THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0464

State of New Hampshire

v.

Timothy Barr

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Did the trial court err by finding that the First Amendment does not protect one's right to manufacture and possess child pornography that depicts an actual child who legally consented to the underlying sexually explicit conduct.

2. Did the trial court err in finding that the prosecutor's statement that fellatio was "unnatural" to A.L. did not open the door for the defendant to cross-examine A.L. regarding her entire sexual history?

STATEMENT OF THE CASE

The State charged the defendant pursuant to the New Hampshire child pornography statute, RSA chapter 649-A, with nine counts of manufacturing a child sexual abuse image and two counts of possessing a child abuse image. *See* RSA 649-A:3 (2016); RSA 649-A:3-b (2016).

The Grafton County Superior Court (*Ignatius*, J.) held a trial on June 11 and 12, 2018. After the State rested, the defendant moved to dismiss the indictments on First Amendment grounds, claiming that the application of RSA chapter 649-A to him violated his First Amendment rights to possess and observe pornography in his home. A14-A15[1] (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)). He argued that because A.L. legally consented to the documented and recorded sexually explicit conduct, the State could not criminalize the manufacture and possession thereof without offending the First Amendment. *Id.* at 15. The court denied the motion. T 199–201.

The jury found the defendant guilty on two counts of manufacturing a child sexual abuse image and one count of possessing a child sexual abuse image. T 279, 282. The jury found Barr not guilty on the remaining eight indictments. T 280–82.

In July 2018, the trial court sentenced Barr to three consecutive 12-month terms in the house of corrections. A23–A28. The sentences on the manufacturing convictions were stand-committed; the sentence on the

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[1] "T" refers to transcript of trial that occurred on June 11 and 12, 2018.
"TE" refers to exhibits admitted at trial.
"DB" refers to the appellant's brief.
"A" refers to the defendant's addendum.

possession conviction was suspended. A23–A28. The court also placed Barr on probation for two years following his release. A23–A26.

STATEMENT OF FACTS

A.L. was 15 years old when she met the defendant at work. T 126–27. After re-connecting on Facebook a year later, the defendant and A.L. began to engage in sexual conduct. T 144. A.L. was 16 years old and the defendant was 30 years old. T 146; *see* A10.

The defendant and A.L. met in person four times to engage in sexual conduct—twice at the defendant's home and twice in the public bathroom at Settler's Green in Conway. T 129. The remainder of their interactions took place on Facebook, by e-mail, or by phone. T 128, 132. The defendant secretly gave A.L. a smartphone to facilitate their communications. T 128.

The defendant took pictures and videos of A.L. while she engaged in sex acts. T 130–35. He photographed A.L. eight times while she performed oral sex on him at his house. T 131, 148. A.L. testified that because she was nervous, she did not tell the defendant to stop taking photographs. T 148. The defendant also recorded a video of A.L. performing oral sex on him in the public bathroom at Settler's Green. T 133.

The defendant also pressured A.L. to use the smartphone to take pictures and videos of herself engaging in sex acts and to send them to him. T 130, 131, 140. According to the defendant, "Daddy need[ed] it to survive the day." T 61, 177. When A.L. questioned his requests, the defendant assured A.L. that it was legal. T 141. A.L. "felt very uncomfortable [taking sexual photographs of herself] at first, but then . . . got over it and did it." T 140. While A.L. did not always grant the defendant's requests for sexual pictures and videos, she testified that she was worried the defendant would get angry or leave her if she did not send him what he wanted. T 141.

At the defendant's request, A.L. once sent him a video of herself naked and masturbating. T 132. At the beginning of the video, A.L. stated, "This is for you; *this hurts me*. I love you. You'd best love me back, you little bitch." TE 10 (emphasis added).

The defendant stopped engaging in sexual conduct with A.L. after her parents learned of it. T 135. A.L.'s parents called the police, who searched A.L.'s phone, and the defendant's phone and e-mail account, where they found the text messages, photographs, and videos referenced above. T 53–57, 67–82, 113–14, 123.

SUMMARY OF THE ARGUMENT

1. Content-based restrictions on certain categories of speech are not entitled to absolute constitutional protection. One such category is pornography produced using real children under the age of 18, which falls "fully outside the protection of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 471–72 (2010). Here, the defendant was convicted of manufacturing and possessing such pornography—images and videos of a 16-year-old girl masturbating and engaging in fellatio. Because the defendant's conduct fits squarely within this exception, his convictions do not offend his constitutional rights.

The defendant's argument that the United States Supreme Court effectively overruled the child-pornography exception and clarified that the exception was simply an application of the more general speech-integral-to-criminal-conduct exception is unavailing. The Court most recently recognized the freestanding, child-pornography exception in *United States v. Alvarez*, 567 U.S. 709 (2012), in which the Court noted that child pornography and speech integral to criminal conduct are distinct exceptions to the First Amendment. *Id.* at 717 ("Content-based restrictions on speech have been permitted only for a few historic categories of speech, including … *speech integral to criminal conduct* … [and] *child pornography* …." (Emphasis added.)). The defendant's argument to the contrary therefore fails.

2. It is within a trial court's discretion to determine whether a party has opened the door to an otherwise inadmissible topic, and whether the referenced topic prejudiced the opposing party to justify admission of

rebuttal evidence. The mere fact that the door has been opened, however, does not by itself permit all evidence to pass through. Instead, if a party "opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible." *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir. 2005). Thus, a court should admit rebuttal evidence only where the probative value of the proffered evidence outweighs its prejudicial effect on the victim.

Here, the defendant did not argue at trial that the prosecutor's statement that the act of fellatio was unnatural to A.L. was prejudicial. The defendant therefore did not preserve this argument for appeal. And even if he did, the court properly exercised its discretion by determining that the probative value of evidence of A.L.'s sexual experience—a fact that was irrelevant to any trial issue—did not outweigh the prejudicial value, if any, of the prosecutor's statement.

ARGUMENT

1. The defendant does not have a constitutional right to manufacture or possess child pornography regardless of whether the depicted child legally consented to the underlying sexually explicit conduct.

We begin with well-established legal principles. "Congress shall make no law … abridging the freedom of speech …." U.S. Const. amend. I. This prohibition applies to the states through the Fourteenth Amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 489 n.1 (1996) ("Although the text of the First Amendment states that 'Congress shall make no law ... abridging the freedom of speech, or of the press,' the Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment."). The New Hampshire Constitution similarly provides, "Free speech … [is] essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved." N.H. Const, pt. I, art. 22.

Together, these constitutional provisions protect one's right to share and receive information and ideas. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *see Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). This right to receive information and ideas, regardless of their social worth, *see Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society.

But these rights are not without limitation. Neither the federal nor the state constitution protects one's right to manufacture, distribute, or possess pornography produced with actual children under the age of 18. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002)

("The freedom of speech has its limits; it does not embrace … pornography produced with real children."); *New York v. Ferber*, 458 U.S. 747, 763 (1982) ("Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not, incompatible with our earlier decisions."); *State v. Zidel*, 156 N.H. 684, 687 (2008) ("The United States Supreme Court has determined that content-based restrictions on certain categories of speech satisfy strict scrutiny, and, thus, are not entitled to absolute constitutional protection. This unprotected speech "includ[es] … pornography produced with real children."); *see, e.g., U.S. v. X-Citement Videos*, 513 U.S. , 64, 78-79 (2012) (extending the *Ferber* rationale to statutes setting the age of majority at 18).

A state may proscribe the distribution and possession of child pornography based on its compelling interest "in safeguarding the physical and psychological well-being of a minor." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *Ferber*, 458 U.S. at 756−57. Because this interest is compelling "beyond the need for elaboration," the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* Within this broad interest, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757 (emphasis added).

However, the government's broad authority to proscribe child pornography has limits. In *Ashcroft*, the Court held that the First Amendment protects pornography that purports to depict children, but rather than using actual children, relies upon youthful-looking actors or computer-generated images children. *Ashcroft*, 535 U.S. at 249; *see Zidel*,

156 N.H. at 693–94. The Court reasoned that because the production of such material did not harm actual children, the state's compelling interest in protecting the physical and psychological well-being of actual children was not triggered. *Id.* Thus, *Ashcroft* confirms that only pornography produced using real children under 18 was outside of First Amendment protection. *Id.* at 245–46.

Thus, the rule as delivered by the United States Supreme Court is as follows: Congress and state legislatures may criminalize the manufacture, possession, and distribution of pornography produced with real children under the age of 18 without offending the First Amendment. *Ferber*, 458 U.S. at 774; *X-Citement Video, Inc.*, 513 U.S. at 78–79.

New Hampshire has done just that. RSA chapter 649-A prohibits one from possessing and manufacturing visual representations of actual children under the age of 18 engaged in sexually explicit conduct. RSA 649-A:3; RSA 649-A:3-b. The defendant does not dispute the facial constitutionality of the statute or that he violated the letter of the statute. DB 13. Still, he argues that chapter 649-A cannot be constitutionally applied to him because, though A.L. is under 18, the sexual conduct depicted in the videos and photographs underlying his convictions was consensual and legal, and therefore entitled to First Amendment protection. DB 12, 28–29. While framed as a single as-applied challenge, the defendant effectively advances two distinct arguments. First, he argues that chapter 649-A is unconstitutional as applied to him because he did not abuse A.L.; rather, he and A.L. engaged in a "lawful, intimate relationship" and created the video and photographs at issue to chronicle that relationship. DB 29. Second, he implicitly argues that chapter 649-A is more broadly unconstitutional as

applied to anyone who manufactures, possesses, or distributes pornography that depicts actual children who legally consented to the depicted sexually explicit conduct. DB 6 (first question presented), 29. For the reasons stated below, both arguments fail.

This Court reviews questions of constitutional law *de novo. Zidel*, 156 N.H. at 686. Here, the defendant purports to challenge his convictions under both the state and federal constitutions. DB 6. However, he only briefs the federal constitutional argument. DB 15–29. The defendant has not presented any independent argument regarding the state constitution. Thus, this Court should only address the defendant's argument under the federal constitution. *State v. Bashaw*, 147 N.H. 238, 242 (2001) ("Arguments that the defendant raised in his notice of appeal, but did not brief, are deemed waived.").

A. The application of RSA chapter 649-A to the defendant is constitutional because there was evidence that he exploited and harmed A.L.

This case fits squarely within the child-pornography exception defined in *Ferber*, *Osborne*, and *Ashcroft*, and recognized by this Court in *Zidel*. A.L. was an actual child under the age of 18 at the time the defendant used her in the production of child pornography. For this reason, the resulting pornography can claim no constitutional protection.

Moreover, applying the statute here advances the statute's purpose and the State's compelling interest in protecting children from sexual abuse and exploitation. *See* RSA 649-A:1, I, II (2016) ("The legislature finds that there has been a proliferation of exploitation of children through their use

as subjects in sexual performances…. It is the purpose of this chapter to facilitate the prosecution of those who exploit children in th[is] manner."). The mere fact that A.L. legally consented to the "relationship" and resulting sex does not foreclose the possibility that her arrangement with the defendant was nonetheless exploitative, abusive, and harmful to A.L., a minor. And there was evidence presented at trial that it was. The State has an interest in protecting children from this type of harm and applying RSA 649-A to the facts of this case furthers than end.

A.L. hid her involvement with the defendant from her parents, communicating with him through a secret smartphone that he provided. Referring to himself as "daddy," the defendant "controlled" A.L. and "cajole[d]" her to use that smartphone to take pictures and videos of herself engaging in sex acts and send them to him. T 41, 50, 61, 130, 131, 140, 177. A.L. "felt very uncomfortable [taking sexual photographs of herself] at first, but then I got over it and did it." T 140. But she questioned whether these request were even legal. T 141. A.L. also worried that the defendant would become angry or leave her if she did not fulfill his requests. T 141.

Most striking, however, are A.L.'s statements to the defendant in a video that supports one of the convictions on appeal. At the defendant's request, A.L. sent a video of herself naked and masturbating. T 132. At the beginning of the video, A.L. was clear: "This is for you; *this hurts me*. I love you. You'd best love me back, you little bitch." TE 10 (emphasis added).

At trial, A.L. reflected on her actions, testifying that she was disappointed and disgusted with herself as she relived the pornography that she created and in which she appeared. T 131, 135. Perhaps finally

understanding the full harm that may have befallen her, A.L. testified, "I'm just glad that he didn't show … anyone else." T 143.

Based on the foregoing, RSA chapter 649-A is constitutional as applied to the defendant because the pornography supporting the defendant's convictions falls within the child-pornography exception to absolute First Amendment protection and because there was sufficient evidence that the defendant exploited A.L. and that the production of the pornography at issue harmed her.

B. There is no age-of-consent exception to the child-pornography exclusion.

The defendant also argues that RSA chapter 649-A cannot apply to him as a matter of law because A.L. legally consented to the depicted sexually explicit conduct. DB 10. However, whether A.L. could legally consent to sex at the time the defendant used her in the production of child pornography is immaterial to whether the First Amendment protects the pornography at issue. Federal courts have addressed this precise question—whether the government can constitutionally proscribe child pornography that depicts legal and consensual sex acts—and have answered yes.

For example, the United States Court of Appeals for the Ninth Circuit rejected this argument in *United States v. Laursen*, 847 F.3d 1026 (9th Cir. 2017), based on facts similar to those presented here. There, a 45-year-old defendant faced child-pornography charges pursuant to 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2) after he recorded consensual sexual conduct with a 16-year-old girl, a minor. *Id.* at 1028–29. "The pornographic photographs were produced after [the defendant] told [the victim] that the

two "looked good together" and that "***he*** wanted to take pictures." *Id.* at 1032 (emphasis in original). "Importantly, J.B. testified that she did not enjoy taking pornographic pictures." *Id.* Similar to this appeal, there was no evidence that the defendant distributed, transferred, or otherwise displayed the images to anyone else. *Id.* at 1036 (Hawkins, CJ concurring). Rejecting the defendant's constitutional challenges, the Ninth Circuit noted that while the sexual relationship was legal, "[t]he production of pornography stemming from that relationship was not." *Id.* at 1034. "Given that [the victim] was a minor, using her to produce pornography is unquestionably prohibited conduct …." *Id.*

The Eighth Circuit reached a similar decision in *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005), rejecting age-of-consent and constitutional challenges under the First and Fifth Amendments. Bach, who was 41 years old, took photos of a 16-year-old boy, a minor, engaged in sexual conduct. *Id.* at 628. He was convicted of possessing and transmitting child pornography under federal law. *Id.* Similar to the defendant here, Bach argued that his prosecution violated his First Amendment right to free speech because the boy was of the age of consent for the depicted activity and posed willingly for the images. *Id.* The court rejected Bach's arguments, observing, "The First Amendment does not prevent prosecution for child pornography, and Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so." *Id.* at 629. The court further observed that the legislative "choice to regulate child pornography by defining minor as an individual under eighteen is rationally related to the government's legitimate interest in enforcing child pornography laws." *Id.*

Without acknowledging any case law to the contrary, the defendant nonetheless attacks the viability of the child-pornography exception itself. He argues that the Supreme Court has abandoned the child-pornography exception in favor of a more general, universal rule that excludes from First Amendment protection only speech that is intrinsically related to criminal conduct. Thus, he argues, because A.L. had reached the age of consent in New Hampshire, their conduct was lawful and consensual, and was not an act of underlying abuse, the depictions of their sexual conduct retained First Amendment protection. There is no support for either proposition.

The United States Supreme Court has not overruled the categorical exception for child pornography. The defendant erroneously cites one case to argue the contrary—*Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). The *Brown* Court listed "examples" of the "limited areas" in which the First Amendment has permitted restrictions upon the content of speech. The court happened not to include child pornography as one such example. *Id.* at 790–91. However, that omission is of no significance. A year later, the Court recognized the continued existence of the categorical, child-pornography expectation in *United States v. Alvarez*, 567 U.S. 709, 717 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional *categories* [of expression] long familiar to the bar. *Among these categories are … child pornography*." (internal citations and quotations omitted.)).

Moreover, contrary to the defendant's assertion, the Court has not abandoned categorical exceptions to absolute First Amendment protection in favor of a universal, "more general exception" that excludes from First

Amendment protection only "speech that is closely connected with an illegal act." DB 24. Based on a single-sentence section from a legal treatise, the defendant argues that *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)—a fighting-words case—and *Brandenberg v. Ohio*, 395 U.S. 444 (1969)—an incitement case—demonstrate the Court's movement away from permitting the government to ban speech categorically, toward permitting it to ban speech only when it is integral to independently criminal conduct. DB 11. By analogy, the defendant argues that the Court engaged in similar movement with regard to child pornography, with the Court deciding *Ferber* and *Osborne* consistent with *Chaplinsky*, but subsequently moving toward *Brandenberg* in *Ashcroft* and *Stevens*, which is not a child pornography case at all. DB 25–27.

One can defeat the defendant's argument without deeply analyzing *Chaplinsky* or *Brandenberg*. Even accepting as true the defendant's premise regarding the Court's movement from *Chaplinksky* to *Brandenberg* related to fighting words and incitement, such movement did not occur with regard to child pornography.

First, *Ferber* and *Osborne* were decided 13 and 21 years, respectively, after *Brandenberg*. It is illogical that the Court would decide those cases pursuant to *Chaplinsky*, which the defendant argues is invalid in light of *Brandenberg*, DB 21, when it was moving toward the universal criminality requirement purportedly annunciated in *Brandenberg*. The defendant's argument does not acknowledge, let alone explain, this peculiarity.

Second, neither *Ferber* nor *Osborne* actually follows *Chaplinsky*. *Chaplinksky* advanced the proposition that fighting words are those that "by

their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Id.* Thus, *Chaplinsky* provides that states may ban such speech to protect from harm the listeners of such speech. *Osborne* expressly rejected that the child pornography exception was based on this proposition—affirming the constitutionality of the challenged statute because it did not embrace the "paternalistic interest" in controlling what people see or hear. *Osborne*, 495 U.S. at 109. Instead, *Ferber* and *Obsorne* make clear that the exception is premised on protecting children from the harms associated with producing of pornography and associated with the continued existence of such pornography, not on protecting the viewers of consumers of such materials. *Id.* at 111; *Ferber* 458 U.S. at 759.

Ashcroft underscores this point. *Ashcroft*, 535 U.S. at 249 ("The production of the work, not its content, was the target of the statute."). As stated above, in that case, the defendant challenged a federal statute that criminalized pornography that only appeared to depict minors. *Id.* at 241. To defend the statute, the government harkened to *Chaplinsky* and argued that Congress could ban pornography that only appeared to depict children because such content "rarely can be valuable speech." *Id.* at 250. The Court held that the statute was unconstitutional, and in doing so, squarely rejected the government's *Chaplinsky*-based arguments and reiterated the basis for the child-pornography exception annunciated in *Ferber. Id.* "*Ferber* did not hold that child pornography is by definition without value." *Id.* at 251.

Rather, "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250–51. In *Ashcroft,* because actual children were not harmed in pornography depicting young-looking adults or computer-generated children, the state's compelling interest was not implicated; therefore, the speech was protected by the First Amendment. *Id.* at 257.

This Court followed this rationale in *Zidel*. The State prosecuted Zidel under RSA 649-A:3 for possession of child pornography. *Zidel*, 156 N.H. at 684. Like in *Ashcroft*, Zidel did not possess pornography produced with actual children; rather, he created the pornography by superimposing the heads of children on sexually explicit images. *Id.* at 685. While noting the State's compelling interest in preventing harm to children resulting from their "use as subjects in sexual performances," this Court found that "criminalizing the *possession* of materials depicting heads and necks of identifiable minor females superimposed upon naked female bodies, where the naked bodies do not depict body parts of actual children engaging in sexual activity, does not promote this interest." *Id.* at 693. "Accordingly, applying the standard articulated in *Ashcroft, Ferber*, and *Stanley* to [Zidel]," this Court held that the application of RSA chapter 649-A was "not narrowly tailored to achieve the State's asserted objectives," and therefore violated the First Amendment. *Id.* at 694.

Third, the defendant's reliance on *Stevens* is misplaced. *Stevens* does not involve the criminalization of child pornography—it addressed a statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty. *Stevens*, 559 U.S. at 464. To support the constitutionality of the challenged statute, the government argued that animal cruelty was akin

to child pornography—a category of speech already outside of the protections of the First Amendment—and that the Court should recognize it as a new category of unprotected speech. *Id.* at 469. In doing so, the government again advocated that the Court should adopt *Chaplinsky*-like balancing for determining new categorical exceptions to the First Amendment. *Id.* The Court declined on all fronts, reasoning that unlike child pornography, while the prohibition of animal cruelty has a long history in American law, there is no evidence of a similar tradition prohibiting *depictions* of such cruelty. *Id.* Moreover, the Court rejected the proposition that it created the child pornography exception "upon a categorical balancing of the value of the speech against its societal costs." *Id.* at 470–71. Thus, *Stevens* represents the Court's decision not to treat animal cruelty like child pornography under the First Amendment; it did not change the Court's treatment of child pornography in any way.

In rejecting this request, the Court discussed *Ferber*. The defendant contends that within that discussion, the Court stated that *Ferber* did not create a new, freestanding child-pornography exception; but rather, it represented the application of the existing categorical exclusion for speech that was "an integral part of conduct in violation of a valid criminal statute" to child pornography. But the Court's subsequent decision in *Alvarez* negates this claim.

In *Alvarez*, which was decided two years after *Stevens*, the Court identified the "historic and traditional categories" of speech that may be constitutionally prohibited—separately recognizing "speech integral to criminal conduct" and "child pornography" as distinct categories. *Alvarez*, 567 U.S. at 717–18 ("Among these categories are advocacy intended, and

likely, to incite imminent lawless action; obscenity; defamation; *speech integral to criminal conduct*; fighting words; *child pornography*; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent). The Court recognized: "[t]hese categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules." *Id.* at 718.

Because the child-pornography exception remains the law of the land, the defendant's First Amendment rights were not violated by the disposition of this case.

2. The trial court sustainably exercised its discretion by declining to permit the defendant to introduce A.L.'s sexual history as evidence to rebut the prosecutor's statement that fellatio was an act "unnatural" to A.L.; but if otherwise, the error was harmless.

The rape-shield law prohibits inquiry into the prior consensual sexual activity between an alleged victim of sexual assault and persons other than the defendant. *State v. Spaulding*, 147 N.H. 583, 589 (2002); *see N.H. R. Ev.* 412. The law spares sexual-assault victims from "unnecessary embarrassment, prejudice and harassment." *Spaulding*, 147 N.H. at 589. Nonetheless, the rape-shield law can yield to due process and the right of confrontation in certain cases. *Id.* This includes instances where one party "opens the door" to the admissibility of prior-sexual-conduct evidence, and the party seeking to introduce evidence of the victim's prior sexual activity in rebuttal establishes that such evidence has a probative value in the context of a particular case that "outweighs its prejudicial effect on the victim." *Id.*; *accord State v. Cannon*, 146 N.H. 562, 565 (2001).

During her opening statement, the prosecutor stated:

> The [d]efendant, the adult, used [A.L]. He directed her to obtain images and videos of a sexually explicit nature. She was unsure of how to act, so he made sure to tell her where and how to stand, what to wear, how to stroke or suck on his penis, *actions that were unnatural to [A.L.]* who was nearly half his age.

T 32–33 (emphasis added). At trial, the defendant argued that the statement "actions that were unnatural to A.L." "essentially, in not quite so many words, but close to it[,] said [A.L.] was a newcomer to sexual activity …."

T 45–46. Because, as the defendant contended, that proposition was untrue, T 46, he argued that the prosecutor opened the door for the defendant to present as rebuttal evidence A.L.'s prior statements about her sexual history and experience related to sexual pictures. *Id.* The defendant made no argument or claim that the prosecutor's statement inflicted any prejudice upon him.

The trial court properly rejected the defendant's claim that the prosecutor stated A.L. was a "sexual innocent." T 46 ("if she were to be represented as being a sexual innocent, I think we'd have to take that up"). The court further noted that even if the prosecutor had portrayed A.L. as such, her sexual proclivities were irrelevant to the charged offenses, which were not about the fact of A.L.'s sexual encounters with the defendant or A.L.'s consent thereto, but rather, the creation and possession of the pictures and videos depicting those encounters. T 46, 48. Thus, A.L.'s sexual history would still be inadmissible. This Court should affirm the trial court's decision.

It is within a trial court's discretion to determine whether a party has opened the door to an otherwise inadmissible topic, and whether the referenced topic prejudiced the opposing party to justify admission of rebuttal evidence. *State v. Wamala*, 158 N.H. 583, 587 (2009); *State v. Carlson*, 146 N.H. 52, 56–57 (2001). However, the fact that the "door has been opened does not, by itself, permit all evidence to pass through." *State v. Benoit,* 126 N.H. 6, 21 (1985). Instead, if a party "opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible." *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir. 2005) ("Permissible does not mean mandatory, however; the decision to admit or

exclude rebuttal testimony remains within the trial court's sound discretion."). The purpose of the doctrine is to prevent prejudice, and it must not be subverted into a rule for the injection of prejudice. *Wamala*, 158 N.H. at 590. Thus, a court should only admit rebuttal evidence where the probative value of the proffered evidence outweighs its prejudicial effect on the victim. *State v. DePaula*, 170 N.H. 139, 145 (2017). Because the trial court is in the best position to gauge the prejudicial impact of particular testimony, this Court will not upset the trial court's ruling on whether the defendant opened the door to prejudicial rebuttal evidence absent an unsustainable exercise of discretion. *Carlson,* 146 N.H. at 56.

On appeal, the defendant argues that the trial court erred when it declined to permit rebuttal evidence regarding A.L.'s sexual experience. This argument fails for the reasons stated below.

First, the defendant did not preserve this argument for appeal. As stated above, the opening-the-door doctrine is designed "to prevent prejudice, and is not to be subverted into a rule for the injection of prejudice." *Wamala*, 158 N.H. at 590. However, the defendant only now argues for the first time on appeal that the prosecutor's opening statement was prejudicial, thus entitling him to rebut her assertions with evidence of A.L.'s sexual history. DB 34–35. The defendant did not raise this argument at all during trial. Instead, he argued that the prosecutor opened the door to A.L.'s sexual experience, and therefore, he was entitled to inject A.L.'s complete sexual history—the type of evidence that this Court has recognized is embarrassing and prejudicial—as a matter of course. *See Spaulding*, 147 N.H. at 589; T 41–48. Without any argument or showing of prejudice, the trial court properly rejected the defendant's request for

rebuttal evidence. T 44, 48. The defendant cannot attempt to repair this deficient argument for the first time on appeal. *See, e.g., N.H. Dept. of Corrections v. Butland*, 147 N.H. 676, 679 (2002) ("Because her due process argument was not presented to the superior court, we decline to review it for the first time on appeal.").

Second, the defendant's appellate argument rests on the assertion that by stating that the act of fellatio was "unnatural" to A.L., the prosecutor harkened to A.L.'s sexual purity, DB 34, and implied that she was "sexually inexperienced," DB 35. Upon this foundation, the defendant argues, again for the first time on appeal, that he was prejudiced by that implication. DB 34–35. However, the defendant glosses over the fact that the trial court rejected the defendant's argument that the prosecutor's statement implied A.L.'s sexual innocence. T 46 ("[I]f she were represented as being a sexual innocent, I think we'd have to take that up."). The defendant does not challenge this finding on appeal—he ignores it and proceeds as if the trial court found to the contrary. DB 31–32. But the defendant cannot proceed to prejudice without first challenging the predicate finding that the prosecutor did not imply that A.L. was a "sexual innocent." T 46. He has not done so, and therefore, his argument fails.

Third, even if the defendant had preserved his prejudice argument and properly challenged the trial court's determination that the prosecutor did not imply that A.L. was a "sexual innocent," his opening-the-door argument nonetheless fails. The opening-the-door doctrine comprises two sub-doctrines: curative admissibility and specific contraction. *Wamala*, 158 N.H. at 589. The curative-admissibility doctrine applies when "inadmissible prejudicial evidence has been erroneously admitted, and the

opponent seeks to introduce testimony to counter the prejudice." *Id.* The specific-contradiction doctrine "more broadly applies when one party has introduced some admissible evidence that creates a misleading advantage and the opponent is then allowed to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage. *Id.* This Court has held that statements made by counsel during opening statement can create a misleading advantage. *State v. Nightingale*, 160 N.H. 569, 580 (2010). The defendant argues that he prevails under either doctrine. DB 33, 35. He is wrong on both accounts, beginning first with curative permissibility.

As a threshold matter, and in addition to the preservation argument raised above, the defendant did not preserve his curative-admissibility argument for appeal. The defendant's sole focus at trial was the claimed inaccuracy of the prosecutor's opening statement, arguing that the prosecutor misled the jury by implying that A.L. was a "sexual newcomer" when she was not. T 45–46. But the claimed misleading nature evidence is irrelevant to the curative-admissibility framework; it applies only to specific contradiction. *Wamala*, 158 N.H. at 589. Thus, while the defendant did not invoke either doctrine by name at trial, his singular focus on the claimed misleading nature of the prosecutor's statement demonstrates that he only raised the specific-contradiction doctrine. *See id.* The defendant cannot raise the doctrine of curative admissibility for the first time on appeal. *Butland*, 147 N.H. at 679. Thus, the argument fails.

Regardless, the defendant's curative-admissibility argument fails on its merits. Whether A.L. was a "sexual newcomer" or was sexually experienced was irrelevant to the charges against the defendant. Thus,

evidence on this point was not probative of any issue at trial. Moreover, the admission of such evidence would have caused the then 17-year-old victim in this case "unnecessary embarrassment, prejudice and harassment." *Spaulding*, 147 N.H. at 589. Thus, given that the probative value of the proffered evidence did not outweigh its prejudicial effect on the victim, the trial court properly exercised its discretion and denied the defendant's motion to admit such evidence.

The defendant's specific-contradiction argument also fails. Specific contradiction only applies when a party injects admissible evidence into the trial. *Wamala*, 158 N.H. at 589. As discussed above, even if the prosecutor implied that A.L. was a "sexual newcomer," that fact would have been irrelevant to the charges against the defendant, and therefore, inadmissible evidence at trial. *See N.H. R. Ev.* 402.

Cannon highlights this point. In that case, the State charged the defendant with aggravated felonious sexual assault. *Cannon*, 146 N.H. at 563. On the issue of consent, the victim testified that she rejected the defendant's sexual advances before the alleged sexual assault because she had a boyfriend. *Id.* at 563–64. The defendant argued that this testimony opened the door to evidence that the victim previously had consensual sex with the defendant's cousin while she was dating that boyfriend, thus undercutting her stated rationale for why she did not consent to sex with the defendant. *Id.* at 563. This Court agreed, noting, "The central issue in this case was whether the complainant consented to having sexual intercourse with the defendant," and therefore, the victim's testimony "served only to bolster her credibility regarding the issue of consent." *Id.* at 565. "In such a circumstance, the defendant is entitled to rebut this assertion because the

probative value of the proffered evidence would outweigh its prejudicial effect on the victim." *Id.*

Cannon is not unique on this point. This Court has conditioned the admissibility of rebuttal evidence under the specific-contradiction doctrine on relevance to a central trial issue. *See, e.g., DePaula*, 170 N.H. at 147–48 (permitting rebuttal evidence of the defendant's subsequent criminal activity where the defendant, who was charged with conspiracy to commit theft by unauthorized taking, testified that he thought his charged co-conspirators planned to "buy an illegal gun," rather than steal one); *Nightingale*, 160 N.H. at 580 (in a drug case, the "informant's testimony that she had previously targeted another person and that she was required to participate in multiple buys before the task force would help her[] was necessary to counter [the] misleading impression," created by defense counsel, that the informant and the police "had only one target, the defendant"); *Wamala*, 158 N.H. at 591 (permitting rebuttal evidence of the sexual-assault victim's prior, childhood statements regarding sexual abuse where the defendant testified that he could never sexually assault kids and that the victim fabricated the allegations as part of a rebellious streak).

By contrast, even if the prosecutor framed A.L. as a sexual innocent, that statement was irrelevant to the charged crimes—"the charge … isn't about the sex itself, it's about the photographs and it's about the video and creation and possession of the visual representation." T 46 ("So I still don't see a basis for any prior sexual relationship to come in."). The trial court was correct and this Court should therefore affirm its decision.

Fourth, even if this Court determines that the trial court erred by precluding the defendant from rebutting the prosecutor's opening statement

with evidence of A.L.'s sexual history, it should nonetheless affirm because any error was harmless.

"To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict." *State v. Bazinet*, 170 N.H. 680, 686–87 (2018) (quotation omitted). "An error may be harmless beyond a reasonable doubt if the other evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight, and if the evidence that was improperly admitted or excluded is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id.* "In making this determination, [this Court will] consider the other evidence presented at trial as well as the character of the erroneously admitted evidence itself." *Id.*

Here, the evidence of the defendant's guilt was overwhelming. To carry its burden, the State was required to prove that the defendant knowingly possessed and manufactured a visual representation of a person under the age of 18 engaging in sexually explicit conduct. RSA 649-A:2, I, III; RSA 649-A:3; RSA 649-A:3-b. The facts of consequence are undisputed. The pictures and videos at issue depict a 16-year-old A.L. engaged in sexually explicit conduct, namely masturbation and fellatio. T 68, 69, 130–33; TE 1-8, 9, 10. Moreover, the defendant knew that A.L. was 16 years old when he created or took possession of the images. T 147.

Because the prosecutor's statement was inconsequential to the defendant's convictions, this Court should affirm.

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,

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CERTIFICATE OF COMPLIANCE

I, Elizabeth A. Lahey, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,789 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.

July 19, 2019

/s/ Elizabeth A. Lahey
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CERTIFICATE OF SERVICE

I, Elizabeth A. Lahey, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

July 19, 2019 *<u>/s/ Elizabeth A. Lahey</u>*
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