NEW HAMPSHIRE SUPREME COURT

No. 2018-0606

State of New Hampshire

Appellee

v.

Jerry Newton

Appellant

ON APPEAL FROM JUDGMENT

OF THE HILLSBOROUGH COUNTY SUPERIOR-NORTH COURT

BRIEF AND ADDENDUM OF APPELLANT JERRY NEWTON

Theodore M. Lothstein
N.H. Bar # 10562
Kaylee C. Doty
N.H. Bar # 273677
Lothstein Guerriero, PLLC
Five Green Street
Concord, NH 03301
(603) 513-1919
lgconcord@nhdefender.com

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QUESTIONS PRESENTED

1. Mr. Newton asserted that trial counsel provided ineffective assistance of counsel when he voluntarily disclosed incriminating and prejudicial text messages exchanged between Newton and his wife, Marion. The court found that any reasonable person would recognize that the messages were more inculpatory than exculpatory, but found that counsel's error prejudiced only the sentencing hearing. Did the court err in ruling that the disclosure did not prejudice the outcome of the trial?
2. Did the court err in ruling that calling Marion as a witness at Newton's behest, against counsel's strenuous advice, did not fall below an objectively reasonable standard of performance, when counsel was incapable of fully informing Newton as to the consequences of the decision?
3. Did the court err in ruling that Newton was not prejudiced by counsel eliciting inadmissible and prejudicial opinion testimony that his own client lied during the official investigation?
4. Did the court err in excluding statements from Newton's parents that were relevant to the mental state element of the offenses and not barred by the rules of evidence?

STATEMENT OF THE CASE

The State brought four indictments to trial alleging financial exploitation of an elderly, disabled or impaired adult, contrary to RSA 631:9 and 631:10. T4. 601-02. All alleged that Newton recklessly, for his own profit or advantage, took either temporarily or permanently financial resources of an elderly adult, Hazel Newton, valued in excess of $1,500.00, in breach of a fiduciary obligation recognized in law, by spending Hazel's money for the benefit of someone else. T4. 601-02; Add. 5, 13-14.

Each indictment went on to make a specific allegation:

a. Between September 1, 2015 and June 6, 2016, Newton took $22,168.14 from the sale of Hazel's home for the benefit of a person other than Hazel. T1. 20-21; Add. 13.

b. Between December 18, 2015, and August 29, 2016, Newton took approximately $227,460.94 from an IRA that named Hazel as beneficiary, and used the funds for the benefit of someone other than Hazel. T1. 23; Add. 14.

c. Between September 1, 2015 and March 4, 2016, Newton took $73,759.83 from Hazel's FNBC checking account, and wrote checks from that account payable to himself, his business, and to pay for personal expenses and debts. T1. 22; Add. 5.

d. On March 1, 2016, Newton took $4,987.05 from two Honeywell checks made out to Hazel. T1.21.

After trial in which Newton was represented by James O'Rourke, Esq. (trial counsel), the jury found Newton guilty on three of the four indictments. T4. 601-02; Add. 5, 12-13. The jury found Newton not guilty of the last allegation relating to two Honeywell checks. T4. 601.

On October 4, 2018, the court sentenced Newton to concurrent sentences of seven and one-half to fifteen years in state prison, plus a consecutive, suspended state prison sentence, and $327,933.09 in restitution. T-S. 45; Add. 2, 7, 10. The court denied Newton's request for bail pending appeal. T-S. 46. Newton brought his direct appeal, and retained new counsel. Subsequently, this Court granted Newton's motion to vacate the briefing schedule and stay the appeal, for the purpose of remanding the case to litigate a motion for new trial.

Newton filed his initial motion, the State objected, and the parties conducted discovery, gathering documents from trial counsel's file and deposing trial counsel. App-V1. 1, 50, 59-60, 62, 64, 69. On January 27, 2020, Newton filed an Amended Motion for New Trial based on ineffective assistance of counsel which incorporated information from the entire record, including the deposition of former counsel. App-V1. 64. On February 7, 2020, the State filed its Amended

Objection. App-V1. 128. On February 20, 2020 the court (Brown, J.) conducted a non-evidentiary hearing on the motion for new trial.

On March 24, 2020, the court denied the motion for new trial, but granted a review hearing as to sentencing. Add. 33. In denying the motion for new trial, the court found that counsel's disclosure of incriminating text messages was objectively unreasonable, but did not prejudice the outcome of the trial. Nevertheless, the court ordered the scheduling of a review hearing because counsel's deficient performance may have prejudiced the sentencing hearing. Add. 33.

Newton filed a Notice of Discretionary Appeal, asking that this Court accept his appeal and consolidate the ineffective assistance of counsel issues with the direct appeal. The State filed a cross-appeal, asking that this Court reverse the court's decision as to counsel's deficient performance and as to ordering a sentencing review hearing. This Court accepted and consolidated these appeals with the direct appeal.

STATEMENT OF FACTS

This statement of facts attempts to maintain a chronological order for clarity but separates evidence introduced by the prosecution from evidence introduced by the defense.

The Newton Family Trust and IRA Funds.

In 2008, Arkansas lawyer Jodi Carney prepared a living revocable trust called the Newton Family Trust and durable powers of attorney for Newton's parents Hazel and William. T1. 48-51, 63. The trust was funded with their home in Arkansas and certain personal property. T1. 54-55. The trust specified that only the settlors could modify it. Arkansas law governed the trust, even if the settlors moved. T1. 58, 68. The power of attorney did not authorize changes to the trust beneficiaries. T1. 71.

In 2014, Newton's parents directed Carney to make several changes to the trust. T1. 72-73. They made Newton the successor trustee, made him the agent on durable powers of attorney, and made him the trust beneficiary if both of his parents passed away. T1. 73-74.

Much of the Newton parents' savings were deposited in an Edward Jones IRA account held in William's name and not within the trust, which named Hazel as beneficiary and Newton as contingent beneficiary if Hazel predeceased him or disclaimed her interest. T1. 55, 151, 159-60. As of November

27, 2015, the value of the IRA assets was $227,460.94. T1. 161.

Carney's Testimony – Communications with Newton.

On August 15, 2015, Newton emailed Carney stating that his parents' health was failing and they were contemplating moving to New Hampshire. T1. 78-79. On August 18, Newton emailed that William had a seizure and was in a nursing home, and Hazel was "disoriented," raising concerns about possible dementia. T1. 80-81. A month went by with no response from Carney. T1. 81.

On September 14, 2015, Newton emailed new developments: Hazel had been suffering from dementia, was admitted to a psychiatric ward, and was in a nursing home, while William had been hospitalized following brain surgery and was headed to that same nursing home. T1. 81-82. Newton advised that he filed a power of attorney with a court and taken over his parents' finances. T1. 83. He further advised that an auctioneer had been commissioned to auction off his parents' home, as they agreed to move and live in a residence near Newton's home. *Id.*

On September 23, 2015, Carney emailed Newton, cautioning that Newton could not become successor trustee unless two doctors in different practices made a written determination that both settlors were incompetent. She stated that it was her "understanding" that this had not happened.

She stated that his parents asked her to inform Newton that they did not want him to become trustee, and advised him that the durable power of attorney did not authorize Newton to act on behalf of trust assets. Thus, she stated, unless Newton got appointed trustee, he could not sell assets held in trust such as their home and household goods and furnishings. T1. 83-84.

Newton responded, stating that neither he, nor his parents had retained Carney. T1. 84-85. He acknowledged that Carney had spoken to Hazel by telephone and subsequently contacted the auctioneer, attempting to stop the auction. T1. 85. But, he stated, Hazel had been declared mentally incompetent and had no capacity to retain Carney's services. T1. 85. Carney replied, stating she had spoken to William, who told her he had not authorized the auction, had not been declared mentally incompetent by two physicians, and had asked Carney to halt the auction. T1. 85-86.

The auction went forward on September 28, 2015. The proceeds, $52,168.14, were initially deposited in a bank account held in the name of the Newton Family Trust, which was opened at the time of the auction and named William and Hazel as trustees. T1. 181-82.

The Newton Parents Move to Pine Rock Manor.

On October 2, 2015, Newton and Marion applied to Pine Rock Manor (Pine Rock) in Warner, NH, an assisted living

facility, seeking admission for his parents. T1. 94, 107. On November 1, 2015, an ambulance transported William and Hazel from Arkansas to Pine Rock. T1. 96. William arrived in very poor health, bedridden, and suffering from deep vein thrombosis, renal failure, and dementia. T1. 97-98, 126. On November 10, Dr. Kundu, Pine Rock's medical director, activated William's durable power of attorney, granting Newton power of attorney. T1. 109, 115. On December 10, unable to swallow, William stopped taking medications other than for palliative care. T1. 102. On December 15, Pine Rock informed Newton that his father had reached the end-of-life stage. On December 21, 2015, William died. T1. 103-104.

Although Hazel arrived in better physical health, Dr. Kundu believed she was afflicted by dementia, psychosis, anxiety disorder, and depression. T1. 101, 135. Just two days after she arrived, Dr. Kundu activated her durable power of attorney, due to her cognitive impairment. T1. 115-16.

Coral Grady, Pine Rock's Health Services Director, testified that Hazel repeatedly expressed anger at Newton for moving her from Arkansas to Pine Rock. T1. 112. Grady also testified, however, that Newton and Marion were "very, very attentive" to William and Hazel, and "tried very hard to make Hazel happy." T1. 113-14. Grady testified that Newton and Marion spent many hours with Newton's parents, more than other families, including excursions to take Hazel shopping,

to the hair salon, etc. T1. 113-14. Similar testimony was provided by two Pine Rock employees called by the defense. T3. 394; T3. 408. Grady testified that Hazel remained at Pine Rock for "a few months" after William passed away. T1. 106.

Testimony Regarding Financial Transactions.

Investigator Robert Sullivan testified regarding the flow of money from accounts controlled by the Newton parents, to accounts controlled and owned by Newton, as shown in financial records and summarized in a prosecution exhibit. App-V2. 1. First, in a series of transactions, Newton transferred or liquidated $19,172.36 of the auction proceeds into accounts he owned and controlled. T1. 184-186; App-V2. 28. Between September, 2015 and February, 2016, Newton withdrew a total of $81,300.68 from the Newton parents' FNBC bank account, directing the funds as follows:

- $37,770.83 into accounts held in the name of JFN Services, LLC (d/b/a Honest Engine, Newton's auto repair shop in Henniker). T1. 153; T2. 254;App-V2. 34, 42.
- To pay utility bills and taxes for Honest Engine and Newton and Marion's residences. T1.154-155, 191; App-V2. 36, 38.
- To pay $10,298.97 in mortgage payments and back-due mortgage payments for Marion's house in Henniker, starting in September, 2015. As discussed below, Hazel

moved into that house around March, 2016; it had been vacant since Marion moved in with Newton. T1. 189; T2. 155; App-V2. 31-33.

- To pay down credit card debt held in Newton's name. T1. 152-154, 189-94; App-V2. 31, 34-43.

Newton directed funds out of the FNBC account by various means, with Newton sometimes signing as trustee, sometimes signing as power of attorney, and sometimes simply signing with no explanatory title. T1. 152. The State did not dispute that at least some of the expenditures went to purposes that directly benefited Hazel, such as medical bills, nursing home bills, and prescriptions. T1. 152, 200-201.

Transfer of the IRA Assets.

On December 18, 2015, an external account transfer form was faxed from Honest Engine to TD Ameritrade, holding the purported signature of William Newton. T1. 168-69. It directed the transfer of $220,000 out of the Edward Jones IRA and into a TD Ameritrade account that listed its owner as William and beneficiary as Newton. T1. 3, 163, 168-69; App-V2. 4. Ameritrade's records of the creation of the account indicate that William was identified as "widowed," which was not correct. T1. 165. Forensic document examiner Dennis Ryan testified that it was "virtually certain" that William was not the person who signed his name on the external transfer

form. T2. 239. Newton subsequently transferred $47,000 out of this IRA into Hazel's FNBC account. App-V2. 16.

A second TD Ameritrade account opened, listing Newton as owner and Marion as beneficiary; Newton transferred all of the remaining assets from the first Ameritrade account to the second one. T1. 172; App-V2. 9. He then transferred all of the assets out of that account into financial accounts held in Newton's name, including another IRA account maintained at Edward Jones. T1. 172-77; App-V2. 9-17. These transfers, totaling $114,422.80, caused the Newtons to incur about $70,000 in tax penalties for early withdrawals from an IRA. T1. 172-77; App-V2. 16-17.

Honeywell Checks Made Out to Hazel Newton.

Sullivan testified that on March 2, 2016, two Honeywell checks made payable to Hazel, totaling $6,287.05, were deposited into Newton's bank account. T1. 179; App-V2. 19. The checks were endorsed, "Made to the order of Jerry Newton," with a signature purporting to be Hazel's. T1. 180-81. Subsequently, Newton transferred $1,300 of that sum into Hazel's bank account. T1. 179; App-V2. 21. The forensic document examiner testified that Hazel Newton probably was not the person who signed the checks. T2. 239.

Hazel Moves from Autumn Road to Copp Hill Residential Home.

Cheryl Doddrell, Administrator of Copp Hill Residential Home, testified in a video deposition that Hazel arrived at Copp Hill by ambulance from Concord Hospital on June 6, 2016. T2. 267; App-V2. 52. The funding for Hazel's care at Copp Hill was supposed to come from Medicaid, which Concord Hospital had arranged for, plus $2,695 per month from Hazel. App-V2. 53. Jerry Newton made one payment of $734, drawn from the Newton Revocable Family Trust, towards these obligations. *Id*. The remainder was paid by Hazel herself; Doddrell testified that Hazel began writing her own checks. App-V2. 54. Doddrell testified that although Hazel arrived with a physician's diagnosis of "Alzheimer's dementia," Doddrell did her own assessment, and believed that Hazel was competent to write her own checks. App-V2. 55-56.

Newton's Statements to Investigator O'Brien.

Investigator Kevin O'Brien testified that he conducted non-custodial audio-recorded interviews of Newton in November of 2016 and January of 2017. T2. 254, 257. The State played brief excerpts from these interviews to the jury. T2. 256, 258; App-V2. 44. Newton made several incorrect statements, including: He said William changed the beneficiary to himself on the Edward Jones IRA account

about six to seven months before he died, but in fact, William changed the *contingent* beneficiary to Newton several months before he died. App-V2. 45; T2. 256. When asked about the two Honeywell retirement checks, Newton identified the signatures as being his mother's signature, but when pressed, said he may have signed them. App-V2. 46-47; T2. 257. Finally, O'Brien asked how William's IRA balance dropped from $227,000 to $732.00 in late 2015, and Newton responded: "Dad died and he unbeknownst to anyone had willed that money not to his wife." App-V2. 44.

The Defense Case.

According to testimony offered by Newton and his wife Marion, in 2015 Newton lived in Hillsborough and owned and operated an automobile repair business in Henniker, Honest Engine. T2. 270; T3. 446, 448. At that time, Newton was engaged to Marion Gamache, who went on to marry him in 2016 and become Marion Newton. T2. 269-71; T3. 515. Marion owned a home on Autumn Road in Hillsborough, which was subject to two mortgages. T2. 273; T3. 321-22. In June 2015, she moved into Newton's home with her daughters. T2. 269-71. At that time, she was unemployed, and was behind on mortgage payments. T2. 285-86.

Newton and Marion testified that Newton traveled to Arkansas several times that summer and early fall, trips that took him away from home and his business, when his parents

asked for help. T2. 289; T3. 448, 475. In Arkansas, Newton observed signs that his parents could no longer care for themselves--falls, hospitalizations, Hazel's onset of dementia. T3. 452, 471. Newton testified caregivers made clear to him that his parents could no longer live independently in their home. T3. 471. Contrary to Carney's testimony, Newton testified that as of the time of the auction, he had met the qualifications to become successor trustee to the Newton Family Trust, by obtaining the attestation from two physicians from different practices. T3. 510-11.

Newton and Marion testified that William and Hazel agreed to a plan to use Marion's vacated Autumn Road residence as a home for his parents, and that admission to Pine Rock was supposed to be a short-term plan until they got well enough to live there. T2. 288-89, 292, 295-96; T3. 485. Newton testified that they used his parents' funds to make mortgage and back-due mortgage payments on the Autumn Road house and to pay for renovations to make the home available for his parents. T3. 476.

Newton testified that his mother's dementia was frustrating at times, as she was "very difficult" and would change her mind about critical decisions that had already been made. T3. 470-71, 478, 481. Thus, she initially was "eager" to move to New Hampshire, but then "waffled." T3. 470. Newton testified that he understood that this was a

typical manifestation of dementia, and that once he exercised the power of attorney, he needed to "stay[] the course." T3. 471.

Newton further testified that after attempting to seek legal advice from Carney, speaking with another lawyer, and consulting with a financial planner, he and his father made the determination to change the beneficiary on his father's IRA from Hazel to himself. T3. 466-67. Newton testified this decision was made because of concerns about Hazel's "mental state" and the need to "tak[e] care of [his] parents for the foreseeable future; years, decades." T3. 467. However, Newton testified, he did not take steps to make that change right away, because he didn't think his father was going to die so soon. T3. 467. He testified that his father was competent to make the decision to make him beneficiary when they originally made that plan, but acknowledged that his father was not physically able to sign the document and may not have been mentally competent to make the change when Newton actually directed the change in December 2015. T3. 497, 507.

Cross-examined regarding statements he made to O'Brien, Newton acknowledged that his father had not "willed" the IRA to him and that he had misspoken. T3. 495-96. Newton attempted to testify that discussions with a financial advisor led him to open a TD Ameritrade account in

William's name with him as beneficiary, rather than simply sending in a change of beneficiary form for the existing IRA, but the trial court stopped him and struck the testimony as inadmissible hearsay. T3. 509-10. He testified that the reference to his father as "widowed" in Ameritrade's records was wrong, that he never made that claim, and that other TD Ameritrade records showed that he identified his mother's nursing care costs as a reason why he withdrew funds. T3. 499-500; App-V2. 80.

Explaining why the IRA funds then went to another TD Ameritrade account, Newton testified that TD Ameritrade opened this account out of necessity due to his father's death. T3. 483. He explained that he then transferred the funds to a fourth IRA, maintained by Edward Jones, because Marion had an acquaintance who worked there. T3. 483-84. As beneficiary, Newton explained, he considered the funds to be his money, with the moral obligation to use the money to take care of his mother. T3. 484. He acknowledged, however, that he used "a lot" of that money "on some of [his] own needs…." T3. 485.

Thus, Newton distinguished money sourced to the IRA, which he considered to be his own as beneficiary, from the assets of the Newton Family Trust, for which he was to act as trustee. He acknowledged that he handled things in an inconsistent manner, as he didn't really understand "the ins

and outs" of being a trustee. T3. 487. He acknowledged using some of his parents' money to keep his business afloat, because the time away from his business tending to his parents' needs in Arkansas caused about $40,000 in business losses. T3. 472-76, 479-80.

Newton testified that he signed the Honeywell checks that purported to bear Hazel's endorsement, and deposited them in his own account, but did so in order to fund payments for nursing home care. T3. 479-80, 486-87, 490. At times, the court sustained objections or otherwise prevented Newton from explaining his reasons for certain financial transactions, T3. 453-54, 475-76, 509, as discussed further in Section II of the Argument. Ultimately, Newton believed that he had not acted recklessly, but rather thoughtfully and under what he believed to be his authority as power of attorney, in the management of his parents' finances. T3. 486.

Newton acknowledged that on June 7, 2016 he applied for Medicaid on Hazel's behalf, at the request of the hospital, and represented that Hazel only had $734.56 to contribute for nursing care. T3. 503-504. That same day, he acknowledged, he had transferred $15,000 out of the Newton Family Trust account and into his own account, leaving only the $734.56. T3. 501. He further acknowledged that William had not changed the beneficiary on the IRA "six to seven months"

before he died. T3. 495-96. He explained that he had been referring to the change that made him contingent beneficiary, secondary to Hazel, on September 11, 2015. T3. 495-96, 504.

Counsel's Disclosure of Incriminating Text Messages.

Prior to trial Newton had provided trial counsel with 350 pages of text messages between him and Marion. Trial counsel thought the messages were more helpful than incriminating, and disclosed them to the prosecution as reciprocal discovery. The prosecution then relied on the messages extensively when cross-examining Newton and Marion, and in closing argument. These messages are discussed in further detail in Section I(B).

SUMMARY OF ARGUMENT

The trial court correctly found that counsel's decision to disclose incriminating text messages was objectively unreasonable. However, the court erred in determining that their disclosure did not prejudice the outcome of the trial, because the messages were highly prejudicial and used primarily by the prosecution to inculpate Newton rather than by the defense to exculpate him.

Second, the court erred in determining that trial counsel's acquiescence to Newton's insistence that his wife testify was objectively reasonable under a court decision that holds that a properly advised client cannot direct his attorney's strategic decisions and then claim ineffective representation because his lawyer followed the client's instructions. The court erred because counsel did not properly advise Newton of the consequences of his decision.

Third, the court erred in denying Newton's contention that the jury's verdicts were prejudiced by trial counsel's introduction of evidence that Investigator O'Brien saw signs of deception and thought Newton was lying during his interview.

Finally, the court erred in excluding out-of-court statements that were probative as to the mental state element of the indictments and not barred by the rules of evidence.

I. THE LOWER COURT ERRED IN DENYING NEWTON'S MOTION FOR NEW TRIAL, BECAUSE TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED THE VERDICTS.

Counsel's ineffective performance during pretrial proceedings and the jury trial deprived Newton of the fundamental right to the effective assistance of counsel under Part I, Article 15 of the State Constitution, and under the Sixth and Fourteenth Amendments to the federal constitution. Trial counsel provided ineffective assistance of counsel in that he: 1) Voluntarily disclosed incriminating text messages exchanged between Newton and Marion that prejudiced both the verdict and sentencing; 2) Unjustifiably allowed Newton to make the final decision to call Marion in his own defense, when Newton had not been fully informed of the consequences of this decision; and 3) Elicited inadmissible and prejudicial opinion testimony that an investigator believed Newton lied in a pre-arrest interview.

A. Legal standards and standard of review.

"To successfully assert a claim for ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient, and that counsel's deficient performance actually prejudiced the outcome of the case." *State v. Flynn*, 151 N.H. 378, 389 (2004). The defendant "must show that counsel made such egregious errors that he … failed to function as the counsel

that the State Constitution guarantees." *State v. Sharkey*, 155 N.H. 638, 641 (2007).

"[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *State v. Whittaker*, 158 N.H. 762 (2006) (quotations omitted). This Court affords "a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." *State v. Thompson*, 161 N.H. 507, 529 (2011). Thus, "to establish that his trial attorney's performance fell below this standard, the defendant has to show that no competent lawyer would have engaged in the conduct of which he accuses his trial counsel." *State v. Cable*, 168 N.H. 673, 680-81 (2016) (quotation and brackets omitted).

In order to establish that the defendant suffered prejudice as a result of counsel's deficient representation, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Thompson*, 161 N.H. 507, 528 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Both prongs of the ineffective assistance of counsel analysis contain questions of law and fact. *Whittaker*, 158

N.H. at 768. The Court will not overturn the lower court's factual findings "unless they are not supported by the evidence or are erroneous as a matter of law…." *Id.* (citations omitted). The Court applies *de novo* review to the ultimate determination of whether counsel's performance was objectively unreasonable, and whether it inflicted prejudice. *Id.*

B. This court should affirm the lower court's ruling that trial counsel's disclosure of incriminating text messages was objectively unreasonable.

This Court should affirm the ruling that counsel's disclosure of incriminating text messages exchanged between Newton and Marion was objectively unreasonable, because its decision was well supported by the evidence and not erroneous as a matter of law. The court correctly determined the facts relating to this issue as follows: Prior to trial, Newton emailed counsel and said he and Marion had gone through old cell phones and found text conversations exchanged between Newton and Marion during the period that Newton was traveling back and forth to Arkansas. Add. 17. He stated that they had printed out about 350 pages of messages which he thought corroborated his story. *Id.* Counsel believed the messages were helpful to his case, and disclosed them to the State prior to trial. Add. 17-18.

The court correctly found that counsel made a strategic decision to disclose the messages based on his own judgment, and did not merely follow a directive from his client. Add. 18, 25-26. There were some text messages that could help the defense, such as messages sent by Newton that he felt badly about taking over his parents' finances and that he did not want to abandon his parents. Add. 26.

Other messages were incriminating and prejudicial, so much so, that the prosecution referred to messages no less than 42 times during the cross-examinations of Marion and Newton. The court identified the most prejudicial message as being sent on September 1, 2015, while Newton was in Arkansas. Add. 27. In this exchange, Marion proposed to Newton:

> I did the math in my head and we could spend 180,000 dollars appropriately 'for them' in short time, then pay the 120,000 in taxes. It's better than giving it to the state or that whore.

T3. 366. Newton responded: "Agreed." Add. 17.

The court interpreted the punctuation of 'for them' as signaling sarcasm: "The use of single quotes around the phrase 'for them' strongly suggests that Defendant and Marion had no intention of spending the money for Defendant's parent's benefit." Add. 27. And, in a stroke of luck for the prosecution, the date of the message, September 1, 2015, corresponds precisely to the first day of the time

frame of the alleged crimes in two out of the three indictments of conviction. T1. 20-22. Thus, this message voluntarily disclosed by the defense seemed to set forth the precise conspiratorial plan that resulted in the indictments against Newton. Indeed, the prosecutor read this message into the record during Marion's testimony, again during Newton's testimony, and again during closing argument. T2. 366; T3. 366; T4. 560.

Other text messages introduced by the prosecution showed that Newton and Marion harbored antipathy and scorn towards Hazel. Thus, on August 31, 2015, the day before the "better than giving it to the state or that whore" message, Marion sent Newton a message which the prosecutor read into the record:

> I am so angry with your mom. I know I shouldn't be; however, this is more than her Alzheimer's. This is her continuing to be a mean, bitter, spiteful, self-righteous, controlling, manipulative, self-loathing, ungrateful, selfish, abusive piece of shit and terrible useless mother to you and terrible useless wife to your poor dad.

T3. 363. Newton responded that he agreed. *Id*.

The same day, Newton messaged Marion: "I want to give her exactly what she expects from me at this point, which is just take her to the shittiest, nastiest nursing home I can find and never talk to her again." T3. 364. Marion sent a similar sentiment, writing that Newton should "[d]rop her miserable

ass someplace in Florida." T3. 364. The prosecutor read these into the record while cross-examining Marion. T3. 364.

Other text messages introduced by the prosecution at trial revealed that Newton and Marion were struggling financially. On August 17, 2015, Marion texted Newton: "We have no money." T3. 358. She told him that the electricity may have been cut off at her house. T3. 358. On September 9, 2015, she texted: "We're pretty broke right now at the moment." T3. 359.

Thus, there was ample support in the record to support the court's determination that "the damaging text messages that the State introduced not only contradicted, but far outweighed any exculpatory value that these helpful messages may have had." Add. 26-27. The court correctly afforded "a high degree of deference to the strategic decisions of trial counsel.'" Add. 26 (quotations omitted). Nevertheless, the court held that the messages could not be adequately explained by Newton if he took the stand, and the disclosure could not be justified by strategic considerations. Add. 27. Based on all of these considerations, the court's ultimate conclusion was well supported by the record and should be affirmed on appeal: "It would have been clear to any objectively reasonable person reading the messages before trial that the messages were more inculpatory than

exculpatory, and that the State would use them to its advantage." Add. 27.

C. The lower court erred in determining that the disclosure of text messages did not prejudice the trial's outcome.

The court relied on three considerations in ruling that the disclosure of the incriminating messages did not prejudice the trial's outcome: 1) The "flow of money" provided overwhelming evidence that Defendant used his parent's money for his personal expenses, rather than for their benefit; 2) While the text messages raised incriminating inferences regarding Newton's motive to steal from his parents based on financial difficulties, other evidence introduced also supported that inference, and 3) "The State needed only to prove that Defendant acted with a mens rea of recklessness," lessening the importance of motive evidence. Add. 28-30.

First, Newton cannot dispute that the financial records showed that he used some of his parents' money for expenditures that benefitted himself, such as paying his then-fiancée's back mortgage payments, renovating the Autumn Road house, covering Honest Engine's business expenses, buying a vehicle and prom flowers for Marion's daughter, and clothing purchases for Marion. However, the court overlooked that Newton's defense was that he acted in good faith, not recklessly, based on the premises that the IRA transfers were

intended to prevent his mother, suffering from dementia, from misusing the funds, but also meant that the money became his own as beneficiary, albeit with a moral obligation to support his parents; and many expenditures that benefitted him personally also benefitted his parents. He testified that the Autumn Road house was supposed to be the long-term residence for his parents, T3. 476, so expenditures on renovations and to make the mortgage current served his parents' interest as well as his own. He testified that Honest Engine lost $40,000 when he was in Arkansas attending to his parents' needs. T3. 475. A juror could reasonably infer that Newton's parents would want to help support the business under the circumstances, where the financial struggles occurred due to Newton attending to their needs rather than the needs of his business. Accordingly, the "flow of money" alone did not provide evidence so overwhelming that the text messages are rendered inconsequential.

Second, while the court was correct that other evidence supported the inference that Newton was experiencing financial difficulties, Add. 28, the prosecution had no evidence of motive and intent comparable to the most incriminating messages. These were the "better to give it to the State than that whore" message that crudely set forth the entire conspiratorial plan, and the messages that demonstrated that Newton and Marion harbored antipathy

and scorn towards Hazel. In his deposition, former counsel acknowledged that apart from these messages, he had no reason to believe from the discovery or otherwise that the prosecution had any evidence of ill-will directed at Hazel by either Newton or Marion. App-V1. 93, 94, 284-85, 289.

Finally, the court missed the mark when it downplayed the significance of motive evidence generally, on the basis that the indictments required proof of a recklessness mens rea. Add. 29. But this just underscores the gravity of the harm caused by counsel's ineffective representation: In a trial where his client was accused of acting recklessly, he disclosed evidence suggesting that his client acted purposefully.

The fact the jury acquitted Newton on the charge relating to Hazel's checks also undercuts the court's premise that the "flow of money spoke for itself" and rendered trial counsel's errors inconsequential. The jury acquitted after hearing undisputed evidence that Newton forged these checks, deposited them into his own personal account, and after hearing the prosecutor accuse Newton of "double counting" these funds on cross-examination after Newton testified that the funds ultimately paid for nursing home care. T3. 479-80, 486-87, 490-94. In other words, evidence of forgery and commingling of funds was not enough for this jury to convict. The jury must have focused on Newton's mental state, his good faith or bad faith, in reaching its

verdicts. That points to the conclusion that the jury did not view the evidence of recklessness to be overwhelming.

The strongest evidence of the prejudicial impact of these messages comes from the manner in which the parties actually used the messages at trial. The State introduced text messages into evidence on far more occasions and placed far more reliance on the messages than the defense. During the direct examinations of Marion and Newton, counsel made reference to just four text messages, which referenced the plan to move Newton's parents to New Hampshire; Newton's text that he "fe[lt] like an asshole" for taking control for his parents' finances but did not feel he had a choice; Newton's message that stated: "I can't abandon them. I won't be a good son if I abandon them." T2. 290; T3. 456-57, 469-70. On cross-examination, the prosecutor confronted Marion and Newton with approximately 42 text messages that impeached their testimony and prejudiced the defense case, including the most prejudicial messages quoted above. T3. 326, 331, 332, 336, 348, 351, 352, 354, 355, 356, 357, 358, 359, 360, 361, 363, 364, 366; T3. 519-20.

In closing argument, the prosecutor relied on the text messages to support the following incriminating inferences and conclusions: 1) Newton and Marion set forth their conspiratorial plan in the September 1, 2015 message, T4. 560; 2) Messages revealed that certain purchases were really

made for Newton's benefit, using his parents' needs as a mere pretext, T4. 568; 3) Messages that called Hazel abhorrent names and suggested abandoning her at the "shittiest, nastiest nursing home you can find" showed that Newton "conned his parents…" T4. 575; 5) Financial difficulties provided the motive for Newton to steal from his parents, T4. 559.

Another way that the introduction of these messages into evidence instilled prejudice is that the messages actually disclosed only covered the two-month period between August 4, 2015 and September 30, 2015. It covered only 30 days of the 12-month collective time frame alleged in the indictments. Add. 5, 14. Thus, the messages did not cover the time periods of the most critical events, such as the transfer of IRA assets in December, 2015, the withdrawals from Newton's parents' accounts into Newton's personal accounts between January 1 and August 29, 2016, Hazel's move from Pine Rock to Autumn Road, Hazel's move from Autumn Road to Copp Hill. The selective disclosure of text messages only invited speculation from the jury as to why the defense did not disclose text messages from the more relevant time periods. Indeed, the prosecutor raised this question during cross-examination of Marion, T3. 383, and in closing argument. T4. 574.

Finally, the trial judge's comments at sentencing leave no doubt as to the tremendously prejudicial impact of the messages, even after months had gone by since the jury's verdict. The court made the following comments:

> And I can't get out of my head the texts -- I guess it was all texts, maybe some emails, between you and your wife over the course of your thievery....
>
> ...
>
> [T]hose messages between you and your wife were of a significant part, I think, of their [the jury's] decision-making tree.
>
> ...
>
> And for purpose of the sentence review, I want to make sure a sentence review is fully cognizant of the messaging that I'm referring to ... the exhibits that relate to your messaging and the wording thereof during the pendency of your thievery.

T-S. 44-45.

If the sentencing judge found the messages so abhorrent that they were still occupying his thoughts more than two months after the verdict, how could these messages have not impacted the jury's deliberations? But more to the point, the court, by acknowledging that the messages "were a significant part . . . of their [the jury's] decision-making tree," strongly implied that the text messages did prejudice the outcome of the trial.

Accordingly, this court should reverse, and order a new trial.

D. The lower court erred in ruling that trial counsel did not render ineffective assistance of counsel by calling Marion as a witness.

Before trial, counsel and his law partner determined that Marion should not be called as a witness, for many reasons: Her testimony would "hurt" their defense theories; she was "very high strung," and "hard to have a normal… calm conversation with"; she came across as being "all about money," and ultimately her testimony would be "more inculpatory." App-V1. 261-63. Counsel felt so strongly about this, he "had a private conversation with Newton shortly before trial, which he described as a 'final warning' or 'come to Jesus moment,' where he told [Newton] it was a bad idea for Marion to testify because her testimony might be more inculpatory." Add. 16; App-V1. 263-64.

In the proceedings below, trial counsel testified that his concerns were borne out at trial, as he viewed Marion to have "proved to be a poor witness [that] didn't hold up under any kind of cross-examination." App-V1. 267. The record unquestionably supports this assessment, as there are approximately 17 different points where her testimony is interrupted because it was not conforming to court rules or otherwise inflicting prejudice. T2. 276, 284, 286-87, 302; T3. 319-20, 322-23, 325, 326, 333, 334, 337, 352, 356, 357, 362, 364, 365. For example, at one sidebar during Marion's testimony, the court told counsel that "you've got to get her to

focus" because "you're losing the jury and she's losing it for you…." T2. 284. Just a bit later, the court addressed Marion directly, saying her repeated going "off on tangents" might make "[her] feel better… but it's not helping your counsel" and "may not be helping your husband…" T2. 287. At that point, trial counsel pointed out that Marion had "some anxiety issues" and had not taken her medication before testifying. T2. 287.

Below, the State did not argue prejudice prong of the *Strickland* standard. App-V1. 128-144. Indeed, the State below "concede[d] that Marion's testimony was more inculpatory than exculpatory…." Add. 22. Accordingly, the court in its ruling relied solely on the premise that the decision to call Marion was objectively reasonable because the defendant insisted that Marion testify at trial, relying on *State v. Candello,* 170 N.H. 220 (2017); Add. 23-24; App-V1. 129-131 264-65. The court erred, because *Candello* is distinguishable and cannot justify what happened in this case.

In *Candello*, this Court held that it is not objectively unreasonable for a lawyer to follow their client's directive to introduce certain evidence, even if the lawyer believes introduction of the evidence will hurt their client's case, as long as the lawyer has "*thoroughly explain[ed] the potential problems with the suggested approach*." *Id.* at 229 (Emphasis

added). The decision makes repeated reference to the requirement that the client must make a fully informed decision for counsel to be insulated from a claim of ineffective counsel. *Id.* at 229 ("Where a defendant, *fully informed of the reasonable options before him,* agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel.") (quoting *United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir. 1989))(emphasis added); *id.* at 229 ("Counsel's actions are usually based, quite properly, on *informed strategic choices made by the defendant*....")(quoting *Strickland*, 466 U.S. at 691)(Emphasis added).

This case is distinguishable from *Candello* because counsel's assessment of the case was so fundamentally flawed that Newton's insistence on calling Marion was not a fully informed decision. Counsel believed that the text messages were, on balance, favorable to his client, an assessment that the court correctly held to be unreasonable. When a defense lawyer demonstrates that his assessment of the case is that ill-advised, the lawyer cannot meaningfully inform Newton of the risks associated with calling Marion, as the *Candello* decision requires.

Had trial counsel acted competently, he would have informed Newton that disclosure of the text messages would be catastrophic, which would have transitioned into warnings

of the disastrous consequences associated with calling Marion as a witness. Indeed, the State claimed below that calling Marion as a witness would have inevitably resulted in disclosure of the text messages under reciprocal discovery rules and based on counsel's duty of candor to the tribunal. App-V1. 136-37.

By allowing a fully informed client to direct trial strategy, the *Candello* decision balances interests that serve different purposes. Allowing clients to direct trial strategies promotes the interest in client autonomy, which may mean that clients do not always pursue the most effective or prudent strategy. But by requiring that the client be fully informed, it promotes the Sixth Amendment and state constitutional mandate that attorneys' representation remain objectively reasonable at all times, which helps ensure that the adversarial system promotes just outcomes. The *Candello* Court balanced these interests to ensure that a defense attorney is "'still only an assistant to the defendant and not the master of the defense.'" *Id.* at 229 (quotations omitted). But when the lawyer advising the client has already assessed the case in an objectively unreasonable and untenable manner, the lawyer is reduced to a mere enabler of, not assistant to, his ill-informed client. Indeed, it is disturbing that the defense lawyer who represented the client in the trial court in *Candello* is the same defense lawyer in the

proceedings below. T-MH. 28. Accordingly, this Court should clarify that the *Candello* decision insulates effective defense lawyers who respect their client's autonomy, but does not provide a shield for ineffective defense lawyers who defer to their clients' whims.

E. The lower court erred in rejecting Newton's claim that trial counsel rendered ineffective assistance of counsel when he elicited inadmissible opinion testimony.

The trial court erred in rejecting Newton's claim that trial counsel provided ineffective assistance when he elicited opinion testimony from Investigator O'Brien that Newton exhibited signs of deception and that he believed that Newton was lying during an interview. O'Brien testified regarding his two non-custodial interviews of Newton, in which Newton denied committing any misconduct with respect to his father's IRA, and answered questions relating to Hazel's Honeywell checks. *See* App-V2. 44-47. On cross-examination, defense counsel elicited O'Brien's testimony that during these recorded interviews, O'Brien "saw several signs of deception with [Newton] as I spoke to him." T2. 264. Counsel elicited that O'Brien did not believe Newton's testimony about the signing of the Honeywell checks, based on O'Brien's "training and experience," and based on "the other signs I was seeing from [Newton]…" T2. 265. Further, counsel elicited that O'Brien possessed the ability to "tell when people are telling

the truth." T2. 265. The prosecutor had not elicited any testimony from O'Brien as to whether he perceived signs of deception or believed Newton had been lying. T2. 251-258.

A trial witness may not provide opinion testimony as to the credibility of another witness, because such testimony invades the province of the jury. *State v. McDonald*, 163 N.H. 115, 121 (2011); *State v. Reynolds*, 136 N.H. 325, 328-29 (1992). "[T]he prohibition on opinion testimony applies both to testimony that comments on credibility explicitly, as well as testimony that comments on credibility indirectly." *McDonald*, 163 N.H. at 123.

More specifically, the Court has held that the prosecution may not elicit such testimony from a law enforcement officer that interviewed the accused. *McDonald*, 163 N.H. at 121-23; *see also State v. Stott*, 149 N.H. 170, 173 (2003) (officer's testimony admissible where he "did not comment upon the credibility of either the victim or the defendant."). The Court explained: "Allowing this testimony was an invasion of the province and obligation of the jury to determine credibility." *Id.* at 123.

The failure to object to prejudicial opinion testimony, when such testimony has previously been held to be inadmissible, constitutes ineffective assistance of counsel. *State v. Marden*, 172 N.H. 258, 163-64 (2019) (defense counsel committed ineffective assistance of counsel by not

objecting to prejudicial opinion testimony of prosecution expert); *State v. Collins*, 166 N.H. 2110, 212 (2014)(same). Here, counsel did something worse than failing to object to inadmissible and prejudicial testimony. He elicited the testimony.

Below, the State did not claim trial counsel's elicitation of this testimony was objectively reasonable, nor did the court address that issue. App-V1. 139; Add. 30. Instead, the court analyzed the issue solely under the prejudice prong, holding that "there is not a reasonable probability that the outcome would have been any different if counsel had not elicited this testimony or if counsel had objected to it once elicited." Add. 31. The court based its ruling on two considerations: 1) "[A] wealth of other evidence … cast doubt upon Defendant's credibility," and 2) "The fact that the jury acquitted Defendant on the count related to the Honeywell checks indicates that the jury was not particularly persuaded by Investigator's O'Brien's testimony anyway." Add. 31.

First, it is true that other evidence casts doubt on the credibility of Newton's statements to O'Brien, but that does not mean that counsel's removal of all such doubt was inconsequential. At trial, Newton did not dispute that several statements he made to Investigator O'Brien were incorrect, including that William "willed" property to him, and that his father had changed the beneficiary to Newton months before

his death. T3. 495. The issue at trial was whether Newton was simply mistaken in making these statements, misremembered what happened, or purposefully lied to O'Brien. But trial counsel made the jury's job much easier, by eliciting O'Brien's opinion that Newton had purposefully lied to him.

As far as the court's reasoning with respect to the Honeywell checks, it is no more logical to say that the jury's conviction on three counts (including the count relating to the IRA) means that it *was* persuaded by O'Brien's testimony, than to say that the jury's acquittal on one count means it was *not* persuaded by O'Brien's testimony. There are other potential reasons why the jury acquitted on that count, including the fact that the money drawn from the checks matched a similar amount expended by Newton to pay for Hazel's nursing care. T3. 479. Thus, the jury may have limited the import of O'Brien's opinion testimony to the much more significant issue, whether he was intentionally lying about the manner in which he gained access to the IRA funds. Thus, the court's speculation about the jury's impression of O'Brien's credibility does not provide solid ground to support its decision.

In a trial where Newton took the stand, it was particularly prejudicial to have the jury hear a law enforcement officer's opinion that Newton lied during the

official investigation. On their own, and especially in conjunction with the errant disclosure of the text messages, counsel's errors inflicted severe prejudice. In summary, counsel incriminated his client by disclosing the text messages, called a witness that he knew would be a disaster, and then had an officer on the stand call his client a liar. There is a reasonable probability that each of these errors, alone or in combination, prejudiced the outcome of this case. This Court should reverse and order a new trial.

II. THE TRIAL COURT UNSUSTAINABLY EXERCISED ITS DISCRETION BY EXCLUDING TESTIMONY THAT WAS PROBATIVE OF WHETHER NEWTON ACTED RECKLESSLY AND NOT BARRED BY THE RULES OF EVIDENCE.

Prior to trial, Newton filed a motion to admit out-of-court statements of Hazel and William Newton. App-V2. 69. He asserted that the statements were admissible to show that Hazel and William directed Newton to make certain expenditures on their behalf, such as to prepare the Autumn Road house for them and to "assist [Newton] with his own financial obligations; that William directed Newton to change the beneficiary on his IRA to Newton because he was concerned that Hazel was a spendthrift; and to show Hazel's "health, state of mind, … and her wants and needs." App-V2. 69-70. The State objected. App-V2. 75. The trial court reserved ruling on the motion until trial. App-V2. 79.

During Newton's testimony, the trial court repeatedly sustained objections to parts of his story that were probative of his state of mind, in a trial where the State bore the burden of proving that he acted recklessly. The court sustained objections when Newton attempted to testify about conversations with his parents in Arkansas as to whether they should agree to live in the Autumn Road house versus in a nursing home, his parents "waffling" about whether they wanted to move to New Hampshire after they initially thought it was "a great idea," his father's desire to help him keep Honest Engine afloat; and that he relied on the advice of a financial advisor in his efforts to open a new IRA in order to prevent Hazel, afflicted by dementia, from gaining control of the funds upon his father's death. T4. 453-54, 459, 475, 508-509. As to the last ruling, the court struck the testimony *sua sponte*, without hearing any objection from the State. T4. 508-509.

For the first several rulings, the prosecutor stated no grounds when making his objection, and the trial court immediately sustained the objection. T4. 453-54. But when the prosecutor had an opportunity to state grounds for these types of objections, he relied on the hearsay rule. T4. 454-55. However, the prosecutor also correctly stated that out-of-court statements may have a non-hearsay purpose to show

"the effect on the listener," and in such instances, he would ask for a limiting instruction. T4. 455-56.

Subsequently, however, the court *sua sponte* instructed the jury to disregard Newton's testimony that his parents thought moving into the Autumn Road house was a "great idea," explaining to the jury that "he can't testify as what they agreed to and things like that." T4. 459. The record shows that these rulings had a chilling effect on Newton's testimony from that point forward. T4. 473 (Defense counsel asks Newton how the auction of his parents' Arkansas home came about, and Newton responded: "I know I can't tell you what they said, but after the discussion with my parents, I reached a decision that we were going to auction the house."); T4. 508 ("advice that I received from the financial advisor -- and I know I can't say what anybody told me, but based on the advice I received….").

Even when the prosecutor *invited* Newton to explain his reasoning for going through a convoluted process to make himself beneficiary on his father's IRA, the court *sua sponte* interrupted Newton's explanation, citing the hearsay rule, and ordered the jury to disregard it. T4. 508-509. It did so, as soon as Newton started talking about his conversation with his father and the financial planner about how to prevent Hazel from taking control of the IRA funds. T4. 509.

It is black letter law that the hearsay rule does not operate to exclude evidence of a statement offered for the purpose of shedding light on the conduct of a person who heard the statement. This principle of law is expressed in 6 J. Wigmore, Evidence, § 1789, at 314 (Chadbourn rev. 1970) as follows:

> Wherever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

Here, the trial court should have allowed Newton to testify regarding statements that he heard William, Hazel and the financial advisor make, because the statements were probative of whether Newton acted with criminal recklessness. If Newton believed that William or Hazel authorized an expenditure, or believed that it would benefit them, or relied on the advice of a professional in deciding how to manage the financial accounts, those beliefs, even if wrong, would tend to show that he did not act recklessly.

The State showed its understanding of this principle when it introduced emails sent to Newton by Attorney Carney that contained what would ordinarily be considered rank hearsay, including: Statements of Newton's parents to Carney that they did not want Newton to begin acting as trustee at

the time of the auction; and that it was Carney's "understanding" that two physicians had not made written determinations that they are incompetent, without attribution of how she gained that understanding. T1. 80. These out-of-court statements were admissible to show the impact on the listener, Newton, as they tended to bolster the prosecution's case that he acted recklessly.

When Newton took the stand, by contrast, the prosecutor repeatedly objected, preventing him from explaining things he learned from his parents that tended to show that he did not act recklessly. T3. 448, 453-455, 476. The court sustained those objections, and then twice on its own prevented Newton from discussing out-of-court statements that were probative of his state of mind. The most prejudicial ruling prevented him from explaining how he relied on advice of an expert, a financial advisor. T3. 459-460, 509. Taking the time to consult with an expert, and relying on the expert's advice, is the exact opposite of acting "recklessly." Rather, it tends to show prudence and diligence in one's decision making.

The court's errant rulings inflicted prejudice, resulting in a trial that was fundamentally unfair. This Court must reverse.

CONCLUSION

WHEREFORE, Mr. Newton respectfully requests that this Court rule that this Court reverse and order a new trial. In the alternative, if this Court affirms the order denying the motion for new trial, and does not grant relief on the issue discussed in Section II of the Argument, Newton asks that this Court affirm the order granting a sentence review hearing.

Undersigned counsel, who would present oral argument, requests 15 minutes.

Respectfully submitted,

Theodore M. Lothstein
N.H. Bar No. 10562
Lothstein Guerriero, PLLC
Five Green Street
Concord, NH 03301
603-513-1919
lgconcord@nhdefender.com

On the Brief
Kaylee C. Doty
N.H. Bar. No. 273677

Lothstein Guerriero, PLLC
Five Green Street
Concord, NH 03301
603-513-1919
lgconcord@nhdefender.com

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, copies of this brief were distributed to all registrants subscribed to this e-filing matter, including Bryan Townsend and Sean Gill, Esqs., New Hampshire Attorney General's Office, and one copy was sent by first class mail to Jerry Newton.

_____
Theodore Lothstein

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to New Hampshire Supreme Court Rules 16 and 26(7), that the body of this brief, exclusive of pages containing the table of contents, tables of citations, and any addendum, contains 9,427 words, which is less than the limit of 9,500 words.

_____
Theodore Lothstein

NEW HAMPSHIRE SUPREME COURT

No. 2018-0606

State of New Hampshire
Appellee

v.

Jerry Newton
Appellant

ON APPEAL FROM JUDGMENT
OF THE HILLSBOROUGH COUNTY SUPERIOR-NORTH COURT

ADDENDUM OF APPELLANT JERRY NEWTON

Theodore M. Lothstein
N.H. Bar # 10562
Lothstein Guerriero, PLLC
Five Green Street
Concord, NH 03301
(603) 513-1919
lgconcord@nhdefender.com

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Jerry Newton**
Case Number: **216-2017-CR-00999**

Name: **Jerry Newton, 52 Bridge Street Hillsboro NH 03244**
DOB: **June 06, 1964**

Charging document: Indictment

Offense:	GOC:	Charge ID:	RSA:	Date of Offense:
Financial Exploitation; $1500+		1406770C	631:9,I(a)	September 01, 2015

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Felony

Sentence: see attached

October 04, 2018 — Date
Hon. Kenneth C. Brown — Presiding Justice
W. Michael Scanlon — Clerk of Court

MITTIMUS

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

Attest: _____
Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

_____ Date
_____ Sheriff

J-ONE: ☒ State Police ☐ DMV

C: ☒ Dept. of Corrections ☒ Offender Records ☐ Sheriff ☐ Office of Cost Containment
☒ Prosecutor Brooksley C. Belanger, ESQ; Bryan J. Townsend, II, ESQ ☐ Defendant ☒ Defense AttorneyJames P. O'Rourke, Jr., ESQ
☒ Sentence Review Board ☐ Sex Offender Registry ☒ Other DHHS, Estate Recoveries Unit
☒ Jailer Dist Div. _____

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

Court Name: **Hillsborough Superior Court Northern District**

Case Name: **State v. Jerry Newton**

Case Number: **216-2017-CR-0999** (if known) Charge ID Number: **1406770C**

STATE PRISON SENTENCE

~~Plea~~/Verdict: **Guilty**	Clerk: JLC
Crime: **RSA 631:9, 631:10 (Financial Exploit.)**	Date of Crime: 9/1/15 - 3/4/16
Monitor: JB	Judge: **Brown**

A finding of GUILTY/TRUE is entered.

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

☑ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **15 years**, nor less than **7 1/2 years**. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☑ 2. This sentence is to be served as follows: ☑ Stand committed ☐ Commencing _____

☑ 3. **All** of the minimum sentence and **all** of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends **10** years from ☐ today **or** ☑ release on **1489586C, 1406768C** (Charge ID Number)

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

☐ 5. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

☑ 6. The sentence is ☑ consecutive to **1489586C, 1406768C** (Charge ID Number(s))

☐ concurrent with _____ (Charge ID Number(s))

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:

☐ Screen and/or assess for drug and alcohol treatment needs.

☐ Sentence to be served at House of Corrections

☐ _____

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

C.: CBCNHSP 10/1/18

Case Name: State v. Jerry Newton
Case Number: 216-2017-CR-0999
STATE PRISON SENTENCE

PROBATION

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

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

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

OTHER CONDITIONS

☑ 12. Other conditions of this sentence are:

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

☑ B. The defendant is ordered to make restitution of $ 327,933.98 to NH Medicaid/Victim's Estate
☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

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

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

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

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

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

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

☐ I. The defendant and the State have waived sentence review in writing or on the record.

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

☑ K. Other:

See Sentencing Addendum for restitution payment order. In addition, the suspended sentence is conditioned on good behavior, payment of restitution, and defendant shall not serve in any fiduciary capacity for any person, trust, or other entity, other than for his spouse.

10/4/18
Date

Presiding Justice

NHJB-2115-S (01/01/2018)

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

OCTOBER TERM, 2018

STATE OF NEW HAMPSHIRE

v.

JERRY NEWTON

Docket No.: 216-2017-CR-00999

SENTENCING ADDENDUM

This addendum provides terms of the defendant's sentence in addition to form NHJB-2115-S, on Charge ID #1406770C:

1. The defendant is ordered to make restitution of $327,933.98 through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

2. The first $43,641.65 is to be paid to New Hampshire Department of Health and Human Services – Estate Recoveries Unit.

3. The remainder shall be paid to the Estate of Hazel Newton. However, if no Estate is opened within five (5) years of the sentencing date, the funds shall be considered unclaimed and the restitution shall be paid to the victims' assistance fund in accordance with RSA 651:63, III.

10/4/18
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE

INDICTMENT

HILLSBOROUGH, SS. AUGUST TERM, 2017

At the Superior Court, holden at Manchester, within and for the County of Hillsborough aforesaid, on the 16th day of August in the year of our Lord two thousand and seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

Jerry Newton
(DOB: 6/6/64)

HNSC #218 2017 CR 999
CHG ID# 14016770C

of 52 Bridge Street, Hillsborough, New Hampshire, at Hillsborough, New Hampshire on or between the **1st day of September 2015 and the 4th day of March 2016,** did commit the crime of

FINANCIAL EXPLOITATION OF AN ELDERLY, DISABLED OR IMPAIRED ADULT
Contrary RSA 631:9 and RSA 631:10

in that Jerry Newton recklessly, for his own profit or advantage, took either temporarily or permanently the financial resources (money) of Hazel Newton, age 75, an elderly adult, whom Jerry Newton knew or should have known was elderly as defined by RSA 631:8, in breach of a fiduciary obligation recognized in law, by spending Hazel Newton's money for the benefit of someone other than Hazel Newton, not being authorized to do so by the instrument establishing the fiduciary obligation, and the aggregate amount of the money exceeded $1,500.00.

That being, Jerry Newton used $73,759.83 belonging to Hazel Newton to pay Chase Home Finance, JP Morgan Chase, Eversource, Citi Card, Home Depot, Amazon, and PayPal from Hazel Newton's FNBC checking account ending in 5295. Jerry Newton also wrote checks from Hazel Newton's FNBC checking account ending in 5295 payable to himself, Honest Engine, Rymes Oil and Heating, and Ayer and Goss contrary to form of the statute, in such case made and provided, and against the peace and dignity of the State.

Jury Verdict Guilty
Date 7-19-18
Judge Brown
Monitor KA
Clerk JLL

Elizabeth A. Lahey
Assistant Attorney General

This is a true bill.

Foreperson 8/16/2017

Name: Jerry Newton
Address: 52 Bridge Street, Hillsborough NH
RSA: RSA 631:9, :10 Financial Exploitation of an Elderly Adult Felony A

2-3

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Jerry Newton**
Case Number: **216-2017-CR-00999**

Name: **Jerry Newton, 52 Bridge Street Hillsboro NH 03244**
DOB: **June 06, 1964**

Charging document: Indictment

Offense:	GOC:	Charge ID:	RSA:	Date of Offense:
Financial Exploitation; $1500+		1406768C	631:9,I(a)	September 01, 2015
Financial Exploitation; $1500+		1489586C	631:9,I(a)	December 18, 2015

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Felony

Sentence: see attached

October 04, 2018 — Date
Hon. Kenneth C. Brown — Presiding Justice
W. Michael Scanlon — Clerk of Court

MITTIMUS

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

Attest: _____
Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

_____ Date
_____ Sheriff

J-ONE: ☒ State Police ☐ DMV

C: ☒ Dept. of Corrections ☒ Offender Records ☐ Sheriff ☐ Office of Cost Containment
☒ Prosecutor Brooksley C. Belanger, ESQ; Bryan J. Townsend, II, ESQ ☐ Defendant ☒ Defense AttorneyJames P. O'Rourke, Jr., ESQ
☒ Sentence Review Board ☐ Sex Offender Registry ☒ Other Jailer
☒ DHHS, Estate Recoveries Unit Dist Div. _____

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

Court Name: **Hillsborough Superior Court Northern District**

Case Name: **State v. Jerry Newton**

Case Number: **216-2017-CR-0999** (if known) Charge ID Number: **1406768C**

STATE PRISON SENTENCE

~~Plea~~/Verdict: **Guilty**	Clerk: JLC
Crime: **RSA 631:9, 631:10 (Financial Exploit.)**	Date of Crime: 9/1/15 - 6/6/16
Monitor: JB	Judge: **Brown**

A finding of GUILTY/TRUE is entered.

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

☑ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **15 years**, nor less than **7 1/2 years**. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☑ 2. This sentence is to be served as follows: ☑ Stand committed ☐ Commencing _____

☐ 3. _____ of the minimum sentence and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends ____ years from ☐ today **or** ☐ release on _____ (Charge ID Number)

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

☐ 5. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

☐ 6. The sentence is ☐ consecutive to _____ (Charge ID Number(s))

☑ concurrent with **1489586C** (Charge ID Number(s))

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:

☐ Screen and/or assess for drug and alcohol treatment needs.

☐ Sentence to be served at House of Corrections

☐ _____

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

cc: CB & NHSP 11/4/1

NHJB-2115-S (01/01/2018)

15.

Case Name: State v. Jerry Newton
Case Number: 216-2017-CR-0999
STATE PRISON SENTENCE

PROBATION

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

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

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

OTHER CONDITIONS

☑ 12. Other conditions of this sentence are:

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

☑ B. The defendant is ordered to make restitution of $ 327,933.98 to NH Medicaid/Victim's Estate
☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

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

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

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

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

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

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

☐ I. The defendant and the State have waived sentence review in writing or on the record.

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

☑ K. Other:

See Sentencing Addendum for restitution payment order.

10/4/18
Date

Presiding Justice

NHJB-2115-S (01/01/2018)

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

OCTOBER TERM, 2018

STATE OF NEW HAMPSHIRE

v.

JERRY NEWTON

Docket No.: 216-2017-CR-00999

SENTENCING ADDENDUM

This addendum provides terms of the defendant's sentence in addition to form NHJB-2115-S, on Charge ID #1406768C:

1. The defendant is ordered to make restitution of $327,933.98 through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

2. The first $43,641.65 is to be paid to New Hampshire Department of Health and Human Services – Estate Recoveries Unit.

3. The remainder shall be paid to the Estate of Hazel Newton. However, if no Estate is opened within five (5) years of the sentencing date, the funds shall be considered unclaimed and the restitution shall be paid to the victims' assistance fund in accordance with RSA 651:63, III.

10/11/18
Date

Presiding Justice

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

Court Name: **Hillsborough Superior Court Northern District**

Case Name: **State v. Jerry Newton**

Case Number: **216-2017-CR-0999** (if known) Charge ID Number: **1489586C**

STATE PRISON SENTENCE

~~Plea~~/Verdict: **Guilty**	Clerk: JLC
Crime: **RSA 631:9, 631:10 (Financial Exploit.)**	Date of Crime: 12/18/15 - 8/29/16
Monitor: JB	Judge: **Brown**

A finding of GUILTY/TRUE is entered.

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

☑ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **15 years**, nor less than **7 1/2 years**. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☑ 2. This sentence is to be served as follows: ☑ Stand committed ☐ Commencing _____

☐ 3. _____ of the minimum sentence and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends ____ years from ☐ today **or** ☐ release on _____ (Charge ID Number)

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

☐ 5. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

☐ 6. The sentence is ☐ consecutive to _____ (Charge ID Number(s))

☐ concurrent with _____ (Charge ID Number(s))

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:

☐ Screen and/or assess for drug and alcohol treatment needs.

☐ Sentence to be served at House of Corrections

☐ _____

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

a: B + N45

Case Name: State v. Jerry Newton
Case Number: 216-2017-CR-0999
STATE PRISON SENTENCE

PROBATION

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

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

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

OTHER CONDITIONS

☑ 12. Other conditions of this sentence are:

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

☑ B. The defendant is ordered to make restitution of $ 327,933.98 to NH Medicaid/Victim's Estate
☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

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

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

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

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

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

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

☐ I. The defendant and the State have waived sentence review in writing or on the record.

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

☑ K. Other:

See Sentencing Addendum for restitution payment order.

10/4/18
Date

Presiding Justice

NHJB-2115-S (01/01/2018)

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

OCTOBER TERM, 2018

STATE OF NEW HAMPSHIRE

v.

JERRY NEWTON

Docket No.: 216-2017-CR-00999

SENTENCING ADDENDUM

This addendum provides terms of the defendant's sentence in addition to form NHJB-2115-S, on Charge ID #1489586C:

1. The defendant is ordered to make restitution of $327,933.98 through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

2. The first $43,641.65 is to be paid to New Hampshire Department of Health and Human Services – Estate Recoveries Unit.

3. The remainder shall be paid to the Estate of Hazel Newton. However, if no Estate is opened within five (5) years of the sentencing date, the funds shall be considered unclaimed and the restitution shall be paid to the victims' assistance fund in accordance with RSA 651:63, III.

12/4/18
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE

INDICTMENT

HILLSBOROUGH, SS. AUGUST TERM, 2017

At the Superior Court, holden at Manchester, within and for the County of Hillsborough aforesaid, on the 16th day of August in the year of our Lord two thousand and seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

Jerry Newton
(DOB: 6/6/64)

HNSC #216-2017-CR-999
CHG ID# 14067168C

of 52 Bridge Street, Hillsborough, New Hampshire, at Hillsborough, New Hampshire on or between the **1st day of September 2015 and the 6th day of June 2016,** did commit the crime of

FINANCIAL EXPLOITATION OF AN ELDERLY, DISABLED OR IMPAIRED ADULT
Contrary to RSA 631:9 and RSA 631:10

in that Jerry Newton recklessly, for his own profit or advantage, took either temporarily or permanently the financial resources of Hazel Newton, age 75, an elderly adult, whom Jerry Newton knew or should have known was elderly as defined by RSA 631:8, in breach of a fiduciary obligation recognized in law, by spending Hazel Newton's money for the benefit of someone other than Hazel Newton, not being authorized to do so by the instrument establishing the fiduciary obligation, and the aggregate amount of the money spent exceeded $1,500.00.

That being, Jerry Newton took $22,168.14 from the sale of Hazel Newton's home for the benefit of a person other than Hazel Newton contrary to form of the statute, in such case made and provided, and against the peace and dignity of the State.

Jury Verdict Guilty
Date 7-19-18
Judge Brown
Monitor KA
Clerk JVC

Elizabeth A. Lahey
Assistant Attorney General

This is a true bill.

Foreperson

Name: Jerry Newton
Address: 52 Bridge Street, Hillsborough NH
RSA: RSA 631:9, :10 Financial Exploitation of an Elderly Adult Felony A

2-1

THE STATE OF NEW HAMPSHIRE
INDICTMENT

HILLSBOROUGH, SS. APRIL TERM, 2018

At the Superior Court, holden at Manchester, within and for the County of Hillsborough aforesaid, on the 19th day of April in the year of our Lord two thousand and eighteen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

Jerry Newton
(DOB: 6/6/64)

HNSC #216 2017 CR 999
CHG ID# 14895860

of 52 Bridge Street, Hillsborough, New Hampshire, in the County of Hillsborough, between December 18, 2015, and August 29, 2016, did commit the crime of

FINANCIAL EXPLOITATION OF AN ELDERLY, DISABLED OR IMPAIRED ADULT
(RSA 631:9 and RSA 631:10)

In that Jerry Newton recklessly, for his own profit or advantage, deprived, used, or took either temporarily or permanently the personal property or financial resources of Hazel Newton, age 75, an elderly adult, whom Jerry Newton knew or should have known was elderly as defined by RSA 631:8, in breach of a fiduciary obligation recognized in law, by taking, depriving, or using Hazel Newton's personal property or financial resources for the benefit of someone other than Hazel Newton, not being authorized to do so by the instrument establishing the fiduciary obligation, and the funds, assets, or property involved is valued at $1,500 or more.

That being, Jerry Newton without authorization or authority took approximately $227,460.94 from an IRA of which Hazel Newton was the beneficiary, and Jerry Newton used the funds for the benefit of someone other than Hazel Newton. The said act being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Jury Verdict Guilty
Date 7-17-18
Judge Brown
Monitor KA
Clerk JLC

Bryan J. Townsend, II (Bar # 19842)
Assistant Attorney General

This is a true bill.
David Dubois 4/19/2018
Foreperson

Name: Jerry Newton
Address: 52 Bridge Street, Hillsborough, NH
Penalty/RSA: Class A Felony – RSA 631:9 and RSA 631:10

9

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Jerry Newton

Docket No. 216-2017-CR-00999

ORDER

On July 19, 2018, Defendant was found guilty of three counts of financial exploitation of an elderly, disabled, or impaired adult, contrary to RSA 631:9 and 631:10. Defendant now moves for a new trial, arguing that his trial counsel, Attorney Jim O'Rourke was ineffective because he: (1) voluntarily disclosed text messages that were damaging to Defendant; (2) called Marion Newton, defendant's wife, as a witness; (3) elicited testimony from Investigator Kevin O'Brien that he could tell Defendant was lying during pre-arrest interviews; and (4) failed to call Steve Thompson as a witness. The Court held a hearing on February 14, 2020. Upon consideration of the testimony, arguments, and applicable law, Defendant's motion is DENIED. A sentence review hearing will, however, be calendared.

Factual Background

The indictments alleged the following: (1) "Newton took $22,168.14 from the sale of Hazel Newton's home for the benefit of a person other than Hazel"; (2) "Newton took $4,987.05 from two . . . Honeywell checks made out to Hazel Newton for the benefit of a

person other than Hazel Newton";[1] (3) "Newton used $73,759.83 belonging to Hazel Newton to pay Chase Home Finance, JP Morgan Chase, Eversource, Citi Card, Home Depot, Amazon, and PayPal from Hazel Newton's FNBC checking account. . . . [and] wrote checks from Hazel Newton's FNBC checking account . . . payable to himself, Honest Engine, Rymes Oil and Heating, and Ayer and Goss"; (4) "Newton took $227,460.94 from an IRA intended for Hazel Newton and used it for the benefit of someone other than Hazel Newton." (Indictment, Doc. 2.) Attorney O'Rourke represented Defendant throughout the litigation.

A. Marion's Testimony

Marion was closely involved in Defendant's representation throughout the litigation process. (O'Rourke Dep. at 90.) She attended most of Defendant's meetings with Attorney O'Rourke and sometimes she met with Attorney O'Rourke alone. (Id.) On January 21, 2018, Defendant sent an email to Attorney O'Rourke and wrote: "Obviously, Marion and I have been discussing this case on a daily basis. The defense is simple, to us anyway." (State's Ex. 2.) From the beginning of Attorney O'Rourke's representation of Defendant, Marion had indicated that she wanted to testify at trial. (O'Rourke Dep. at 35.) Attorney O'Rourke told both Defendant and Marion that he did not believe she should testify. (Id. at 37.) He also had a private conversation with Defendant shortly before trial, which he described as a "final warning" or "come to Jesus moment," where he told Defendant it was a bad idea for Marion to testify because her testimony might be more inculpatory. (Id.) In response to Attorney O'Rourke's advice that Marion should not testify, Defendant explained that he understood, but if Marion wanted to testify she was going to testify. (Id. at 37.)

[1] Newton was acquitted on this charge.

At trial, Marion struggled to answer Attorney O'Rourke's questions in a concise manner, often going off on tangents. (See Trial Tr. (Day 2) at 284-85.)[2] She also had to be directed by the Court several times that she must answer "yes or no" questions with a "yes or no" before elaborating any further. (See Trial Tr. 3 at 323.) Attorney O'Rourke explained during his post-trial deposition that Marion should not have testified because she "proved to be a poor witness and didn't hold up under any kind of cross examination." (O'Rourke Dep. at 40.)

B. The Text Messages

On September 8, 2017, Defendant sent an email to Attorney O'Rourke stating that he and Marion had stumbled upon old text messages between the couple. Defendant also wrote the following:

> [T]here are numerous contemporaneous references to things that I outlined in my statement, not only corroborating it at the time that it happened, but also jogging my memory about a lot of nuances and things. I took the liberty of printing them into binders, if you would like them/if you think they are valuable or relevant. In my opinion, it can absolutely prove that, at the very least, I wasn't malicious or reckless with their care or assets. It also corroborates the things that happened to Mom and Dad as I was telling Marion about it in real time, and it illustrates the personal sacrifice and the high emotion involved with the whole process.

(State's Ex. 4.) Defendant gave Attorney O'Rourke approximately 350 pages of text messages between himself and Marion.

The text messages were exchanged over a six- to eight-week period when Defendant traveled to Arkansas to visit his parents after learning they were both suffering from health issues. On June 16, 2018, Attorney O'Rourke emailed Defendant to ask about the following text exchange that occurred on September 1, 2015:

---

[2] Hereinafter, the Court will cite to Day 1 of the Trial Transcript as (Trial Tr. 1), Day 2 as (Trial Tr. 2), and so on.

> Marion: I did the math in my head and we could spend 180,000 dollars appropriately 'for them' in short time, then pay the 120,000 in taxes. It's better than giving it to the state or that whore.
> Defendant: Agreed.

(Trial Tr. 3 at 366; State's Ex. 6.) Defendant replied that calling his mother a whore was only a joke and that everyone gets frustrated sometimes. (State's Ex. 6.) Defendant also asked: "Is it one of those things you can redact? Who's to say what you can and cannot redact?" Id. Attorney O'Rourke had subsequent conversations with Defendant about introducing the text messages, and Defendant told Attorney O'Rourke that he thought the text messages were so favorable to him that the State would drop the charges against him. (O'Rourke Dep. at 99-100.) Attorney O'Rourke did not think the messages were so exculpatory that the State would drop the charges, but he believed that the good outweighed the bad and that Defendant could explain the inculpatory messages when he testified. Ultimately Attorney O'Rourke turned the text messages over to the State and provided the State with a list of the text messages that he might introduce at trial. His plan was to use the text messages to bolster the statements of Defendant's witnesses.

Attorney O'Rourke referred to the messages once during his direct examination of Marion. (See Trial Tr. 2 at 290.) The message was not read to the jury but Attorney O'Rourke elicited Marion's testimony that she and Defendant had texted about how they wanted Defendant's parents to move to New Hampshire so she and Defendant could take care of them. (Id.) The State, on the other hand, referred to the text messages numerous times throughout its cross examination of Marion. For example, the following text messages were read out loud during cross examination:

> Defendant: I want to give her exactly what she expects from me at this point, which is just take her to the shittiest, nastiest nursing home I can find and never talk to her again.
>
> Marion: Drop her miserable ass someplace in Florida.
>
> Marion: I am so angry with your mom. I know I shouldn't be; however, this is more than her Alzheimer's. This is her continuing to be a mean, bitter, spiteful, self-righteous, controlling, manipulative, self-loathing, ungrateful, selfish, abusive piece of shit and terrible useless mother to you and terrible useless wife to your poor dad.
> Defendant: I agree. That's exactly how I feel at this moment.

(Trial Tr. 3, at 363-64.) The text message sent by Marion about spending $180,000 "for them" and paying $120,000 in taxes was also read to the jury. Additionally, the State used the text messages to impeach Marion. For example, on direct examination Marion testified that she and Defendant did not have money problems. The State impeached her on cross examination with a text message where Marion stated, "We have no money," to highlight her inconsistent statements. (Id. at 358.)

On direct examination of Defendant, Attorney O'Rourke introduced the following two text messages sent by Defendant to Marion:

> Defendant: I feel like an asshole taking over their bank accounts and things, but what else can I do?
>
> Defendant: I can't abandon them. I won't be a good son if I abandon them.

(Id. at 469-70.) On cross examination, the State again introduced the text message that Marion sent about spending $180,000 'for them.' (Id. at 520.) The State also used the messages to impeach Defendant on his statement that he purchased a trailer solely for moving his parents' belongings from Arkansas to New Hampshire. (Id. at 519.) The message introduced by the State indicated that Defendant may have actually used the

trailer for his personal business. (Id.) During closing arguments, both Attorney O'Rourke and the State referred to the messages.

C. Investigator O'Brien's Testimony

Kevin O'Brien, an Investigator for the Office of the Attorney General, testified at trial as a witness for the State. Investigator O'Brien interviewed Defendant on two occasions, in November 2016 and January 2017. While Attorney O'Rourke cross examined Investigator O'Brien about the November 2016 interview, the following exchange occurred:

> Attorney O'Rourke: Were you being completely honest with him?
> Investigator O'Brien: No.
> Attorney O'Rourke: Why not?
> Investigator O'Brien: Because I saw several signs of deception with him as I spoke with him.
> . . . .
> Attorney O'Rourke: So you can just tell when people are telling the truth?
> Investigator O'Brien: Yes.

(Trial Tr. 2 at 264-65.) During his deposition, Attorney O'Rourke explained that he was trying to show that Investigator O'Brien was untruthful and elicited this testimony in a sarcastic tone to show that Investigator O'Brien was essentially calling himself a human lie detector. (O'Rourke Dep. at 83.) When Investigator O'Brien gave his opinion about Defendant's credibility, Attorney O'Rourke did not object. (See Tr. 2 at 264.)

D. Failure to Call Steve Thompson as Witness

During the course of Attorney O'Rourke's representation, Defendant informed him that Steve Thompson, his father's Arkansas financial advisor, could confirm that his father did not want his mother to have control of their money. (O'Rourke Dep. at 16.) Defendant also stated that during a prior conversation, Thompson had advised him

about how to get around Arkansas law with respect to managing the money. (Id. at 122.) However, Defendant explained that Thompson had made a statement to him to the effect that if Thompson was ever questioned about the conversation, he would deny that it ever happened. (Id. at 123-24.) Sometime in winter 2018, Attorney O'Rourke and Defendant had a phone conversation with Thompson. (Id. at 15.) During this conversation, Thompson confirmed that Defendant's father wanted Defendant, rather than Defendant's mother, to control the money. (Id. at 22-23.) Toward the end of the phone conversation, Thompson questioned whether he might need to obtain a lawyer. (Id. at 121.) After that first phone call, Attorney O'Rourke made about six more phone calls to Thompson, but he did not answer or return the calls. (Id. at 28.)

Due to Thompson's behavior, Attorney O'Rourke felt that Thompson might change his story or say something damaging if Defendant were to call him as a witness. (Id. at 74.) Attorney O'Rourke ultimately filed an out-of-state witness subpoena for Thompson a few days before the final pretrial conference. (Id. at 27.) However, Attorney O'Rourke did not call Thompson as a witness at trial.

Analysis

Part I, Article 15 of the New Hampshire Constitution entitles a criminal defendant to "reasonably competent assistance of counsel." State v. Henderson, 141 N.H. 615, 618 (1997). A defendant's right to assistance of counsel is measured "under an objective standard of reasonable competence." State v. Wisowaty, 137 N.H. 298, 301 (1993). "To successfully assert a claim for ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of

the case." State v. Flynn, 151 N.H. 378, 389 (2004) (citing State v. Roy, 148 N.H. 662, 664 (2002)).

To satisfy the first prong of the ineffective assistance analysis, defendant "must show that counsel made such egregious errors that he . . . failed to function as the counsel that the State Constitution guarantees." State v. Sharkey, 155 N.H. 638, 641 (2007). "We afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." State v. Thompson, 161 N.H. 507, 529 (2011). In other words, "[t]he defendant must overcome the presumption that trial counsel reasonably adopted his trial strategy." Id.

"To meet the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Cable, 168 N.H. 673, 681 (2016). "A reasonable probability is a probability sufficient to undermine confidence in the case." Thompson, 161 N.H. at 528. When conducting the prejudice prong analysis, courts consider "the totality of the evidence presented at trial." Cable, 168 N.H. at 681.

A. Marion's Testimony

Defendant maintains that his counsel was ineffective for calling Marion as a witness, despite counsel's strong belief that Marion would hurt the defense if she testified. The State concedes that Marion's testimony was more inculpatory than exculpatory but argues that Attorney O'Rourke's performance was not deficient, because Defendant insisted that Marion testify at his trial.

The Court finds State v. Candello to be instructive. 170 N.H. 220 (2017). In Candello, the defendant argued that his counsel was ineffective because counsel introduced a damaging recording of the defendant at trial, in which the defendant made references to the assault he was accused of. Id. at 227-28. During trial, the defendant's attorney had consulted with him about whether to introduce the entire recording or just part of it, and the defendant decided that he wanted the entire recording to be introduced. Id. at 227. Nonetheless, the defendant later argued that the recording should not have been introduced and that trial counsel should not have deferred a critical strategic decision to his uninformed client. Id. at 228. The Court disagreed with the defendant, explaining that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 229.

The Court held that because the defendant was fully informed as to the contents of the recording, counsel conferred with the defendant, and the defendant directed counsel to introduce the recording, counsel was not ineffective. Id. at 230. In reaching this decision, the Court clarified that because a defendant must have "broad power to dictate the manner in which he is tried, it follows that, in evaluating strategic choices of counsel, [courts] must give great deference to choices which are made under the explicit direction of the client." Id. at 229. In other words, "if counsel is commanded by his client to present a certain defense, and if he does thoroughly explain the potential problems with the suggested approach, then his ultimate decision to follow the client's will may not be lightly disturbed." Id.

Here, from the beginning of Attorney O'Rourke's representation, Defendant allowed Marion to be closely involved in the case. For example, Marion attended almost all of Defendant's meetings with counsel and Defendant even gave his permission for Marion to meet with counsel alone. In an email that Defendant sent to Attorney O'Rourke early on in the litigation, Defendant expressed that he and Marion discussed the case together every day. Most importantly, throughout the litigation process, Defendant and Marion both made it clear that they wanted Marion to testify.

The Court must give great deference to the choices Attorney O'Rourke made at the direction of Defendant. See id. at 229. There is no question that Defendant not only directed his counsel to call Marion as a witness, but insisted that she testify. Attorney O'Rourke fully informed Defendant of the potential consequences and tried to discourage Defendant from having Marion testify, but Defendant chose to disregard those warnings. Under these circumstances, the Court cannot find that Attorney O'Rourke's performance was constitutionally deficient. Because Defendant has failed to meet the first prong of his ineffectiveness claim, the Court need not address the prejudice prong.

Accordingly, with respect to counsel's decision to call Marion as a witness, Defendant's motion is DENIED.

B. The Text Messages

Defendant next argues that his counsel provided ineffective assistance by turning the text messages between himself and Marion over to the State. The State maintains that because Defendant directed Attorney O'Rourke to turn the text messages over,

counsel was following Defendant's directions and therefore, his performance was not deficient.

As the Court explained above, it must give great deference to actions Attorney O'Rourke took at the direction of Defendant. However, the Court is not convinced by the State's assertion that Defendant *directed* Attorney O'Rourke to produce the text messages. At one point during the deposition, when asked whether Defendant encouraged him to turn the messages over to the State, Attorney O'Rourke responded, "Yes." (O'Rourke Dep. 106.) Attorney O'Rourke also answered in the affirmative when he was later asked whether Defendant "pushed him" to turn the messages over. (Id. at 113.) However, Attorney O'Rourke was not consistent in that position. During the same deposition, the following conversation took place:

> Q: Do you remember whether [Defendant] told you not to disclose – or not to include any of these messages?
>
> A: No.
>
> Q: Okay. He found them just as relevant to his defense?
>
> A: I don't remember. I don't remember.
>
> Q: Okay. But he certainly didn't object when you showed these to him, right?
>
> A: No.

(Id. at 111.)

Moreover, although Defendant compiled the text messages himself and believed that they were favorable to him, Defendant's initial email to counsel about the messages also demonstrates that he would defer to counsel's expertise on that matter. In the email, Defendant stated, "I took the liberty of printing them into binders, if you would like them/if you think they are valuable or relevant." (State's Ex. 4.) Moreover, during one

of the email exchanges between counsel and Defendant, after Attorney O'Rourke and Defendant established that he was referring to his mother as a whore, Defendant stated: "Is it one of those things you can redact? Who's to say what you can and cannot redact? I don't think it's relevant, because we don't really think of her as a prostitute, and we weren't really going to take her to FL and throw her in the swamp." (Id. at Ex. 6.) Defendant's request that Attorney O'Rourke redact that message indicates Defendant likely recognized that some of the messages, particularly the ones in which he and Marion spoke ill of his mother, were damaging to him. Moreover, the email demonstrates that Defendant did not have a proper understanding of the fact that Attorney O'Rourke could not just turn over the favorable messages while redacting the unfavorable ones. Accordingly, the Court declines to find that Defendant directed counsel to introduce the messages, and Candello is therefore inapplicable here.

Despite finding that Defendant did not direct counsel to make this decision, the Court still must "afford a high degree of deference to the strategic decisions of trial counsel." Thompson, 161 N.H. at 529. "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. However, even without the benefit of hindsight, counsel's actions give the Court pause.

At trial, Attorney O'Rourke only referred to the favorable text messages a handful of times. The messages that counsel introduced through direct examination of Defendant were helpful in that Defendant expressed that he felt badly about taking over his parents' finances and that he did not want to abandon his parents. However, the

damaging text messages that the State introduced not only contradicted, but far outweighed any exculpatory value that these helpful messages may have had. Counsel turned over messages to the State in which Defendant said he wanted to drop his mother off in "the shittiest, nastiest nursing home" he could find and then never speak to her again. Counsel provided the State with a message in which Marion referred to Defendant's mother as a "mean, bitter, spiteful, self-righteous, controlling, manipulative, self-loathing, ungrateful, selfish, abusive piece of shit," and another in which she called his mother a "whore." The messages reveal that Defendant responded to both these statements saying he agreed. Counsel also turned over several messages that demonstrated that Defendant and Marion were struggling financially. Most importantly, he turned over the following message: "I did the math in my head and we could spend 180,000 dollars appropriately 'for them' in short time, then pay the 120,000 in taxes. It's better than giving it to the state or that whore." (Trial Tr. 3 at 366.) The use of single quotes around the phrase "for them" strongly suggests that Defendant and Marion had no intention of spending the money for Defendant's parent's benefit.

Counsel stated that he thought the messages would be more helpful than damaging, because Defendant would be able to explain the inculpatory messages. However, the Court cannot find counsel's belief that the messages, especially ones filled with expletives about Defendant's mother, could be adequately explained by Defendant. It would have been clear to any objectively reasonable person reading the messages before trial that the messages were more inculpatory than exculpatory, and that the State would use them to its advantage. Accordingly, the Court finds that counsel's performance fell below an objective standard of reasonable competence.

Turning next to the second prong of the analysis, the Court must determine whether there is a reasonable probability that, but for counsel turning over the text messages to the State, the jury would have found Defendant not guilty. See Cable, 168 N.H. at 681. Defendant argues that the introduction of the text messages at trial prejudiced his theory of defense in three ways: (1) they provided evidence that Defendant and Marion were struggling financially and therefore had motive to steal from his parents; (2) they demonstrated that Defendant acted for the purpose of benefitting himself and Marion, rather than his parents; and (3) they showed that Defendant and Marion bore ill will towards his parents. The State contends that it introduced ample evidence on each of these points even without the text messages. Accordingly, the Court will examine the evidence that the State presented at trial.

To be sure, the State used the text messages on cross examination of Marion to present evidence that Defendant and Marion were struggling financially. However, the State also presented other evidence on this point. For example, Investigator Sullivan testified that the mortgage payments were behind on a home that Marion owned and that Defendant took $10,298.97 from his parent's personal account to pay that mortgage. (Trial Tr. 1 at 188-89.) Although Defendant later testified that he intended for his parents to live in Marion's second home, Investigator Sullivan testified that Defendant's parents were residing in a nursing home at the time. (Id.) Investigator Sullivan's testimony also revealed that Defendant used money from his parents' accounts to pay off his own existing debts. For example, the State presented evidence that Defendant used the money to pay off a $5,257.68 balance on his Home Depot credit card. (Id. at 192.) Although Defendant testified that he used the Home Depot

card to make improvements to the home that his parents planned to live in, Investigator Sullivan testified that the majority of the purchases made with the card that Defendant paid off were made before he started improving the home. (Id. at 193.) The State also presented evidence that Defendant used the money to pay off a $3,863.08 Amazon credit card debt. (Id.) Investigator Sullivan testified that most of the Amazon purchases were for auto parts, presumably for Defendant's business as an auto mechanic. (Id. at 194.) He also testified that Defendant paid off a $7,000 Citi credit card debt with the money. (Id. at 191.) Based upon this evidence, the Court finds that even absent the text messages, the jury certainly could have concluded that Defendant used his parent's money for the benefit of himself and Marion because they were struggling financially. Regardless, while evidence of Defendant's financial struggles may have provided the jury with a motive, the State needed only to prove that Defendant acted with a mens rea of recklessness.

In addition to the foregoing, Investigator Sullivan also provided a plethora of evidence that Defendant used his parent's money for his personal expenses, rather than for their benefit. For example, he testified that Defendant transferred $27,770.89 from his parent's personal and checking accounts into an account for Honest Engine, his business. (Id. at 189-90.) He also testified that Defendant used $591.99 to pay a utility bill for Honest Engine and $2,402 to pay taxes for the business. (Id. at 191-92.) Additionally, the State presented evidence that Defendant used $454.98 from his parents' account to pay a utility bill for his own home. (Id. at 192.)

Through Investigator Sullivan, the State was able to provide the jury with a paper trail. He testified to exactly which accounts money originated in, which accounts it was

moved into, who moved the money, and what the money was spent on. While the text messages were certainly damaging and painted Defendant in a bad light, the flow of money spoke for itself. Based upon the overwhelming amount of evidence that the State introduced at trial, and given that the State needed only to prove that Defendant acted recklessly, the Court finds that there is not a reasonable probability that the jury would have returned a not guilty verdict if the messages had not been introduced. Accordingly, Defendant has failed to meet the prejudice prong and the Court declines to find that counsel provided ineffective assistance by turning over the text messages to the State.

C. Investigator O'Brien's Testimony

Defendant next argues that counsel provided ineffective assistance when he elicited opinion testimony from Investigator O'Brien that he believed Defendant had been lying during a November 2016 interview. Defendant maintains that counsel's actions were particularly harmful, because Defendant's credibility was crucial to his defense. Because the Court can resolve this claim by analyzing the prejudice prong alone, the Court will do so without inquiring into whether counsel's performance was constitutionally deficient. See State v. Killam, 137 N.H. 155, 158 (1993) (explaining that if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the Court may do so).

On direct examination, Investigator O'Brien testified briefly about two interviews he conducted with Defendant in November 2016 and January 2017. The State introduced evidence that Defendant told Investigator O'Brien that his father changed the beneficiary on his IRA account. Investigator O'Brien testified that in actuality, Defendant

was only a contingent beneficiary and his mother was the primary beneficiary. This evidence alone provided the jury with evidence that Defendant was arguably untruthful with Investigator O'Brien. The only other evidence that Investigator O'Brien testified to related to two Honeywell checks made out to Defendant's mother. The jury acquitted Defendant on the count related to the checks.

The State introduced a wealth of other evidence that cast doubt upon Defendant's credibility, such as the paper trail provided by Investigator Sullivan. Moreover, the fact that the jury acquitted Defendant on the count related to the Honeywell checks indicates that the jury was not particularly persuaded by Investigator's O'Brien's testimony anyway. The only other piece of evidence that Investigator O'Brien testified to was that Defendant was not the primary beneficiary on his father's IRA, but this evidence was also introduced through Investigator Sullivan. While eliciting Investigator O'Brien's opinion that Defendant was untruthful may have been a mistake by counsel, this testimony was certainly not the nail in the coffin. The Court finds that there is not a reasonable probability that the outcome would have been any different if counsel had not elicited this testimony or if counsel had objected to it once elicited. Accordingly, counsel did not provide ineffective assistance with respect to Investigator O'Brien's testimony.

D. Failure to Call Steve Thompson as Witness

Defendant next argues that his counsel was ineffective for failing to call Steve Thompson as a witness, because Thompson was the one witness who could corroborate Defendant's claim that his father wanted Defendant, rather than Defendant's mother, to control the finances. Specifically, Defendant points to the fact

that Attorney O'Rourke failed to file an out-of-state subpoena until days before the final pretrial conference. To establish that counsel's performance was deficient, Defendant "must overcome the strong presumption that counsel's conduct fell within the limits of reasonable practice, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." State v. Croft, 145 N.H. 90, 91 (2000).

Although Attorney O'Rourke spoke with Thompson on the phone and Thompson confirmed that Defendant's father wanted to give him control of the finances, Attorney O'Rourke explained that he had serious reservations about calling Thompson as a witness. First, Defendant indicated that Thompson had given him advice about how he could circumvent Arkansas law, but that Thompson said he would deny ever having that conversation if asked. (O'Rourke Dep. at 122-24.) Additionally, when Attorney O'Rourke and Defendant spoke with Thompson, he expressed concerns about needing to "lawyer up." (Id. at 121.) Thompson also stopped answering Attorney O'Rourke's phone calls, so Attorney O'Rourke was unable to reach Thompson again after their first phone call. (Id. at 28.) Moreover, Attorney O'Rourke had heard from local people in Arkansas that Thompson had left the locality to avoid other subpoena requests. (Id. at 122.) Based upon all of this information, Attorney O'Rourke believed that Thompson might change his story or lie on the stand if he was called as a witness.

Regardless of the timeliness of the out-of-state subpoena, Attorney O'Rourke made an informed and strategic decision not to call Steve Thompson as a witness. Defendant has failed to overcome the presumption that his counsel acted reasonably by doing so. Accordingly, Defendant has not met the first prong of his ineffectiveness claim and his claim fails.

Based upon the foregoing, Defendant's motion for new trial is DENIED. That being said, the Court recognizes that it relied heavily on the text messages in making its sentencing decision. (See Sentencing Tr. at 44-45 ("And I can't get out of my head the texts – I guess it was all texts, maybe some emails, between you and your wife over the course of your thievery.").) Because the Court has found that the introduction of the messages constituted deficient performance by counsel, the Court will schedule a sentencing review hearing to determine what, if any, change in sentence should be contemplated as a result.

SO ORDERED.

3/24/2020
Date

Kenneth C. Brown
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 03/24/2020