THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0433

The State of New Hampshire

v.

Michael Munroe

APPEAL PURSUANT TO RULE 7 JUDGMENT OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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II. Whether a defendant who asked to leave the courthouse during hearings and refused transport from the house of corrections voluntarily absented himself from trial.

III. Whether a patient's name, which he gave to his doctor while seeking medical treatment, falls within the hearsay exception defined by Rule of Evidence 803(4).

IV. Whether the trial court sustainably exercised its discretion when it struck a notice of self-defense that simply recited the legal standard for self-defense and did not provide any supporting factual allegations.

STATEMENT OF THE CASE

In October of 2017, a Rockingham County grand jury indicted the defendant, Michael Munroe, on two counts of assault by a prisoner. Tr.:[1] 46-47; RSA 631:2 (2016); RSA 631:2-a (2016); RSA 642:9 (2016). The first charge alleged that the defendant recklessly "caused serious bodily injury" to the victim, W.V., while the defendant "was a person being held in official custody at the Rockingham County House of Corrections." Tr.: 46. The second charge alleged that the defendant knowing "caused unprivileged physical contact to Correctional [Officer] Graham" by "striking Correctional [Officer] Graham with his elbow" while the defendant "was a person being held in official custody at the Rockingham County House of Corrections." Tr.: 46.

After a two-day trial, the jury convicted the defendant on the assault by a prisoner charge related to the assault on W.V. and acquitted the defendant on the assault by a prisoner charge related to the unprivileged contact with Officer Graham. Tr.: 227. The trial court (*Wageling*, J.) sentenced the defendant to one and a half to three years in the New Hampshire State Prison. SHTr.: 33.

This appeal followed.

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[1] Tr.: refers to the trial transcript;
SHTr.: refers to the sentencing hearing transcript;
PJSTr.: refers to the June 4, 2018 pre-jury selection hearing transcript;
JSTr.: refers to the June 4, 2018 jury selection hearing transcript;
RHTr.: refers to the June 5, 2018 *Richards* hearing transcript;
DBr.: refers to the defendant's brief; and
DApp.: refers to the defendant's appendix.

STATEMENT OF FACTS

1. The Assault

On May 25, 2017, the defendant was an inmate at the Rockingham County House of Corrections where he lived in cellblock E. Tr.: 83-84, 162. That day, the defendant started a fight with the victim on tier E-1. Tr.: 84, 115. The defendant punched the victim and the victim tried to defendant himself by protecting his face with his hands. Tr.: 89-90, 115-16. The victim was "very overwhelmed" by the attack. Tr.: 115. The fight continued until Corrections Officer Charles Graham was able to intervene. Tr.: 89-90, 115-16. While attempting to stop the fight, the defendant pushed Officer Graham out of the way but ultimately, Officer Graham was able to separate the two. Tr.: 89-90, 115-16.

The fight left the victim "bleeding profusely" from the eye and left "blood all over the floor." Tr.: 90, 110. The defendant had no injuries, however. Tr.: 122. The victim was directed to the nurses' station and then to Exeter Hospital for treatment. Tr.: 108, 129. The defendant resists officers' efforts to detain him. Tr.: 106, 163.

At Exeter Hospital, doctors find that the area around the victim's eye was swollen and bruised. Tr.: 134. His eye was swollen shut. Tr.: 134. Further examination revealed that the victim had multiple facial fractures all around his eye. Tr.: 135, 138. The victim would not explain how he sustained his injuries, but the referral forms stated that a physical altercation at the jail had been the source of the injuries. Tr.: 144, 148.

Back at the jail, Sergeant Richard King spoke with the defendant. Tr.: 166. Sergeant King asked the defendant what had happened. Tr.: 166.

The defendant refused to answer because he did not "want to lie to" the sergeant. Tr.: 166. After these initial interactions, neither the victim nor the defendant would discuss the fight and both accepted responsibility for what had occurred. Tr.: 72, 81, 166.

2. The Defendant's Obstreperous Behavior

Before jury selection on June 4, 2018, the defendant addressed the trial court himself. PJSTr.: 6. The defendant began by asking the trial court about the proceedings and how he came to return to New Hampshire "against [his] will." PJSTr.: 7. The trial court explained that he had been charged with two crimes and that the State brought him back to New Hampshire through the Interstate Agreement on Detainers process.[2] PJSTr.: 7-9. The defendant then questioned how the charges against him arose, which the trial court explained. PJSTr.: 9-11.

From there, the defendant repeatedly questioned the trial court's jurisdiction and authority under the federal constitution and claimed that he did not understand the proceedings. PJSTr.: 11-12, 14-16. When the trial court invited the defendant to consult with his attorneys about his concerns he refused to do so because he could not "intelligently ask them questions if [he did]n't know the jurisdiction that's applicable." PJSTr.: 12. When the trial court asked the defendant if he wished to represent himself he refused to answer that question because he could not "intelligently make a decision

[2] The Interstate Agreement on Detainers, codified at RSA 606-A:1, Art. IV(c) (2001), provides that the State has 120 days to bring a defendant to trial after transfer from another jurisdiction.

if [he did]n't know where to start in understanding the rules or the procedures of the jurisdiction that's unknown to me." PJSTr.: 13.

For most of the hearing, the defendant objected or refused to answer when the trial court asked him how he wished to proceed. PJSTr.: 14, 19-20. At one point, however, the defendant told the trial court that he did not want the assistance of counsel. PJSTr.: 21-22.

After this, the trial court continued to attempt to inquire about how the defendant wished to proceed. PJSTr.: 21-24. When the trial court asked about whether he knew how to select a jury, the defendant attempted to renew his challenge to the court's jurisdiction. PJSTr.: 21. He stymied the trial court's ability proceed with claims such as: he could not proceed because he did not "understand where this stemm[ed] from, where the federal Constitution g[a]ve[] this court power." PJSTr.: 21. The trial court again asked if the defendant knew how to pick a jury to which the defendant responded that he "reserve[d] [his] rights without due – without prejudice, under UCC 1-308." PJSTr.: 22. When the trial court asked defense counsel to assist with jury selection, the defendant interjected that defense counsel "refused to present arguments in [his] competent, intelligent events" and that defense counsel "believe[d]" that he had committed the charged crimes. PJSTr.: 22-23. After defense counsel informed the court that they were "ready, willing, and able" to represent the defendant, the defendant complained that they could not explain the trial court's jurisdiction to his satisfaction and that he could not "prepare to defend" himself without that understanding. PJSTr.: 23.

In response to this renewed argument, the trial court explained to the defendant that it had previously found him competent to represent himself

and had addressed his jurisdictional concerns. PJSTr.: 23-24. The trial court observed that "the fact that [the defendant] refused to accept [the trial court's] answer is different from [him] . . . choosing not to understand it." PJSTr.: 24. The trial court refused to address the matter further and took a brief recess to prepare for jury selection. PJSTr.: 24-25.

After a recess, the trial court proceeded to jury selection. JSTr.: 2. The trial court informed the defendant that defense counsel would help with jury selection. JSTr.: 2. The defendant refused to consent to that and refused to be present. JSTr.: 2. After the defendant's departure, defense counsel expressed concern about going forward with jury selection because although the defendant "was a little wishy-washy about when [the trial court] asked him if he'd like to go *pro se* or not, he did say that he would not like the assistance of counsel." JSTr.: 3. The trial court found that the defendant "was very wishy-washy about whether or not he wanted to represent himself" and disagreed that his final desire was to proceed self-represented. JSTr.: 3. The trial court also questioned whether the defendant was competent to represent himself during jury selection—in the sense that he could effectively manage the process. JSTr.: 3-4. The trial court observed that the defendant "can make a decision whether or not he wants to be present during the trial and/or if he wants to answer questions about representing himself." JSTr.: 4.

The next day, June 5, 2019, the trial court held a *Richards* hearing related to the victim's desire to assert his privilege against self-incrimination. RHTr.: 2-53. Before the hearing began, the trial court had a short discussion with the defendant and counsel about the status of counsel. RHTr.: 2-11. Defense counsel explained that the defendant had asked them

to step aside and so the trial court began to inquire with the defendant what his wishes were. RHTr.: 3.

The defendant returned to his complaint that he could not "intelligently make a decision . . . to move forward on [his] own or with counsel, not knowing the jurisdiction." RHTr.: 4; *see also* RHTr.: 5. The trial court asked the State to present the basis for jurisdiction, which it did. RHTr.: 5-6. The trial court then found that it had jurisdiction over the criminal charges and asked the defendant how he wished to proceed, either self-represented or represented by counsel. RHTr.: 6. The defendant responded by asking for a continuance "to sufficiently research the subject and submit an appropriate motion [in] writing so that the – the rejection is put in writing." RHTr.: 7. The trial court denied the defendant's request, which led the defendant to renew his complaint that he did "not understand the proceedings." RHTr.: 7.

The defendant refused to answer the trial court when it asked him if he wanted to proceed with counsel, self-represented, or with hybrid counsel. RHTr.: 7. The trial court informed him that it would not "allow this trial to be stalled" to address the defendant's jurisdiction argument and pressed the defendant to decide how he wanted to proceed. RHTr.: 8. The defendant told the trial court that he did not consent to defense counsel answering "on [his] behalf" but refused to agree that he wanted to represent himself. RHTr.: 9. Defense counsel informed the trial court that they were "ready, willing, and able" to represent the defendant. RHTr.: 9. The trial court ruled that counsel would proceed to trial and warned the defendant that if he chose to stay, which the trial court hoped he would, he would not be allowed to disrupt the proceeding. RHTr.: 9-10. When asked if he

wished to stay, the defendant returned to his jurisdictional claim and said he could not make a decision. RHTr.: 11. The defendant then chose to leave. RHTr.: 11.

After the defendant left, defense counsel raised the issue of whether the trial could proceed in his absence. RHTr.: 12-13. The trial court found that the issue is whether it had a sufficient factual basis to conclude that the defendant had voluntarily absented himself. RHTr.: 16. The trial court concluded that the defendant's statements to the trial court and on the record were sufficient to conclude that he had voluntarily absented himself. RHTr.: 16. The trial court stated that it would try to bring the defendant back to court "and encourage him again to be present for these proceedings." RHTr.: 16-17. In support of the trial court's conclusion, the State directed it to *State v. Davis*, 139 N.H. 185 (1994). RHTr.: 18-19.

On the first day of trial, June 6, 2019, the defendant refused transport from the house of corrections to the court. Tr.: 3. The trial court found that the defendant's refusal, in the face of a trial court order, constituted him "voluntarily absenting himself" from the proceeding. Tr.: 4-5. Defense counsel attempted to distinguish *Davis*, but the trial court reiterated that the defendant had voluntarily absented himself from the proceeding. Tr.: 7-9. The trial court indicated that if the defendant had "a legitimate reason" to delay the trial, it would consider that, but it would not consider "this circular argument [regarding jurisdiction] that [the defendant] put[] before me." Tr.:10-11.

After a recess during which defense counsel spoke with the defendant, counsel explained that the defendant's position was "that the Court must first determine what jurisdiction, and not what territorial

jurisdiction the Court has, but rather the criminal jurisdiction under Article 3, Section 2 of the U.S. Constitution." Tr.: 13. Until the trial court decides that issue, the defendant would not "consent to either speaking further to the Court or appearing." Tr.: 13. The defendant had "no opinion" on defense counsel continuing to participate. Tr.: 13.

The defendant also refused transport from the house of corrections to the court on the second day of trial. Tr.: 183.

3. Notice of Self-Defense

On November 21, 2017, the defendant filed a notice of self-defense. DApp.: 2-3.[3] In the notice of self-defense, the defendant explained that the video "does not show the entirety of the alleged fight"[4] and that it does not show the men's legs or contain any audio. DApp.: 2. The defendant noticed that he "may rely on the defense of self-defense at trial in that he may claim that he was justified in using non-deadly force upon [the victim] and Charles Graham in order to defend himself from the use of unlawful, non-deadly force by [the victim] and Charles Graham." DApp.: 3.

On December 1, 2017, the State objected to the notice. DApp.: 7-10. The State argued that the notice provided was not sufficient for the defendant to proceed on a theory of self-defense because the defendant does not allege any facts that would warrant self-defense. DApp.: 8-9.

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[3] The defendant's appendix does not have numbered pages aside from the table of contents. The State will assign numbers to the pages with the table of contents being page 1.

[4] The State played the video for the jury and has moved for a copy of the exhibit to be transferred to this Court for review.

On December 17, 2017, the defendant provided a supplement to his notice. DApp.: 4-6. In the supplement, the defendant did not provide any additional factual support and instead, argued that he had no obligation to provide factual support in his notice of self-defense. DApp.: 4.

On January 16, 2018, the trial court issued an order in which it ordered the defendant to provide a more detailed notice or else it would strike the notice of self-defense. DApp.: 11-14. In analyzing the notice, the trial court did not consider any information presented by the State or the conclusions of its investigator. DApp.: 12-14. Instead, it looked solely to the sufficiency of the claims raised in the defendant's notice. DApp.: 13-14. The trial court recognized that this Court has considered the question regarding affirmative defenses where the defendant carries the burden of proof but has not considered the question regarding so-called pure defenses where the defendant shifts the burden to the State. DApp.: 13-14. It concluded, however, that the defendant's notice must at least meet the burden required for an affirmative defense, if not a higher burden. DApp.: 13-14. Accordingly, it ordered the defendant to supplement his notice or else it would strike the notice. DApp.: 14.

SUMMARY OF THE ARGUMENT

I. The trial court correctly concluded that the defendant failed to clearly and unequivocally invoke his right to proceed self-represented. Although at least once the defendant asserted he did not want the assistance of counsel, both before and after this, he consistently framed his problem as being unable to decide whether he wanted to proceed self-represented or proceed with the assistance of counsel. When pushed to decide how to proceed, the defendant explained that he could not. He explained that he could not decide until the trial court explained his jurisdictional question to his satisfaction, a clear ploy to delay trial, or at least a non-sequitur, particularly after the court explained it more than once. The defendant's request to proceed self-represented was neither clear nor unequivocal and at times, did not even appear to be a genuine request.

II. The defendant voluntarily absented himself from trial and other hearings when he asked to leave and refused transport to the courthouse. Although the law does not require such a waiver to be knowing and intelligent, the trial court warned the defendant about the consequences of absenting himself. The defendant refused to participate despite these warnings. Accordingly, the trial court proceeded correctly.

III. The victim's name, which he gave to his doctor, constituted a statement for medical diagnosis or treatment and was admissible. A patient's name assists medical professionals in accessing medical records and learning medical history, including allergies, treatment restrictions, and other relevant information. A patient's name is one of the most basic and

useful pieces of information for a medical professional. Accordingly, it falls within the scope of the exception created by Rule of Evidence 803(4).

IV. The trial court sustainably exercised its discretion when it struck the defendant's notice of self-defense. The defendant's notice did little more than recite the standard for self-defense. In the context of a pure defense, which alters what the State must prove beyond a reasonable doubt, this is woefully inadequate. The notice needed to provide some basic factual allegations to support the self-defense claim. This would provide the State will sufficient information to prepare its case. Anything less hamstrings the State's ability to proceed. The trial court understood this and accordingly, sustainably exercised its discretion.

ARGUMENT

I. THE DEFENDANT'S EFFORTS TO DELAY TRIAL DID NOT AMOUNT TO AN INOVCATION OF THE RIGHT TO PROCEED SELF-REPRESENTED BECAUSE HE FAILED TO CLEARLY AND UNEQUIVOCALLY INVOKE THAT RIGHT.

A. The defendant never clearly and unequivocally invoked his right to proceed self-represented.

"Both Part I, Article 15 of the State Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to self-representation and the right to counsel." *State v. Towle*, 162 N.H. 799, 803 (2011). "The two rights are mutually exclusive; the exercise of one right nullifies the other." *Id*. "Because the two rights are antithetical, and the exercise of one right nullifies the other, [this Court] respect[s] a waiver of the right to counsel only if the defendant has evinced an understanding of the right and has asserted an *unequivocal* desire to relinquish it." *Id*. (quotation, brackets, and ellipsis omitted, emphasis added); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("[T]he right to counsel does not depend upon a request by the defendant . . . and that courts [should] indulge in every reasonable presumption against waiver."). "Thus, to be effective, an assertion of the right to self-representation must be: (1) timely; (2) clear and unequivocal; and (3) knowing, intelligent and voluntary." *Towle*, 162 N.H. at 803. The issue, on appeal, is whether the defendant made a clear and unequivocal assertion of his right to self-representation.

"The requirement that asserting the right to self-representation be clear and unequivocal . . . prevents a defendant from taking advantage of

and manipulating the mutual exclusivity of the rights to counsel and self-representation." *State v. Sweeney*, 151 N.H. 666, 670 (2005) (citation and quotation omitted). Although some courts have concluded that a defendant's lack of cooperation with counsel or the appointment of counsel process constitutes a waiver of that right, *see*, *e.g.*, *United States v. Garey*, 540 F.3d 1253, 1264 (11th Cir. 2008) (recognizing that a defendant's uncooperative conduct could cause an implied waiver); *United States v. Alden*, 527 F.3d 653, 661 (7th Cir. 2008) (same), this does not create "a default rule requiring [trial] courts to interpret each instance of uncooperative behavior as a waiver by conduct of the right to counsel," *Jones v. Walker*, 540 F.3d 1277, 1289 (11th Cir. 2008). Waiver, even by uncooperative defendants, still requires that the defendant "understand[] the choices available to him and the potential dangers of proceeding *pro se*." *Jones*, 540 F.3d at 1289. A trial court also need not entertain requests to proceed self-represented that amount to nothing more than dilatory tactics designed to delay trial. *See*, *e.g.*, *United States v. Hilton*, 701 F.3d 959, 965 (4th Cir. 2012) (concluding that the trial court did not violate the defendant's rights by imposing counsel upon him for jury selection when the defendant's lack of cooperation limited the trial court's ability to determine whether he wished to proceed self-represented or with counsel), *Towle*, 162 N.H. at 804.

The question of whether a defendant's request to proceed self-represented is a question of fact. *Towle*, 162 N.H. at 814 (*Dalianis*, C.J.,

dissenting);[5] *see also Hilton*, 701 F.3d at 965 (finding that deciding request to proceed self-represented after "meaningful trial proceedings have begun," such as just before jury selection, falls within "the sound discretion of the trial court"). "This is because determining whether the defendant's request is clear and unequivocal involves factual determinations that are difficult, if not impossible, to make from a silent paper record." *Id*. (quotation and brackets omitted). "In determining whether a defendant's statement is clear and unequivocal, courts have looked at the overall context of the proceedings." *Id*. (quotation omitted). This Court "will uphold the trial court's factual findings provided that the evidence supports them and they are not unlawful." *State v. Glenn*, 160 N.H. 480, 489-90 (2010).

The record demonstrates that the defendant's request to proceed self-represented amounted to nothing more than a "wishy-washy," or equivocal, request designed to delay the proceedings. These efforts to delay the proceedings began with and centered on the defendant's demand that the

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[5] The majority in *Towle* declined to set a standard of review and concluded that the defendant prevailed under either deferential or *de novo* review. *Towle*, 162 N.H. at 803. The State contends, however, that for the reasons articulated by the dissent in *Towle* and the reasons articulated in *Fields v. Murray*, 49 F.3d 1024, 1031 (4th Cir. 1995) (en banc), this Court must defer to the trial court's factual findings. Deference to a trial court's factual findings is consistent with this Court's review in virtually all respects.

Yet, even assuming this Court applies a *de novo* standard, the State prevails because the defendant's repeated statements that he could not knowingly and intelligently choose to proceed self-represented or with counsel muted the impact of his fleeting desire to proceed self-represented. PJSTr.: 13-14, 19-24; RHTr.: 4-5, 7, 9, 11. Moreover, the defendant stymied the trial court's efforts to determine whether his request was genuine and knowing, intelligent, and voluntary by refusing to answer the trial court until it answered his frivolous jurisdictional question to his satisfaction. PJSTr.: 19-24; RHTr.: 4-5, 7, 9, 11.

trial court articulate its jurisdictional authority for trying him. *See*, *e.g.*, PJSTr.: 7, 11-16, 21-22, 24-25; JSTr.: 2; RHTr.: 4-5, 7-8; Tr.: 10-11. The defendant revealed that delay was his goal when he asked the trial court to continue the matter until he could "sufficiently research the subject and submit an appropriate motion [in] writing so that the – the rejection is put in writing." RHTr.: 7. The defendant's refusal to accept the trial court's ruling and authority over the proceedings did not create a legitimate issue to warrant delay of trial.

Realizing that he could not stymy the trial court with this frivolous issue, the defendant attempted to achieve his goal by taking a recalcitrant position on how to proceed: neither allowing counsel to answer for him nor confirming that he wished to proceed self-represented. The defendant never unequivocally requested to proceed self-represented. The defendant framed nearly all of his requests in the context of not being able to decide whether to proceed with counsel or self-represented because he did not understand the trial court's jurisdiction. PJSTr.: 13-14, 19-24; RHTr.: 4-5, 7, 9, 11. Although he did on at least one occasion state that he did not wish to have counsel represent him, when the trial court inquired further the defendant returned to his previous vacillation. PJSTr.: 12-14. Even when defense counsel informed the trial court about the defendant's wish to dismiss them, upon further inquiry the defendant continued to waver and refused to give a clear answer about how he wished to proceed. RHTr.: 3-8.

These requests were far from clear and unequivocal. Although other jurisdictions have recognized that a trial court may conclude that the defendant's conduct constituted a waiver of the right to counsel, those same jurisdictions recognize that a trial court need not reach that conclusion in

every case. *See*, *e.g.*, *Jones*, 540 F.3d at 1289. The defendant's conduct upon failing to stymy the trial court, choosing to absent himself from the proceeding, demonstrates the wisdom in vesting the trial court with some discretion. The defendant's decision to absent himself from the proceeding left the trial court with no choice but to impose counsel who were "ready, willing, and able" to represent him. PJSTr.: 23; RHTr.: 9. Accordingly, this Court must affirm.

B. The defendant did not preserve his argument that defense counsel should have withdrawn and the claim is meritless because the trial court presumably would not have removed appointed counsel.

The defendant never raised the issue that his counsel should or must withdraw pursuant to the rules of professional conduct, which meant that the trial court never had the opportunity to consider whether it would release counsel. "The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." *State v. Town*, 163 N.H. 790, 792 (2012). "The purpose underlying [this Court's] preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review." *Id*.

From the outset of the defendant's jurisdictional concerns, the defendant framed the issue as a threshold to determining whether he would rely upon appointed counsel or proceed self-represented. PJSTr.: 12 ("I'm just trying to start to be able to even think about representation or if I should stand (indiscernible) persona."), 19 ("I cannot move forward in even determining whether I need counsel."), 21-22 ("We can't move forward if I

don't understand where this stems from. . . . [I]f [the trial court] can't answer that, I can't make an intelligent decision."). The defendant did state that he thought counsel had a conflict because they believed that he had committed the crimes, PJSTr.: 22-23, but the trial court correctly rejected this as a conflict that warranted removal of counsel or prevented counsel from presenting a competent defense, PJSTr.: 23. Defense counsel later informed the trial court that the defendant asked them to "step aside." RHTr.: 3. Upon further examination, however, the defendant repeated his earlier concerns regarding the jurisdictional issue and that he could not decide to proceed with counsel or self-represented. RHTr.: 4-5. At no point did the defendant argue that the Rules of Professional Conduct required defense counsel to withdraw.

Moreover, twice during these exchanges defense counsel informed the trial court that they were "ready, willing, and able" to represent the defendant. PJSTr.: 23; RHTr.: 9. Neither attorney expressed any reservations regarding a conflict of interest or any other professional concern that would limit their ability to effectively represent the defendant. The only reservations expressed related to a belief that the defendant may want to represent himself during trial. As discussed above, the trial court rejected these requests as unfounded.

Neither the defendant nor his counsel presented the professional conduct argument that the defendant raises for the first time on appeal. Accordingly, this Court cannot reach that issue because the defendant did not preserve it.

Should this Court reach the question of whether the trial court erred when it declined to allow defense counsel to withdraw, it must affirm

because the trial court sustainably exercised its discretion. For the reasons detailed in Section I.A above, the defendant did not clearly and unequivocally invoke his right to represent himself, which, therefore, did not provide a basis for defense counsel to withdraw. To the extent that the defendant argued counsel had a conflict because they believed he committed the crimes, this argument was baseless and did not form a basis to warrant either mandatory or discretionary withdrawal. Accordingly, this Court must affirm.

II. THE DEFENDANT VOLUNTARILY ABSENTED HIMSELF FROM THE PROCEEDINGS, WHICH ALLOWED THE TRIAL COURT TO TRY HIM *IN ABSENTIA*.

The defendant voluntarily waived his right to be present during his trial. This waiver does not need to be knowing and intelligent to be valid. The defendant's voluntary absence is sufficient. Here, the defendant informed the trial court that he wished to leave before jury selection and refused transport, despite warnings from the trial court, during trial.

Before jury selection, the defendant failed to stymy the trial with his jurisdictional complaint, after which he refused to consent to proceeding with jury selection. JSTr.: 2. The defendant chose to leave before jury selection began, but the trial court warned him that if he left, his defense counsel would proceed with jury selection in his absence. JSTr.: 2. Before the *Richards* hearing, the defendant tried again and failed to stymy the trial court. RHTr.: 9. The trial court informed the defendant that he was "entitled to be present for all . . . critical hearings in this case" and that if he chose to leave, then "the hearing will continue" and "the trial will start tomorrow at 10[:00 a.m.] and continue." RHTr.: 10. The defendant then chose to leave. RHTr.: 11.

Before the trial began, the trial court convened the parties and informed them that the defendant refused transport to the courthouse. Tr.: 3. The trial court explained that it issued an order at "approximately 8:00 [a.m.]" and informed the defendant that a failure to appear could lead to a contempt finding. Tr.: 3-4. The trial court explained that it has issued similar orders in the past and that "the sheriff's office serves the order directly on the [d]efendant and . . . has them read it . . . to get them to

change their mind and agree to come over." Tr.: 4-5. In response to some of defense counsel's concerns, the trial court found:

> [The defendant] has been in front of me a number of times. He is a sophisticated individual who has great knowledge of the criminal justice system. He is articulate. He was citing to me various sections of the federal and state constitutions. I assume, he is receiving input from others within the jail as to a theory of defense that will number one, allow him to delay this trial, and number two, to develop a record on appeal. And he's doing what he believes is right relative to those defenses. But at the eleventh hour for him to come in and when he is a clearly sophisticated individual, very intelligent, I can't deal with this case in a vacuum. As I've told you, I've had [trials][6] with him before. Unless there's been a significant change in his mental status, which I haven't seen, he knows exactly what he's doing and more power to him. This is a good appellate record for him to achieve the goals that he's seeking to achieve through his behavior. Then he's smart.

Tr.: 10. After this, defense counsel spoke with the defendant who expressed that "he has no opinion as to how we proceed. His position is that the Court must first determine what . . . criminal jurisdiction under Article 3, Section 2 of the U.S. Constitution. . . . [U]ntil that's decided, he does not consent to either speaking further to the Court or appearing." Tr.: 13. The defendant had no position on whether defense counsel could proceed in his stead. Tr.: 13. The trial then proceeded. Tr.: 14.

The presence or absence of a defendant from a criminal trial implicates the confrontation provisions of Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States

[6] The transcript reads "times," but the context indicates that this is a typo. Trials is a more logical interpretation.

Constitution. *State v. Lister*, 119 N.H. 713, 716 (1979). These provisions guarantee a defendant the right to be present at trial and confront adverse witnesses in person. *Id*. A defendant can waive this right, however, through the defendant's voluntary absence from trial or jury selection. *Id*.; *see also Diaz v. United States*, 223 U.S. 452, 457 (1912). Part of the rationale underpinning this conclusion is that a defendant should not be able to "freely depart once the jury selection process has begun and in so doing halt the proceedings." *Lister*, 119 N.H. at 716. Because this issue raises constitutional questions, this Court's review is *de novo*. *State v. Benner*, 172 N.H. 194, 198 (2019).

In *State v. Davis*, 139 N.H. 185 (1994), this Court confronted the question of whether a defendant, who was representing himself, voluntarily absented himself from certain pre-trial and trial proceedings by refusing transportation to the court and by affirmatively informing the trial court that he did not intend to participate in the trial. *Davis*, 139 N.H. at 189. In concluding that the defendant had waived his right to attend, this Court stated, "[t]rials are not to be held according to the fancy of the defendant." *Id*. at 190. Affirmative warnings from the trial court further supported the conclusion that the defendant had voluntarily waived his right to attend trial and confront adverse witnesses. *Id*. *Davis* recognized, however, that affirmative warnings may not be necessary because defendants can voluntarily waive their presence by escaping from incarceration. *Id*.; *see also Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (expressly rejecting that voluntary absence requires "that he knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his

right to testify and to confront personally the witnesses against him"). All waiver requires is that a defendant's failure to appear be a volitional act on the defendant's part. *See Davis*, 139 N.H. at 190; *Taylor*, 417 U.S. at 19-20.

The defendant's conduct is virtually indistinguishable from that which occurred in *Davis*. The trial court warned the defendant that if he chose to leave or refused transport, then the hearings and trial would proceed in his absence. With this warning, the defendant chose to leave the courthouse. During trial, he chose to remain at the house of corrections. This occurred even after the trial court warned him that he could not delay trial through his absence. In response, the defendant expressed no opinion as to how the trial should proceed in his absence. Although the trial court had no obligation to warn the defendant of all the rights he would lose or to determine that the waiver was knowing and intelligent, the trial court made extensive findings regarding the defendant's knowledge of the criminal justice process, prior experience with the criminal justice system, and ability to make legal argument. It effectively found that the defendant's waiver was knowing, intelligent, and voluntary. The trial court correctly concluded that the trial could continue without the defendant's presence, and accordingly, this Court must affirm.

III. A PATIENT'S NAME IS AN IMPORTANT PIECE OF INFORMATION FOR MEDICAL PROFESSIONALS TO USE IN TREATMENT AND DIAGNOSIS AND THEREFORE, EXCEPTED FROM THE GENERAL PROHIBITION AGAINST HEARSAY.

The trial court sustainably exercised its discretion when it allowed Dr. Elizabeth Andrada to testify that the victim had told her his name, W. V., and the scope of his injuries, because those statements were made for the purpose of medical diagnosis or treatment and admissible under Rule of Evidence 803(4).[7] "[This Court] accord[s] the trial court considerable deference in determining the admissibility of evidence, and [it] will not disturb its decision absent an unsustainable exercise of discretion." *State v. Munroe*, 161 N.H. 618, 626 (2011). Generally, "[t]o demonstrate an unsustainable exercise of discretion, the defendant must show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case." *Id*. However, in cases where Rule 803(4) is at issue, "[t]he trial court's preliminary factual determinations for admissibility … will be upheld unless clearly erroneous." *State v. White*, 145 N.H. 544, 555 (2000), *habeas corpus denied*, 296 F. Supp. 2d 46 (D.N.H. 2003), *vacated and remanded*, 399 F.3d 18 (1st Cir. 2005); *see also State v. Graf*, 143 N.H. 294, 304 (1999) ("In light of the circumstances in this case, [this Court] cannot conclude that the trial court's finding that certain statements made

[7] The defendant's brief also argues that these statements violated the defendant's rights under the Confrontation Clause. DBr.: 13-14. The trial transcript reflects that the defendant only argued the hearsay matter to the trial court. Tr.: 125-28. Accordingly, the defendant's Confrontation Clause arguments, to the extent he has even adequately developed them, are unpreserved. *Town*, 163 N.H. at 792.

by the victim were for the purpose of medical diagnosis or treatment was clearly erroneous." (Quotation, ellipsis, and brackets omitted.)).

"Hearsay is generally defined as an extrajudicial statement offered in court to show the truth of the matter asserted in the statement." *State v. Soldi*, 145 N.H. 571, 575 (2000) (quotation omitted). "The rule against hearsay holds that hearsay evidence is generally inadmissible, subject to certain well-delineated exceptions." *Id*. (quotation omitted). One such exception is Rule 803(4), "Statements for Purposes of Medical Diagnosis or Treatment." The rule exempts from the normal prohibition against hearsay "[a] statement that: (a) is made for - and is reasonably pertinent to - medical diagnosis or treatment; (b) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and (c) the court affirmatively finds were made under circumstances indicating their trustworthiness." *N.H. R. Ev.* 803(4).

"The rationale for this exception is that statements made with the purpose of obtaining medical attention are usually made with the motivation to obtain an accurate diagnosis or proper treatment and, thus, they are inherently reliable because there is normally no incentive to fabricate." *Munroe,* 161 N.H. at 626. "The controlling issue, however, is the intent of the declarant." *Id*.

The State explained that a patient's name falls within the hearsay exception because it is necessary information for the purposes of medical diagnosis and treatment. Tr.: 128. A patient's name will allow the doctor, and other medical personnel, to quickly and easily access the patient's medical records. From there, the doctor can learn the patient's medical history, allergies, treatment restrictions, among other information that will

assist the doctor in treating the patient. An honest answer assures quick and efficient medical treatment, which means that a patient would be unlikely to lie about a name. *Munroe*, 161 N.H. at 626. This is particularly true in the instant case where the victim as recalcitrant when he had to explain how he received his injuries.

To the extent that the statement was inadmissible hearsay, admitting the patient's name did not prejudice the defendant. The corrections officer that intervened detailed the victim's injuries and explained that they focused around the victim's eye. The corrections officer explained that the victim then went to receive medical treatment. The injuries described by Dr. Andrada, along with the information she received regarding how those injuries came about, were consistent with the corrections officer's description. Thus, allowing Dr. Andrada to testify regarding the victim's name did not prejudice the defendant because even absent the victim's name, the patient's identity was readily apparent. Accordingly, this Court must affirm.

IV. THE DEFENDANT'S NOTICE OF SELF-DEFENSE PROVIDED INSUFICIENT NOTICE TO THE STATE REGARDING THE DEFENDANT'S CLAIM.

New Hampshire Rule of Criminal Procedure 14(b)(2)(A) requires a defendant who intends to rely upon "any defense specified in the Criminal Code," to "file a notice of such intention" with the trial court and the State and requires that notice to "set[] forth grounds" that support the defense. If the defendant fails to comply with Rule 14(b)(2)(A), the rule permits the trial court to "exclude any testimony relating to such defense or make such other order as the interest of justice requires." RSA 626:7 (2016) establishes two types of defenses "[a] defense" also known as a "pure defense," which the State must disprove beyond a reasonable doubt, and an "affirmative defense," which the defendant must prove by a preponderance of the evidence. *See also State v. Soucy*, 139 N.H. 349, 352-53 (1995) (explaining the distinction between "pure" and "affirmative" defenses). Self-defense is a pure defense, *see*, *e.g.*, *State v. Dukette*, 145 N.H. 226, 232 (2000) (explaining the nature of self-defense), whereas defenses like insanity or renunciation are affirmative defenses, *see*, *e.g.*, *State v. Fischera*, 153 N.H. 588, 592-93 (2006) (describing insanity); *State v. Champagne*, 152 N.H. 423, 428 (2005) (describing renunciation). This Court reviews a trial court's decision to strike a defense for "an unsustainable exercise of discretion." *Cf. Fischera*, 153 N.H. at 594 (applying the standard to affirmative defenses).

"Setting forth the grounds therefore" under Rule 14(b)(2)(A) requires a defendant to articulate some facts that support the defense, not mere speculation. *Champagne*, 152 N.H. at 429. Rule 14(b)(2)(A) was a

reclassification of New Hampshire Superior Court Rule 101. *See Id*. at 428 (describing Rule 101). In *Champagne*, although this Court did not provide a detailed definition of "set[] forth the grounds therefore," it affirmed the trial court's ruling because the defendant articulated specific facts that underpinned his renunciation defense. *Id*. at 429. The defendant first explained the nature of the negotiations and arrangements and then stated, "No money exchanged hands. No drugs exchanged hands. The defendant withdrew from any further negotiations before any negotiations were complete. He walked away and renounced any further participation." *Id*. This Court affirmed because the defendant provided sufficient factual allegations to give notice to the State of the factual basis for his affirmative defense. *Id*.; *see also Fischera*, 153 N.H. at 596 ("The defendant's offer of proof was sufficient to give notice of his intent to raise an insanity defense and the grounds upon which he based that defense.").

If a defendant must present some basic facts to support a notice of an affirmative defense, *see Fischera*, 153 N.H. at 596; *Champagne*, 152 N.H. at 429, a situation in which the defendant carries the burden of proof, then a defendant must meet at least this standard to support a notice of a pure defense because a pure defense changes the case that the State must present. Absent even basic facts, it would be unreasonable to expect the State to be able to disprove a pure defense beyond a reasonable doubt. A defendant's pure defense could morph over the course of trial without basic facts to bind the defendant. The State could walk into trial expecting to disprove one set of facts, to learn at trial that it, in fact, needed to disprove a different set of facts. This would be akin to an indictment that simply quotes the statute with no additional facts. In such a situation, the defendant would be

able to ask for a bill of particulars to set forth some supporting facts. *See State v. Kuchman*, 168 N.H. 779, 784-85 (2016) (explaining the purpose of a bill of particulars and leaving it to the trial court's discretion to determine if one such a bill is warranted); *State v. Kelly*, 160 N.H. 190, 196 (2010) ("[I]t may be good practice to ask for a bill of particulars if a defendant is unsure of the specific acts alleged.").

In this case, the defendant's notice was inadequate because it failed to allege any facts that supported his theory of self-defense. He did not allege that the victim had assaulted him out of view of the camera. He did not allege that the victim had threatened to harm him. He did not make any factual allegations at all. He simply recited the legal standard for self-defense. Should the defendant's reasoning prevail, then a defendant can change what the State must disprove beyond a reasonable doubt without providing any notice to the State of what exactly it must disprove. The State would walk into trial blind and be forced to fight on every conceivable front or risk missing a potential theory of defense. This is an absurd interpretation of Rule 14(b)(2)(A) and the trial court sustainably exercised its discretion by ordering the defendant to provide factual detail. Accordingly, this Court must affirm.

CONCLUSION

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

The State requests a fifteen-minute argument before the full court because the final issue raises a novel question of law from which a published opinion would help. The remaining issues, however, do not require a published opinion to further develop the law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,540 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 5, 2019 *<u>/S/Sean R. Locke</u>*
Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that a copy of the State's brief shall be served on Kirsten Wilson, counsel for the defendant, through this Court's electronic filing system

December 5, 2019 */S/Sean R. Locke*
Sean R. Locke