("recogniz[ing] that reasonably diligent counsel are not always required to consult an expert as part of pretrial investigation…'").

18. Attorney Buckey first consulted an expert from Crash Lab Inc. regarding whether they could review the video associated with this case, and provide any requisite guidance. Buckey Dep. pg 39, 12-22. Attorney Buckey consulted with Crash Lab, Inc., in part, at the defendant's request. Buckey Dep. pg 41, 4-13. Attorney Buckey testified that the individual he consulted with was a "former state police officer who did accident reconstructions for a long time." Buckey Dep. pg 110, 11-15. According to Attorney Buckey, the expert from Crash Lab, Inc. advised that "he did not think he would be of assistance because he essentially thought that the video portrayed reckless conduct[,]" a fact not likely helpful to the defendant's case given the nature of the charge. Buckey Dep. pg 42, 5-12, pg. 47, 2-22. Attorney Buckey testified that he is aware of his reciprocal discovery obligations, including the need to turn over, to the State, any expert reports issued. Buckey Dep. pg 50, 10-23, pg. 51, 1-23, pg. 52, 1-6. Attorney Bucky added that, in his opinion, had he further pursued the expert avenue, said report would likely have been turned over to the State, and the State would be privy to the experts adverse opinion. Buckey Dep. pg 51, 5-19.

19. The defendant asserts trial counsel was defective because no accident reconstruction was conducted in this case, that the state police failed to conduct a "proper investigation", and trial counsel neglected to make inquiries into the same. See Buckey Dep. pg 109, 10-12; See also defendant's pleadings. Attorney Buckey stated he elected not to consult with said expert about whether there was a "proper investigation", because "there was a high-definition video of the entire event." Buckey Dep. pg 109,14-15. In New Hampshire, trial counsel is afforded latitude in crafting appropriate trial strategy. State v. Thompson, 161 N.H. 507, 529 (2011). Attorney Buckey testified he had made the decision not to hire the expert because "they indicated to [him] that they would provide an unfavorable opinion. Buckey Dep. pg 120, 17-23. The defendant apparently asked Attorney Buckey to "get a second opinion". However, while "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions', including questions of overarching defense strategy", Attorney Buckey need not defer to the defendant on every "tactical decision." Candello, 2017 N.H. Lexis 138. Here, the defendant apparently fails to recognize that Attorney Buckey's decision not to retain an expert in this case, was not only a sound strategic decision, it was necessary to prevent the defendant from committing legal suicide.

20. The defendant also suggests trial counsel was defective because of what he suggests was a failure to diligently inquire about the victims vehicle and the ability to extract data from the same. Again, the defendant's reliance upon such an assertion is not reasonable in light of the facts. Attorney Buckey testified he consulted with another expert at Crash Lab, inc, one who "specialized in getting black box or data recorders off cars". Buckey Dep. pg 42, 17-22. Attorney Buckey took affirmative steps to secure funding from the Court for said purpose. Buckey Dep. pg 43, 3-14. The victims vehicle was not available for physical inspection; however, Attorney Buckey, along with the investigative arm of the Public Defender, sought to obtain the necessary vehicle information for the expert's consideration. Buckey Dep. pg 139, 14-21. The expert, once armed with the victim's vehicle identification information, advised Attorney Buckey said data

was not available due to the country the vehicle was manufactured in. Buckey Dep. pg 44, 5-15; See Exhibit C, E. The defendant apparently was not comfortable with this response. The victim, as late as the day of trial, continued to press this position, even providing Attorney Buckey and Breda with a document in support of vehicle data extraction. Buckey Dep. pg 142, 8-16; See Exhibit G. However, the document, provided to trial counsel by the defendant, only serves to reinforce the expert opinion received from Crash Lab, inc. See Exhibit G. As such, Attorney Buckey and/or Attorney Breda's decisions not to pursue said theories, even over the objection of the defendant, are certainly reasonable and factually sound. See Collins, 166 N.H. at 212-213; But See Candello, 2017 N.H. Lexis 138.

21. The defendant also takes exception to trial counsel's decision not to present the victims' phone records at trial, as well as the election not to cross examine the victim regarding his conduct prior to the collision. Attorney Buckey testified that the victim's phone records, while not significant to him, were important to the defendant. Buckey Dep. pg 22, 15-21, pg. 23, 3-15. Attorney Buckey explained that he reviewed the video, on more than one occasion, and did not observe any remarkable operation by the victim. Buckey Dep. pg 24, 1-22. However, Attorney Buckey nevertheless pursued obtaining the victim's phone records. Buckey Dep. pg 25, 1-23, pg. 26, 1-11. Attorney Buckey, despite having some initial difficulty obtaining the records, ultimately received the records ahead of the scheduled trial. Buckey Dep. pg 27, 15-17. After review, Attorney Buckey determined there was no text messaging, nor any telephone communication, happening at the time of the offense. Buckey Dep. pg 27, 18-23, pg. 28, 1-6. Thus, Attorney Buckey decided not to introduce the phone records after discussion of the issue with Attorney Breda "at some point." Buckey Dep. pg 28, 7-15.

22. According to Attorney Buckey, the defendant was "not pleased" after he was informed of the decision not to rely upon the phone records. Buckey Dep. pg 28, 16-20. While it is true that attorney's have a duty to consult their clients on

significant decisions, Attorney Buckey and Breda did not need to consult the defendant on each and every tactical decision in this case. See Candello, 2017 N.H. Lexis 138. The issue here being whether Attorney Buckey and Breda's decision to pivot from the phone records was sound, not whether the defendant was entitled to have them introduced at all costs. Attorney Buckey explained allocation of fault was not the issue, thus the phone records would appear to be inconsistent with their "accident theory", a theory crafted based upon the defendant's own version of events. Buckey Dep. pg 16, 7-23; Buckey Dep. pg. 117, 5-6. Attorney Buckey's testimony further suggests the defendant's displeasure stems not from the soundness of the strategic decision, but rather because "he wanted to blame Mr. Mitchell-Hartson for provoking the crash", a theory that does not appear to be supported by the video evidence. Buckey Dep. pg 29, 7-10. A decision to introduce the phone records, an evidentiary item of apparent little value in this context, could have run the risk of distracting the jury from focusing on the evidence supportive of the accident theory. See Whittaker, 158 N.H. at 769; *c.f.* Collins, 16 N.H. at 214. As such, the decision not to pursue the introduction of the victim's phone records, or the distracted driver theory, was an appropriate tactical decision, and one Attorney Buckey and Breda were permitted to make. State v. Cable, 168 N.H. 673, 680 (2016).

23. The defendant initially argued the failure to cross examine the victim on the effect the alleged narcolepsy had on his driving was defective. The defendant subsequently withdrew that argument at a hearing. See Order, August 11, 2017. However, the defendant appears to have tried to renew the argument in his latest motion, dated October 3, 2017. See paragraph 13, defendant's pleading. Again, allocation of fault was not the issue in this case, Attorney Buckey testified that they ruled out the narcolepsy issue, and determined the accident theory to be more viable. Buckey Dep. pg. 35, 11-23; pg. 36, 1-8; Buckey Dep. pg. 117, 5-6. The decision, by Attorney Buckey and/or Attorney Breda to decline to pursue the medical issue theory was a reasoned tactical decision. See Cable, 168 N.H. at

680-681 ("[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms…").

24. Next, the defendant raises a number of new theories in his pleading, dated October 3, 2017, to include, failure to cross examine witnesses on what the defendant characterizes, generally, as an improper accident investigation, a failure to inquire as to proper procedure relative to motor vehicle accidents, and no inquiry into the officers' training and experience. See paragraph(s) 5-9, defendant's pleading. The defendant fails to appreciate that criminal investigations are fluid, unique to the facts, and that there is not necessarily a rigid framework to follow in any particular set of circumstances. In this case, there was a very good video that captured the defendant's conduct. The expert, consulted by the defendant, advised they would not be able to assist because "he essentially thought that the video portrayed reckless conduct." Buckey Dep. pg. 42, 6-11. Neither charge the defendant faced required a showing of contact between the vehicles. See RSA 631:3; RSA 264:25; See also Wilson v. Progressive N. Ins. Co., 151 N.H. 782, 789-790 (2005); Buckey Dep. pg. 108, 5-10. While the issues raised by the defendant, may have been an appropriate line of inquiry in another factual scenario, they appear to be inconsistent with the theory of "accident" built around this case, made difficult by the presence of the video, a fact not usually common in this type of case. Buckey Dep. pg. 16, 10-21. Again, these types of strategic decisions are ones Attorney Buckey and Breda may reasonably make. Collins, 166 N.H. at 212-213.

25. Lastly, the defendant asserts trial counsel was ineffective because they failed to object to certain arguments raised by undersigned counsel during closing arguments. See paragraph 27, defendant's pleading. First, the defendant alleges "the prosecutor insisted that the evidence proved the defendant intentionally and knowingly engaged in 'road rage'…" Id. Such an assertion is patently wrong. A review of the State's closing argument would, in fact, support the State had made it abundantly clear that "road rage" was not what the State was suggesting. See

trial record, approximately 2:45 pm. Thus, such an argument should be disregarded as factually untrue.

26. Second, the defendant takes exception to the State's suggestion the defendant braked in front of the victim. The State is afforded certain latitude, during closing statements, to argue reasonable inferences from the evidence admitted during trial. See e.g. State v. Ainsworth, 151 N.H. 691, 698-699 (2005). The video, obtained from the victim's vehicle, was evidence that was admitted at trial. The video, from the front facing camera, clearly shows the rear of the defendant's vehicle, including any lighting positioned on the rear of the vehicle. The rear of the defendant's vehicle was observed from the time it encroaches on the victims lane, until the camera angle changes positions as the front of the victims' vehicle connects with the guard rail. The State is certainly free to point out certain aspects of the video, as well as any inferences that can reasonably be drawn therefrom, during its closing. Ainsworth, 151 N.H. at 698-699. Moreover, Attorney Buckey, when asked during his deposition why no objection was made, stated "I did not believe that they were objectionable." Buckey Dep. pg. 90, 16-18, pg. 91, 4-9. Attorney Buckey's decision not to object to the State's closing argument is well within his discretion, and was not unreasonable under the circumstances, despite the defendant's belief to the contrary. See Thompson, 161 N.H. at 529.; *c.f.* Collins, 166 N.H. at 214.

27. For the above referenced reasons, the defendant cannot satisfy his burden "that 'no competent lawyer' would have engaged in the conduct..." at issue. Cable, 168 N.H. at 681. Thus, the defendant's motion for a new trial based upon ineffective assistance of counsel must be denied.

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

A. DENY the defendant's motion for a new trial based upon ineffective assistance of counsel; AND

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

Dated October 24, 2017

Justin S. Hersh (Bar #20094)
Deputy Sullivan County Attorney
14 Main Street
Newport, NH 03773
(603)863-7950

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing pleading to Dan Corley, Esquire, counsel for the Defendant, and John Newman, Esquire, this 24th day of October, 2017.

Justin S. Hersh

STATE OF NEW HAMPSHIRE

SULLIVAN COUNTY, S.S. SUPERIOR COURT

Docket No. 220-2016-CR000150

State of New Hampshire

v.

Henry Carnevale

MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 10, 2018

NOW COMES, defendant, Henry Carnevale, by and through counsel, McGrath Law Firm, PA, and hereby files this Motion for Reconsideration of Order Dated April 10, 2018 with Notice of Decision on April 11, 2018.

In support thereof, we find as follows:

1. On April 11, 2018, the Defendant in the above-action received an Order dated April 10, 2018, denying (I) Defendant's Motion for New Trial Due to Weight of Evidence, (ii) Motion to Set Aside the Verdict and Enter Judgment of Acquittal, (iii) Motion for New Trial Due to Juror Misconduct, (iv) Motion to Set Aside Verdict, Motion for New Trial, and Motion for Reconsideration, and (v) Amended Motion for Reconsideration and scheduled a sentencing hearing.

2. New Hampshire Superior Court Rule 59-A states in relevant part, "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;" and shall be filed "within ten (10) days of the date on the Clerk's written notice of the order or decision." See New Hampshire Superior Court Rule 59-A.

3. The Court correctly held that the claim for ineffective assistance of counsel must prove that (I) the attorney's representation fell below an objective standard of reasonableness, and

(ii) the deficiencies prejudiced the defense (See Page 8 of Order dated April 10, 2018). *State v. Eschenbrenner,* 164 N.H. 532, 539 (2013).

4. Further, the Court correctly noted a standard of defense must be provided wide latitude when making tactical decisions entitled to formulate a strategy that is reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. (See Page 9 of Order dated April 10, 2018) [562 U.S.] at 107.

5. In the Court's Order of April 10, 2018, the Court found that Attorney "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 Page 9 of Order dated April 10, 2018.)

6. The Court also found that Attorney Buckey also explored other avenues of defense by obtaining the phone records to look for evidence of distraction by texting. (See Page 9 of Order dated April 10, 2018.)

7. The Court stated that Mr. Carnevale argued there was a lack of testimony from an accident reconstruction expert. Mr. Carnevale's expert places fault for the accident with the victim, Mr. Mitchell-Hartson. (See Page 10 of Order dated April 10, 2018).

8. The Court also notes that defense counsel did consult with an expert and did obtain funds from the Court to retain a specialist on accident reconstruction to review the video and other information. Attorney Buckley noted that there was nothing they could do to be helpful. (See Page 11 of Order dated April 10, 2018).

9. The Court noted that Mr. Carnevale's expert report is "not as much a technical reconstruction of the accident as it is a narrative of the trial testimony and speculation woven

together to represent a theory of why Mr. Carnevale is innocent." (See Page 11 of Order dated April 10, 2018).

10. The Court notes that the defense attorney's theory of defense was based on sound reasons that simply was different from the "blame the victim" premise constructed post-trial. (See Page 11 of Order dated April 10, 2018).

11. The Court further notes that Mr. Carnevale raised related omissions that his attorney should have explored. In particular, the failure of State Police to reconstruct the accident through technical investigation and inadequately documented the condition of Mr. Mitchell-Hartson's car. (See Page 11 of Order dated April 10, 2018).

12. The Court noted the arguments made that the defense counsel failed to argue the above resulting in prejudice to Mr. Carnevale's defense.

13. The Court noted the argument made that Mr. Carnevale's attorney should have challenged the State's assertion that Mr. Carnevale intentionally braked once he got in front of Mr. Mitchell-Hartson which relates to the recklessness charge. The Court found that the post-trial expert did in fact state that Mr. Carnevale did apply his brakes.

14. Further, the Court notes the arguments made that Mr. Carnevale's defense counsel should have objected to the arguments of road rage and contact between the vehicle. The Court states that, "[A]" prosecutor may draw reasonable inferences from the facts proven and has great latitude in closing argument to summarize and discuss the evidence presented to the jury and to urge them to draw inferences of guilt from the evidence."

15. The Court noted that Mr. Carnevale's reconstruction expert stated that there was no contact between the two vehicles. A post-trial argument was made that contact was a prerequisite to a guilty finding.

16. The Court noted that there was evidence of the marks shown on the left rear bumper of Mr. Carnevale's vehicle "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." The Court held that objections related to the pictures admitted into evidence and markings on Defendant's vehicle were unwarranted.

REVIEW OF OVERLOOKED OR MISAPPREHENDED POINTS OF LAW OF FACT

17. Respectfully, the Court erred in failing to consider that defense counsel learned for the first time during Mr. Mitchell-Hartson's trial testimony that he was on cruise control at the time Mr. Carnevale entered his lane of travel in front of him. The Court failed to consider that Mr. Mitchell-Hartson first attempted to operate or disengage his cruise control in an effort to slow down before applying his brakes when Mr. Carnevale entered his lane of travel. The expert testified that this action is what caused the accident. The expert found that Mr. Carnevale was slowing down in front of Mr. Mitchell-Hartson's vehicle while he was on cruise control. Mitchell-Hartson gave up control of the vehicle to cruise control which continued at the same rate of speed in lieu of braking for traffic slowing down in front of him. Mitchell-Hartson then reacted thereafter by applying his brakes and losing control of the vehicle.

18. Second, the defense counsel completely ignored this new and damaging testimony that could have assisted Mr. Carnevale's defense. He failed to ask any questions on cross examination, or mention same at the time of closing.

19. Third, the Court stated the jury could infer from the mark on Mr. Carnevale's vehicle and the movement of the vehicles that contact was made. There is no testimony that contact was made and that it was highly prejudicial to defendant Carnevale that pictures depicting marks on Mr. Carnevale's vehicle, which infer contact between the two vehicles were introduced. Defense counsel failed to conduct any cross examination regarding the marks on Mr. Carnevale's bumper as they relate to the other vehicle driven by Mitchell-Hartson. Further, Mitchell-Hartson's vehicle was not preserved at the accident scene to investigate whether the marks were related to both vehicles.

20. This leads to the next question as to why the State Troopers, who are trained and required to conduct an accident reconstruction on a "road rage" type of case, failed to conduct a textbook accident reconstruction and retain the vehicles pending investigation. It should be noted that they lost and/or failed to preserve Mr. Mitchell-Hartson's vehicle after the State confiscated Mr. Carnevale's vehicle. As a result of failing to match up the marks on the bumper and allowing the evidence to be destroyed, it was highly prejudicial to Mr. Carnevale's defense, for defense counsel's failure to explore, object to, or mention at closing, the problems with the evidence. This would have supported the accident theory.

21. Although the Court noted that funds were granted to Mr. Carnevale's defense counsel, defense counsel only used $280 of those funds for a data search, to determine if Mr. Mitchell-Hartson's vehicle had a black box. That no funds were used for accident reconstruction and no accident reconstruction was ever conducted or requested.

22. Invoices provided by Crash Labs to the Court supported the limited data search and not retention of an accident reconstruction expert. The Court failed to consider these facts. Mr. Carnevale would have benefitted from expert testimony regarding the accident reconstruction at trial.

23. The Court did not consider evidence suggesting that an accident reconstruction by the State Troopers was required and not conducted at this criminal scene. Further, defense counsel failed to explore this crucial requirement during trial.

24. Accident reconstruction testimony would have shown that the vehicles did or did not make contact. It would have required measurement and comparison of the bumpers of the respective vehicles. Please note, as per the expert, Mr. Carnevale has scratch marks on the bumper that were aged prior to the accident. As a result, for the jury to infer contact as a result of the photographs, without objective, or further inquiry was highly prejudicial to Mr. Carnevale's defense.

25. Failure to raise the aforesaid objections and arguments during trial and cross examination of key evidence and testimony, fell below an objective standard of reasonableness by defense counsel and fell below a constitutional standard. As a result, Mr. Carnevale was found guilty.

26. Further, the defendant's expert offered an expert opinion based on defendant's lack of evidence and proper procedure by State Troopers which was not considered by the Court. In fact, the Defendant's expert testified that he went out and investigated, measured and obtained data at the accident scene. Unlike the State Troopers or any other expert, Mr. Carnevale's expert conducted an accident reconstruction, measured every aspect of the course of travel between the two vehicles, markings on the roadway, and considered the facts that were provided in police reports to support his opinion. No other evidence was provided from a technical reconstruction other than from the post-trial testimony and evidence of the expert.

27. The Court found however, that the expert's testimony was simply a narrative of the trial testimony and speculation. Respectfully, the court erred in considering the evidence introduced

by the expert. As a result, Mr. Carnevale's defense was prejudiced and this evidence should have been considered by a jury. This case required expert testimony and accident reconstruction, as demonstrated by Mr. Carnevale's expert post-trial and his animation of the reconstruction of the accident showing the vehicles traveling and impact with the guardrail. The jury was entitled to hear expert testimony which provides a completely different picture as to how this accident occurred.

28. It was acknowledged that Mr. Carnevale pleaded with defense counsel to obtain a second opinion prior to the trial. The requests were ignored by defense counsel even though funds were made available for same. The Court did not consider this matter.

29. For the foregoing reasons, it is respectfully requested that the Court reconsider the facts, consider the holding in *State v. Whittaker*, 158 N.H. 762 (NH 2009) which is not consistent with the instant ruling. As cited in *Whittaker*, there was a clear need for Defendant's trial counsel to consult with an independent accident reconstruction expert because the exact nature of how the collision occurred was vital to the defense. *Id.* at 771. [*Strandlien v. State*, 156 P.3d 986, 993 (Wyo.2007); see also, *Gersten*, 426 F.3d at 608, 771]. In *Gersten,* the Court also stated, " [F]ailing to present exculpatory evidence is not a reasonable trial strategy. Id. at 611." Id. at 775.

30. The court, properly relies on cases regarding the standards for proper representation, but fails to consider cases that relate in particular to accident reconstruction, which is prejudicial to defendant's case.

WHEREFORE, Defendant prays that this Court:

A. Grant the within Motion for Reconsideration of the Court's Order dated April 10, 2018; and,

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

Dated: April 20, 2018

McGRATH LAW FIRM, PA
Counsel for Defendant, Henry Carnevale

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

CERTIFICATE OF SERVICE

I, Daniel J. Corley, hereby certify that a copy of the foregoing Motion for Reconsideration has been mailed first class, postage prepaid, this day, to the following parties:

Justin S. Hersh, Esq.
Deputy County Attorney
Sullivan County Attorney's Office
14 Main Street
Newport, NH 03773

Dated: April 20, 2018

By:_____
Daniel J. Corley

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THE STATE OF NEW HAMPSHIRE

SULLIVAN COUNTY

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

STATE OF NEW HAMPSHIRE

VS.

HENRY CARNEVALE

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 10, 2018

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 Reconsideration of Order Dated April 10, 2018, 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 to set aside the verdict, motion for a new trial, and motion for reconsideration.

7. On October 5, 2017, the Sullivan County Attorney's Office received the defendant's pleading titled "Amended Motion For Reconsideration."

8. This Honorable Court held two (2) hearings on separate dates to address the defendant's post-verdict pleadings. This Honorable Court, on April 10, 2018, issued an order denying each of the defendant's post-verdict pleadings. The Court subsequently scheduled the sentencing in this matter for April 20, 2018.

9. The defendant, through counsel, filed a motion to continue the sentencing with the assent of the State. The purpose of said request being the defendant's intention to file a motion to reconsider this Court's April 10, 2018 Order. The plea has been rescheduled for May 9, 2018.

10. On April 20, 2018, undersigned counsel received a copy of the defendant's motion for reconsideration of order dated April 10, 2018 by email. The Sullivan County Attorney's Office subsequently received a hard copy of said pleading on April 23, 2018.

11. New Hampshire Superior Court Rule 12 (e) states "[a] party intending to file a motion for reconsideration or to request other post-decision relief shall do so within 10 days of the date on the written Notice of the order or decision..." Super. Ct. R. 12 (e); See also Super. Ct. Crim. R. 43 (a). According to the rule, 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..." Super. Ct. R. 12 (e); Super. Ct. Crim. R. 43 (a).

12. The State appreciates that New Hampshire Superior Court Rule 12 (e) does not require an "answer or objection to a motion for reconsideration...unless ordered by the court." Super. Ct. R. 12 (e) 1; See also Super. Ct. Crim. R. 43 (b). To date, the State has not heretofore received an order or notice from the Court requiring such a response. However, out of an abundance of caution the State nevertheless issues its objection to the requested relief. Super. Ct. R. 12 (e) 1; See

also Super. Ct. Crim. R. 43 (b) ("...but any answer or objection must be filed within ten days of the notification of the motion.").

13. This Honorable Court entertained two (2) separate days of hearings, which addressed the defendant's post-verdict pleadings in total. Upon information and belief, the defendant's expert produced extensive testimony on direct examination, put forward an animation, and was also subjected to lengthy cross examination. While the record would be the most accurate recitation of the testimony, undersigned counsel recalls many of the issues the defendant raised in his motion to reconsider, have been raised and/or were discussed during the two hearings. This Court, after having presided at hearings on pretrial motions, the criminal trial, and two days of post-verdict hearings, issued a lengthy and detailed Order, dated April 10, 2018, denying the defendant's requested relief in total. While the defendant's counsel has written a lengthy pleading requesting this Court reconsider its April 10, 2018 Order, said pleading appears to have included many of the same subject matters that have previously been presented to this Court, and were presumably further considered by this Court.

14. For the above referenced reasons, the defendant's motion to reconsider should be denied and sentencing should go forward as scheduled on May 9, 2018.

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

A. DENY the defendant's motion for reconsideration of order dated April 10, 2018; AND

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

Dated April 27, 2018

Justin S. Hersh (Bar #20094)
Deputy Sullivan County Attorney
14 Main Street
Newport, NH 03773
(603)863-7950

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 27th day of April, 2018.

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

Re: Defendant's Motion to Reconsider Order of April 10, 2018

The motion is to reconsider the part of an order denying the defendant's claim of ineffective assistance of counsel. A jury convicted the defendant of reckless conduct and conduct after an accident in connection with the crash of another vehicle. The motion questions whether the order adequately addressed trial counsel's determinations to forego accident reconstruction analysis and to put blame for the incident on the victim.

As noted in the order, a video recording of the incident informed defense counsel's trial strategy and caused him to frame it as an accident. The video showed the jury precisely what happened and it supports trial counsel's conclusion that the jury was unlikely to find fault with the victim. And with the video, it wasn't necessarily worthwhile to advance an alternative theory of how the crash occurred. In fact, defense counsel testified that he consulted an expert in accident reconstruction who viewed the video and told him, in

essence, that it was dispositive. This advice explains not only the limited funds expended on an accident reconstructionist, but also defense counsel's decision to address the video head–on and argue it reflects an accident rather than criminal conduct.

The motion does not describe overlooked or misapprehended points of fact or law. Super. Ct. Crim. Pro. R. 43(a). The motion is DENIED.

SO ORDERED.

DATE: MAY 4, 2018

BRIAN T. TUCKER
PRESIDING JUSTICE

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: **1363353C**

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: **Guilty**	Clerk: **Catherine J. Ruffle**
Crime: **Conduct After Accident**	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 **6 months**

☑ 2. This sentence is to be served as follows:
- ☑ Stand committed ☑ Commencing **05/21/2018**
- ☐ Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____
- ☑ **All but 1 day** 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 **1260987C**
(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.

PROBATION

☐ 6. The defendant is placed on probation for a period of _____ 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.

☐ 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 $ _____ to _____
☐ 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: ordered in CID 1260987C

☐ 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 Robert Hartson or Sonoma Hartson 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:

A condition of the suspended sentence is that the defendant abide by all terms and conditions of the sentence imposed in CID 1260987C.

05/09/2018
Date

Brian Tucker
Presiding Justice


STATE'S
EXHIBIT
1
16-CR-150
7-15-17

STATE'S
EXHIBIT
6
11-08-150
PENGAD 800-631-6989

STATE'S
EXHIBIT
16
16 R-15D
PENDAD 800-631-6989

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220-2016-CR-150

STATE OF NEW HAMPSHIRE

v.

HENRY CARNEVALE

ORDER

The defendant is charged with committing the crime of Reckless Conduct by driving his vehicle erratically and aggressively and "'cutting off' and making contact with" another vehicle. He also faces a charge of Conduct after an Accident for failing to stop after the vehicle he struck collided with a guardrail and sustained damage. The defendant has filed several motions challenging the admissibility of certain evidence at trial.

Re: Defendant's Motion *in Limine* #1: To Preclude Certain Images (document no. 20)

Ruling: *Granted by agreement.*

Re: Defendant's Motion *in Limine* #2: To Preclude Expert Testimony by Trooper McLaughlin (document no. 21)

Ruling: *Granted by agreement.*

6/9/17
copies to CA, Buckey

These motions are to exclude an enlarged image of video purportedly taken from a dashboard camera and to bar a state trooper from offering an opinion on the speed of a vehicle. The State answers that it doesn't intend to offer the evidence in its case-in-chief. Should its position change, the State will first obtain a ruling on admissibility.

Re: Defendant's Motion *in Limine* #3: To Preclude Expert Testimony by Trooper Catafalmo
(document no. 22)

Ruling: *Granted.*

State Police Trooper Catalfamo will testify that he examined the defendant's vehicle and found "a dent and scratch on the left side of [the] bumper." The defendant allows that this observation is admissible testimony, but he seeks to keep the trooper from offering an opinion that the damage "matched with the contact of [the alleged victim's] vehicle." The State opposes the motion and says the testimony comes in under Rule of Evidence 701, which governs opinion testimony by witnesses who are not experts.

One of the requirements of admissibility under this rule is that the opinion helps the jury determine a fact in issue. *Cyr v. J.I. Case Co.*, 139 N.H. 193, 200 (1994). The trooper's opinion is that the evidence is consistent with the vehicles having come in contact. The basis for the trooper's opinion is not described in the pleadings, but unless he saw the vehicles collide, his view on what the damage indicates is likely based on inferences he drew from other evidence in the case. In that sense, he is in no better position to draw the conclusion than a juror with the same evidence.

The trooper may testify to his observations, but not to his opinion that damage to the defendant's vehicle "matched" or was consistent with it having struck the alleged victim's vehicle. Of course, the State is not prohibited from arguing this conclusion as an inference if supported by the evidence.

Re: Defendant's Motion in Limine #4 –Rule 403
(document no. 23)

Ruling: *Granted by agreement.*

With respect to testimony by Newbury Police Chief Robert Lee that he is "familiar with" the defendant, the State agrees to confine his testimony to that, without getting into the degree of familiarity.

Re: Defendant's Motion in Limine #5 –Rule 403 (document no. 24)

Ruling: *Granted by agreement.*

The State agrees it will not offer testimony from Trooper Catalfamo that based on his observations of the dashboard camera video, the defendant "seems to be agitated as he was making hand gestures during the video."

The rulings are subject to motions for reconsideration at trial if circumstances warrant.

SO ORDERED.

DATE: JUNE 7, 2017

BRIAN T. TUCKER
PRESIDING JUSTICE