THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0606; 2020-0338

State of New Hampshire

v.

Jerry Newton

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT-NORTH

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument requested)

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ISSUES PRESENTED

I. The defendant's trial counsel warned him that his wife should not testify because her testimony would incriminate him. The defendant rejected counsel's advice and insisted that she testify. Did trial counsel provide constitutionally effective assistance of counsel in following the defendant's directive?

II. The defendant gave trial counsel copies of text messages written during the period of charged conduct, which the defendant considered exculpatory. Trial counsel consulted with the defendant on a trial strategy to use the texts. The defendant pushed trial counsel to disclose the texts to the State, knowing he may need to explain inculpatory texts when he testified. Did the trial court err in concluding that trial counsel acted constitutionally deficient in disclosing the texts?

Issue preserved at SA 91-97, 165-71; MNT 27-36, 41-42; NOCA 1-14.[1]

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[1] Citations to the record are as follows:
"DB_" refers to the defendant's brief and page number.
"DD_" refers to the addendum to the defendant's brief and page number.
"DAI_" and "DAII_" refer, by volume number, to the appendices to the defendant's brief, and page number.
"DTD" refers to the deposition transcript of Cheryl Doddrell and page number.
"SA_" refers to the State's addendum and page number.
"T_" refers to the consecutively paginated transcripts of the jury trial held July 16-19, 2018 and page number.
"ST_" refers to the transcript of the sentencing held on October 4, 2018 and page number.
"PTHI_" refers to the transcript of the final pretrial hearing held on June 28, 2018 and page number.
"PTHII_" refers to the transcript of the motions pretrial hearing held on July 3, 2018 and page number.
"MNT_" refers to the transcript of the motion for new trial hearing held on February 20, 2020 and page number.

III. Did the trial court correctly conclude that trial counsel's disclosure of the texts did not constitutionally prejudice the jury's verdicts?

IV. The trial court granted the defendant a sentence review hearing because it relied heavily on the texts at sentencing. Did the trial court err in granting the defendant a sentence review hearing?

Issue preserved at SA 99, 165-71; MNT 27-36, 41-42; NOCA 1-14.

V. While cross-examining a prosecution witness, trial counsel asked whether the witness could tell when someone is lying. Did the trial court correctly conclude that the question and answer did not prejudice the defendant considering all other evidence undermining the defendant's credibility and his acquittal on the indictment to which the challenged evidence related?

VI. The trial court sustained certain objections to out-of-court statements defense claimed were made to the defendant and his wife by the victim and others. Did the trial court sustainably exercise its discretion to exclude the statements? If not, was any error harmless?

"MRH_" refers to the transcript of the motion/review hearing held on June 23, 2020 and page number.
"NOA_" refers to the defendant's notice of appeal and page number.
"DNOA_" refers to the defendant's notice of discretionary appeal and page number.
"NOCA_" refers to the State's notice of cross-appeal.

STATEMENT OF THE CASE

Following a jury trial in the Hillsborough County Superior Court – Northern District, the defendant was convicted of three class A felony counts of financial exploitation of an elderly adult, contrary to RSA 631:9 (Supp. 2018), and RSA 631:10 (Supp. 2018). T 22-24, 601-02. He was acquitted of one class A felony count of financial exploitation of an elderly adult. *Id.* The trial court (*Brown*, J.) sentenced him to serve two concurrent 7½-15 year stand-committed state prison terms, DD 6-14, and a consecutive, fully suspended, 7½ -15 year sentence beginning upon his release from incarceration. DD 1-4. The court ordered he pay $327,933.98 in restitution. DD 1-14.

The defendant filed a mandatory appeal. NOA 1-4. This Court stayed the defendant's appeal, allowing him to litigate a motion for new trial, based on ineffective assistance of counsel, in the trial court. The trial court denied the motion for a new trial, but granted a sentence review hearing. NOCA 15. The trial court stayed that hearing pending appeals. NOCA 34. The defendant filed a discretionary appeal, and the State cross-appealed. DNOA 1-4; NOCA 1-14. This Court accepted these appeals and consolidated them with the defendant's mandatory appeal.

STATEMENT OF FACTS

A. The State's Evidence

1. Hazel and William Newton, and the defendant's fiduciary obligations.

Hazel Newton ("Hazel") lived with her husband, William Newton ("William"), in Salem, Arkansas. T 48-49. In August 2015, William, 76, suffered a subdural hematoma requiring brain surgery. T 82, 98-99, 126-27. At the same time, Hazel, then 73, was diagnosed with dementia. T 82, 135, 184; SA 203, 205.

The defendant is William and Hazel's son. T 75, 253-54. Between August and September 2015, he traveled to Arkansas several times to see his parents. T 13-15; SA 198-210. In September 2015, he took control of their financial and medical decision-making. T 13, 108; SA 203-05, 256-57. He began serving as trustee of his parents' living, revocable trust, "The Newton Family Trust," which held title to their home and personal belongings. T 53-55, 152; SA 176-84, 210, 256-57. He also started acting as attorney-in-fact under their durable financial powers of attorney, which were governed by Arkansas law. T 83, 108, 152; SA 172-175, 210, 256-57.

These legal instruments imposed fiduciary obligations on the defendant to act in his parents' best interests and use their resources for their care, comfort, and maintenance. T 57, 60-61, 68, 70; SA 177, 185-97. The defendant knew he was obligated to act in his parents' best interests. SA 206. He was not authorized to gift his parents' property or assets to himself or others, nor could he legally alter their beneficiary designations.

T 71-72; SA 194, 96. The defendant was required to account for how he spent his parents' money. T 72; SA 194.

The defendant e-mailed his parents' estate-planning attorney, Jodi Carney ("Carney") when he began acting as their agent. T 76-77; SA 198-210. He asked about the consequences of his parents' failing health. T 79; SA 198. Carney cautioned that the defendant could not serve as trustee until two doctors each made a written determination that both of his parents were incompetent. T 83-84; SA 200. Until then, the defendant's parents remained the trustees. SA 200. The defendant told Carney his parents' doctors declared them incompetent. SA 205.

The defendant wanted to move his parents to New Hampshire so he hired an Arkansas auctioneer to sell their home and belongings to the highest bidder. T 83; SA 205. On September 14, 2015, the defendant e-mailed Carney to report that his parents opposed his plan. SA 205. William and Hazel called Carney requesting that she stop the auction and stop the defendant from acting as trustee. T 83-86; SA 209. Carney called the auctioneer to stop the sale and contacted the defendant to explain once again, that he was not yet the trustee. *Id.*

On September 24, 2015, the defendant e-mailed Carney to say he was not retaining her services and she should contact him before speaking with anyone else about the Trust. T 84-85; SA 210. Carney never heard from William, Hazel, or the defendant again. T 86. The defendant moved forward with the auction. T 202-04.

2. Assisted living and William's death.

On October 2, 2015, the defendant contacted Pine Rock Manor ("Pine Rock"), in Warner, New Hampshire about admitting his parents. T 94; SA 256-57. Pine Rock is an assisted living facility specializing in the care of dementia patients. T 94. The defendant identified himself as his parents' attorney-in-fact for finances and healthcare and trustee of their Trust. SA 256-57. He reported that his parents had $300,000 in assets, with additional monthly income. T 106-108; SA 256-57. Pine Rock accepted William and Hazel for admission. T 125.

On November 1, 2015, William and Hazel arrived at Pine Rock from Arkansas by medical transport. T 125. William arrived in poor and failing health. T 97-98, 125. He was bedridden. T 126. He suffered from a blood clot in one of his legs; his legs were swollen and weeping. T 98, 126. He had kidney failure. T 126. William could understand simple directions. T 101. He could answer yes or no questions with prompting, but he was otherwise non-verbal. T 101. Pine Rock's Medical Director diagnosed Hazel and William with dementia and activated medical powers of attorney, authorizing the defendant to make medical decisions for them. T 109, 115, 135; SA 212-213.

By late November 2015, William was in hospice and receiving comfort care. T 130-32, 143. This decision was made following a meeting between Pine Rock medical staff, the defendant, and the defendant's fiancée, Marion Gamache ("Marion"). T 130-31. They did not consult William due to his cognitive limitations. T 130-31.

William received strong narcotic medication, which further impaired his cognition. T 132-34. By December 10, 2015, he was actively dying. T 103. He could no longer swallow and began receiving a liquid narcotic. T 102. He needed complete care and was incontinent. T 103. During his last medical assessment on December 15, 2015, he could not communicate. T 103-04, 132-33. Hospice staff found him equally unresponsive. T 145. William died on December 21, 2015, from, among other things, dementia. T 134-35; SA 211.

3. Hazel's move from Pine Rock and Medicaid Application.

Hazel continued to live at Pine Rock after William's death. T 406. She had many possessions, including furniture and multiple sewing machines. T 114, 136, 406. The defendant and Marion also occasionally took her shopping. T 408. In March 2016, the defendant notified Pine Rock that Hazel would be moving out and into an unoccupied home, which Marion owned. SA 258-59. While the defendant originally intended to keep Hazel at Pine Rock "indefinitely," he explained that he was moving her to conserve resources. T 411, 415-15; SA 258. The defendant moved Hazel from Pine Rock in March 2016. T 411; SA 258-59.

Hazel lived in the unoccupied home for three months. T 411, DTD 8; SA 258-59. She lived alone. T 382-83. In June 2016, Cheryl Doddrell ("Doddrell"), administrator of Copp Hill Assisted Living ("Copp Hill") in Sanbornville, New Hampshire, received a call from Concord Hospital. DTD 6-8. Hospital staff explained that Hazel, who had been admitted, needed a place to live. DTD 7. Hospital staff explained Hazel would pay for Copp Hill using state assistance through Medicaid. DTD 9-10. Hazel

arrived at Copp Hill by ambulance on June 7, 2016; she arrived with only three or four garbage bags filled with clothes and yarn. DTD 8.

In addition to state assistance, Hazel had a small monthly obligation to pay from her income. DTD 9. Doddrell asked the defendant to pay this amount. DTD 12. He paid roughly 25% of the first monthly obligation from Hazel's Trust funds. DTD 11-12. The defendant paid nothing more on Hazel's behalf, and he never brought her remaining possessions to Copp Hill. DTD 14.

4. The defendant's use of Hazel's assets.

In July 2016, the State began investigating whether the defendant unlawfully took his parents' money while serving as their fiduciary. T 252-53. Investigator Robert Sullivan summarized at trial the defendant's use of: (1) Hazel and William's personal checking account; (2) The Newton Family Trust account; (3) William's IRA account, of which Hazel was the primary beneficiary; and (4) two pension checks issued to Hazel. T 156; DAII 1-43. While the defendant paid his parents' bills from these assets, the summary focused on his own use of the assets. T 152-56. The defendant does not dispute the summary's accuracy. T 480.

a. William's IRA account.

In September 2015, William solely owned an Edward Jones IRA account. T 157; SA 214-15. On September 11, 2015, while still living in Arkansas, he designated Hazel as the account's sole primary beneficiary, entitled to receive 100% of the funds in the account upon his death. T 159-61; SA 214-15. He designated the defendant as the contingent beneficiary,

who would receive funds only if Hazel predeceased William or disclaimed the funds. T 159-60; SA 214-15.

On November 27, 2015, the IRA account contained $227,460.94. T 161; SA 217. On December 18, 2015, three days before William's death, the defendant created a separate IRA account in William's name at TD Ameritrade. T 163-66; SA 226-29. He used William's date of birth and social security number on the application, SA 226-27, but his own home address, e-mail, and telephone number. T 136, 165; SA 226-27. The application listed William as "widowed," even though Hazel was still alive. T 165-66; SA 226.

Within one hour of creating the account, the defendant faxed an "external account transfer form" to TD Ameritrade from his auto repair business. T 164, 167-69; SA 231-32. The form directed TD Ameritrade to transfer $220,000 from William's Edward Jones account to the newly created TD Ameritrade account. T 168; SA 231-32. The defendant signed the form using William's name and dated it December 18, 2015. T 168-69, 239, 483; SA 231-32.

Ten days after William died, Edward Jones transferred $223,597.96 to the TD Ameritrade account the defendant created. T 169; DAII 6. By this time, the defendant had named himself sole beneficiary of the TD Ameritrade account. T 169-70; DAII 6. Only $732.87 remained in the Edward Jones account. T 170; SA 234. The defendant withdrew that amount the following month. T 173; SA 243.

In January 2016, the defendant transferred $47,000 from the TD Ameritrade account into Hazel's personal checking account. T 171-72;

DAII 9. Over the next several months, he transferred the remaining funds into his personal accounts, as follows:

- On January 26, 2016, the defendant transferred all of the funds into a new TD Ameritrade account in his own name. He designated Marion as the sole beneficiary of this new account, T 172-75; DAII 10;
- On February 3, 2016, he transferred $18,000 into his personal checking account, paying a $2,000 early withdrawal penalty, T 175; DAII 12;
- On February 24, 2016, he transferred all of the remaining funds, $154,083.86, into a newly created Edward Jones account in his name, T 175; DAII 14;
- On June 7, 2016, the day Hazel arrived at Copp Hill, he transferred $15,003.00 into his personal account, which incurred an additional $1,677.00 withdrawal penalty, T 176; DAII 16; and
- On August 29, 2016, the defendant transferred $81,419.80 into his personal account, paying a $66,641.20 withdrawal penalty. No assets remained in the account thereafter, T 176; DAII 17.

The defendant admitted at trial that he used the funds transferred into his personal account as his own money and for his own purposes. T 485.

Within three months of the final transfer, State Investigator Kevin O'Brien ("O'Brien") met with the defendant and asked him to explain what happened to the "$227,000" in William's Edward Jones account. DAII 44. The defendant falsely claimed, "Dad died and he unbeknownst to anyone had willed that money not to his wife . . . . He gave it to me." *Id.* O'Brien asked what he did with the money. *Id.* The defendant said he "moved it into another Edward Jones account." *Id.* The defendant said that William, "at some point along the last 6 or 7 months of his life . . . changed the

beneficiary." DAII 45. The defendant claimed it was a "surprise" to him because he "didn't know" his father "willed" the money to him. *Id.* At trial, a State's handwriting expert opined that that it "was highly probable, virtually certain," William did not sign the TD Ameritrade transfer form. T 239; SA 254-55. At trial, the defendant admitted signing William's name to the form, conceding his father was "perhaps not" competent when he did so. T 497.

b. The Newton Family Trust Account.

The defendant opened a financial account in the name of the Trust in September 2015. T 182-83; DAII 22. He listed himself as trustee signatory. T 183; DAII 22. On September 28, 2015, he deposited a $52,168 check issued to the Trust into the account. T 182; DAII 22. At that time, he withdrew $6,482.60 in cash. T 184; DAII 23.

Between October and November 2015, the defendant transferred $33,000 into William and Hazel's personal checking account. T 184; DAII 24. After William died, the defendant withdrew $12,689.76 in two installments and deposited the funds into his personal PayPal, Inc. account. T 185-87; DAII 25-28. He transferred a nearly identical amount from his PayPal account to his personal checking account. T 187; DAII 27-28.

c. Hazel's Honeywell Checks.

Honeywell issued two checks to Hazel following William's death for: $4,000; and $2,287.05. T 178-81. The defendant signed Hazel's name to the checks and deposited them into his personal checking account on March 2, 2016. T 178-79, 239, 486-87; DAII 18-21; The defendant

withdrew $1,300 from his personal account and deposited the funds into Hazel's personal checking account, but kept $4,987.05 in his personal account. T 179; DAII 18-21.

During a January 2017 interview, O'Brien asked him about these deposits. DAII 46. The defendant initially said that Hazel endorsed the checks. *Id.* When pressed, he acknowledged that it was "conceivable" that he signed the checks. DAII 47-48. The State's handwriting expert testified that Hazel "probably" did not sign the checks. T 239; SA 249-53. The defendant subsequently admitted he signed both checks and claimed he used the money to cover one $7,200 payment on her behalf to Pine Rock. T 479-80.

d. William and Hazel's personal checking account.

William and Hazel had a joint checking account. T 171-72; DAII 29. The defendant began accessing the account as attorney-in-fact in September 2015. T 171-72, 186-87; SA 205; DAII 29-31. Between September 2015 and February 2016, he used the account to pay many of his parents' bills, including monthly rent at Pine Rock. T 187-195.

However, during that same period, the defendant used his parents' assets for his and Marion's benefit, including the following:

- He used $10,298.97 from the account to pay two mortgages on Marion's vacant, second home. Marion was in arrears on the mortgages when the payments began. He also paid an electric bill associated with the home. William never lived in the home, and Hazel did not live in the home during this time. During these months, the defendant was paying his parents' rent at Pine Rock, T 187-88; DAII 31-35;

- He transferred $27,770.83 into his business bank account. In the two weeks before William's death, the defendant also used his parents' checking account to pay roughly $3,000 for his business's fuel and tax bills, T 189-92; DAII 34;
- He wrote checks to himself totaling $7,444.26, depositing them into his personal bank account, T 190; DAII 35;
- He used a total of $16,120.76 to pay off his credit card debt at Citi Bank, Home Depot, and Amazon. Much of the debt pre-existed his trips to Arkansas in August 2015. His Amazon debt was associated with purchases for auto parts, T 192-94; DAII 37, 40, 41; and
- He transferred $16,000 into his personal checking account, T 194; DAII 42.

In only six months, the defendant transferred or spent $81,300.68 from his parents' checking account for his and Marion's benefit. T 194; DAII 43. He admitted at trial that by June 2016, just nine months after becoming his parents' fiduciary, Hazel was left with $732; he then applied to put her on Medicaid. T 501-03.

B. Grand Jury Indictments and Pretrial

A Hillsborough County−Northern District Grand Jury indicted the defendant on four class A felony counts of financial exploitation of an elderly adult. T 20-24; DD 5, 13, 14. The indictments alleged commonly that the defendant recklessly, for his own profit or advantage, took the property or financial resources of Hazel, an elderly adult, in breach of a fiduciary obligation recognized in law, and the aggregate amount spent exceeded $1,500.00. *Id.* The indictments separately alleged specific unlawful, reckless takings as follows:

1. Between September 1, 2015, and March 4, 2016, the defendant took $73,759.83 from Hazel's personal checking account, T 22;[2]
2. Between September 1, 2015, and June 6, 2016, the defendant took $22,168.14 from the sale of Hazel's home, T 21;[3]
3. Between December 18, 2015, and August 29, 2016, the defendant took $227,460.94 from an IRA of which Hazel was a beneficiary, T 23; and
4. On March 1, 2016, the defendant took $4,987.05 from two Honeywell checks issued to Hazel. T 21.

The defendant retained attorney James O'Rourke ("trial counsel") to represent him. DAI 231. The defendant took an active role in the preparation and development of his case. DAI 315-16. He made his views known to and had no trouble disagreeing with trial counsel. DAI 315-117, 321-23; SA 105-121. He provided trial counsel a list of points to argue at trial. DAI 321-22; SA 126-27. He lectured trial counsel on how to present to the jury, instructing him to "make eye contact" because trial counsel supposedly had a "habit of looking down." DAI 322-23; SA 127.

The defendant told trial counsel his defense was "simple": He did not have a thorough understanding of his fiduciary responsibilities and, as a result, his recordkeeping was "a mess." DAI 318-19; SA 122-23. Trial counsel initially believed the defendant's conduct was likely reckless. DAI 236. Nonetheless, trial counsel believed they had a "chance of winning," and settled on a defense that the defendant, as an "uneducated,

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[2] By the time of trial, the State alleged and its summary reflected the defendant unlawfully took $81,300.68 from the account.

[3] By the time of trial, the State alleged and its summary reflected the defendant unlawfully took $19,172.36 from the Trust assets.

unsophisticated car mechanic," did not act recklessly in carrying out his responsibilities. DAI 248-49, 313.

1. The defendant's decision to call Marion.

The defendant allowed Marion (now his wife) to be very involved in his representation. DAI 317. He told trial counsel that he and Marion were a "team." DAI 320. Marion attended most meetings, and, at times, she met with trial counsel alone, at the defendant's direction. DAI 317. Trial counsel found Marion difficult to deal with. DAI 261. She was high strung and emotional. DAI 261. Trial counsel grew to believe that Marion was "all about money." DAI 262-63.

The defendant insisted that Marion testify. DAI 204. Trial counsel believed strongly that Marion should not testify because her testimony was incriminating. DAI 262. As trial approached, trial counsel told the defendant and Marion he believed she should not testify and explained why. DAI 263, 264. The defendant and Marion insisted that she testify. DAI 264.

Trial counsel met with the defendant shortly before trial in a last attempt to convince him that calling Marion was a bad idea. DAI 263-64. Trial counsel referred to this as a "come to Jesus" meeting. *Id.* He explained this was the "final warning," and listed the reasons why he believed she should not testify. *Id.* The defendant said he understood, but that "if she wants to testify, she is going to testify." DAI 264.

2. The disclosure of texts.

The defendant supplied trial counsel with hundreds of pages of documents he believed were exculpatory, which included roughly 350 pages of text messages ("texts") between the defendant and Marion from August and September 2015. DAI 316, 323. Prior to turning them over, the defendant told trial counsel that he reviewed them, and they jogged his memory about "a lot of nuances." DAI 324-25; SA 128. He told trial counsel he believed the texts could "absolutely prove" that he was "not reckless with [his parents'] care or assets." DAI 325; SA 128. He asked if trial counsel thought they would be "valuable or relevant," and whether trial counsel wanted them. SA 128. Trial counsel said he wanted them. DAI 325-26.

Trial counsel reviewed each text, as did other members of his firm. DAI 326. Trial counsel found texts he believed were helpful for the defendant. DAI 326. One text from the defendant to Marion read, "I can't abandon them. I won't be a good son if I abandon them." T 470. Another read, "I feel like an asshole taking over their bank accounts and things, but what else can I do?" T 469. Trial counsel believed he could use these texts, to show the defendant's state of mind was not reckless. DAI 326.

On the other hand, trial counsel discovered texts that appeared damaging to the defense theory. These included texts in which the defendant and Marion:

- Disparaged Hazel, calling her, among other things, a "bitch," "whore," and "useless mother"; DAI 289, 328;
- Complained of money problems, including that they were "pretty broke" and had "no money"; DAI 288;

- Discussed using a large trailer the defendant purchased with Hazel's money for his auto business; DAI 285 and
- Talked about dropping Hazel at a nursing home and never speaking with her again, and joked about feeding her to "alligators." DAI 330.

Trial counsel also saw a September 1, 2015 message by Marion to the defendant that read: "I did the math in my head and we could spend 180,000 appropriately 'for them' in a short time, then pay 120,000 in taxes. It's better than giving it to the state or that whore." DAI 328. The defendant responded, "agreed." DAI 328. The text referred to Hazel and her money. DAI 328; SA 132-33.

Trial counsel raised the apparently damaging texts with the defendant who believed he could "explain everything." DAI 274-79, 286-87. The defendant explained that with regard to the disparaging remarks, he and Marion were joking. DAI 282-83, 330. The defendant felt the texts showed his frustration, which supported his professed "personal sacrifice." DAII 325; SA 128. The defendant explained that the "for them" message represented his honest intent to use $180,000 for his parents' care, including paying their taxes. DAI 280.

The defendant asked trial counsel whether they could redact certain derogatory remarks referring to Hazel. SA 139. Trial counsel believed that if they chose to use the helpful texts, they could not withhold the relevant, seemingly incriminating ones. DAI 332-33. Trial counsel concluded, based on the defendant's explanations, overall the texts were helpful in that they showed a "layman trying to do his best." DAI 339. The defendant agreed with this strategy. DAI 339.

Prior to disclosure, trial counsel discussed with the defendant portions of the texts they would redact. DAI 331-32. The defendant never asked that they redact the "for them" text. DAI 332. The defendant "pushed" trial counsel to disclose the texts, believing them so helpful the State may drop the charges upon reviewing them. DAI 326-27, 340. The defendant knew he may have to "explain" some of the problematic texts when he and Marion testified. DAI 281, 332; SA 139. Trial counsel disclosed the texts, less some irrelevant, sexually explicit ones. DAI 332. Trial counsel believed the decision to disclose the texts was the defendant's choice. DAI 340.

C. Trial

1. O'Brien's cross-examination.

The State called Criminal Investigator Kevin O'Brien to introduce the defendant's audio-recorded interviews concerning his use of the IRA funds and Honeywell checks. T 251-58. On cross-examination, trial counsel asked O'Brien whether he was trying to "set up" the defendant when interviewing him about the Honeywell checks. T 264-65. Counsel asked whether the defendant's response—that he "didn't know" whether he signed the checks—was an "acceptable answer." T 265. O'Brien responded, "Not with the other signs I was seeing from [the defendant], based on my training and experience." *Id.* Trial counsel then asked sarcastically, "So you can just tell when people are telling the truth?" *Id.* O'Brien responded, "Yes." *Id.*

2. Marion's testimony.

In the defense case, trial counsel called Marion to testify. T 269; DAI 264. On direct examination, her demeanor was anxious and she was non-responsive to many questions. T 270, 276, 284, 286-88. The trial court interrupted her testimony multiple times in an effort to get her to "focus." T 284, 286-88.

Marion testified the "plan," which she referred to as "God's plan," was for Hazel and William to move to New Hampshire and into her second home, but that the defendant had to get them "on board." T 288-89, 291-92. She explained the plan required securing an "in-house nurse" to "help take care of them." T 288. She testified that she "honored" and "loved" Hazel, and Hazel's difficult behavior did not bother her. T 297-99. She testified that William and Hazel's money was to be used to take care of them. T 302. She claimed that she and the defendant were "absolutely not" having money problems during this time. T 294.

Trial counsel had Marion authenticate several texts believed to be exculpatory. T 291. This represented the first time either party introduced any of the texts at trial. *Id.* None of the texts had been introduced in the State's case-in-chief or referred to in opening statement. T 24-268. Marion testified that it was by the "grace of God" she and the defendant found the texts, and she was "so grateful" to have found them. T 282.

On cross-examination, Marion conceded she was behind on her mortgage payments when the defendant began using Hazel's money to pay them. T 318-19. She admitted that contrary to the alleged "plan," they did not secure nursing services for Hazel while she lived at the home. T 382-

83. She testified that once Hazel went to Concord Hospital, she and the defendant would not allow Hazel back in the house. T 384-85. She testified that after Hazel went to Copp Hill, they gave away a "bunch of Hazel's stuff," and "had a yard sale," the proceeds of which were not shared with Hazel. T 386-87.

Prior to trial, the defendant sent a list of expenses from his personal account to the State in an effort to justify his spending of Hazel's money. T 326-27, 333. Marion conceded that several of these claimed expenses, such as charges for flowers, and hair and nail appointments, were actually for Marion and her daughters. T 333-46. The State impeached Marion with her own Facebook account records and receipt information to contradict the charges the defendant used to justify his spending. *Id.* Marion testified that she "never thought that they would be gone through." T 336. Marion also admitted that a car the defendant purchased with Trust assets was actually a gift for Marion's daughter. T 353. Marion testified that her daughter drove it for only two months before "totaling it." T 353-54. Marion conceded that the defendant did not reimburse the Trust for the vehicle's cost. T 354.

The State also impeached Marion's testimony with many of the texts. The State introduced the "we have no money" and "we're pretty broke" texts to impeach her testimony that she and the defendant were "absolutely not" having money problems. T 358-59. The State introduced texts calling Hazel derogatory names to impeach Marion's testimony that Hazel did not frustrate them, and that they honored and loved her. T 363. Finally, the State introduced the "for them" message to impeach her testimony that the "plan" was to care for the defendant's parents. T 366-67. Marion insisted the State was taking the texts "out of context." T 367.

3. The defendant's testimony.

On direct examination, the defendant testified there was "no plan to steal from" his parents. T 459. As to the IRA, he explained that he, William, and a financial planner agreed to make the defendant the "beneficiary" because the defendant was taking care of his parents for "decades." T 467. He testified William believed Hazel would spend the money frivolously due to her "mental state." T 466-67. He testified that William did not change the beneficiary at that time because it "did not seem prudent." T 467. He testified that from a "moral point of view," the money was to take care of Hazel for "20 years," but in a "legal sense," he believed the money to be his, and so he used "a lot" of the money on his own needs. T 484-85. He insisted he "honored" William's wishes and William would be "proud" of how he used the money. T 489.

The defendant testified that, after conversations with his parents, he used their assets to cover business losses he suffered while taking care of them. T 474. He testified that he purchased a trailer with their money because it made fiscal sense. T 473-74. Concerning the Honeywell checks, he testified that he deposited the funds in his account to cover a $7,200 bill to Pine Rock on Hazel's behalf. T 479. Trial counsel also introduced some of the texts through the defendant and asked the defendant to explain their meaning. T 478-79.

On cross-examination, the defendant admitted that William was "perhaps not" competent when he created the TD Ameritrade account and signed William's name to the transfer form. T 497. The defendant testified that he applied for Medicaid on Hazel's behalf when she went to Copp Hill.

T 502. He acknowledged that a Medicaid investigation identified 22 concerning transactions from Hazel's accounts, 18 of which occurred after the defendant took control of Hazel's spending. T 505-06.

The defendant conceded that he was unable to substantiate all of his spending. T 517. He acknowledged using the single $7,200 final payment to Pine Rock to justify multiple transfers and takings from Hazel's funds. T 479. He agreed that prior to trial, he e-mailed O'Brien acknowledging there could be a "substantial" difference between the amount of his parents' money he used for himself, and the amount he used for them. T 517-18.

The State impeached the defendant's testimony using the some of the texts. T 474. To impeach his testimony that the trailer made financial "sense" for his parents, the State introduced texts in which the defendant said that he could "see it emblazoned with [his business's] logos," and that it would be a "tax write-off" for his business. T 474; 519-20. The State confronted the defendant with the "for them" message. T 520-21. The defendant insisted the State was taking it out of context, and that it "isn't about stealing money." T 521.

4. The Jury's verdicts and the trial judge's sentencing comments.

The jury convicted the defendant on the charges that he recklessly took funds from the IRA, William and Hazel's personal checking account, and Trust account. T 601-02. The jury acquitted the defendant as to reckless use of Hazel's Honeywell checks. T 601.

At sentencing, the trial court observed:

> And I can't get out of my head the texts . . . between you and your wife over the course of your thievery . . . . But those messages between you and your wife were of a significant part, I think, of [the jury's] decision-making tree. And really, what you were doing with the assets and how fast, how extremely fast you depleted your mother's assets. I would find it hard to spend money that fast, but I am not you.

ST 44.

D. The Trial Court's Ruling on the Defendant's Motion for New Trial

The defendant moved for a new trial, and in the alternative, a new sentencing hearing. DAI 1. He argued that trial counsel rendered ineffective assistance of counsel, in violation of the State and Federal Constitutions, when he: (1) allowed the defendant to make the decision to call Marion to testify; (2) disclosed the texts; and (3) elicited testimony that O'Brien could tell when people were lying. *Id*. The State objected. SA 88.

The trial court denied his request for a new trial. SA 68. The trial court analyzed the defendant's claims solely under the State Constitution, which required that he "first show that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." SA 74-75. The trial court concluded that trial counsel's decision to call Marion was not constitutionally deficient because the defendant directed trial counsel to call Marion against trial counsel's advice, and after being fully informed of the consequences. SA 75-77. The trial court did not address the prejudice prong. SA 77.

As to O'Brien's testimony, the trial court did not consider whether trial counsel's conduct was constitutionally deficient. SA 83-84. The court concluded that the defendant did not establish constitutional prejudice. *Id*. It determined that O'Brien's comment on the defendant's credibility was cumulative of other credibility evidence. SA 84. The trial court also found relevant that the jury acquitted him on the indictment to which the challenged evidence was directed. *Id*.

Finally, the trial court concluded the decision to disclose the texts was constitutionally deficient because it would be "clear to any objectively reasonable person that the texts were more inculpatory than exculpatory." SA 79-80. Nonetheless, it concluded that the verdicts were not prejudiced because the State otherwise presented "overwhelming evidence" to prove the defendant recklessly used Hazel's assets. SA 81-83. The trial court recognized, however, that it relied heavily on the texts when sentencing the defendant. SA 86. The court scheduled a sentence review hearing to determine "what, if any, change in sentence should be contemplated." *Id*.

SUMMARY OF THE ARGUMENT

I. Trial counsel's decision to call Marion as a witness at the defendant's direction was not constitutionally deficient. The law is clear: if a client commands trial counsel to present certain evidence and trial counsel fully informs the client of the consequences, trial counsel's decision to follow the client's direction will not be disturbed. Here, the defendant commanded trial counsel to call Marion to testify after trial counsel advised against this decision fully informing the defendant that her testimony would incriminate him.

The defendant argues he was not fully informed of this decision due to trial counsel's allegedly distorted "views of the texts." This argument fails because he did not preserve it for review. Even if he did, his argument does not establish a necessary link between counsel's views of the texts and the decision to call Marion. Finally, even assuming he can establish deficiency, he cannot prove that he was prejudiced because if trial counsel's views of the texts were different, the defendant would have nonetheless insisted that Marion testify.

II. Trial counsel's decision to disclose the texts was not constitutionally deficient. This decision represented the defendant's fully informed choice, which forecloses his challenge to the strategy. The trial court's conclusion that trial counsel's decision was deficient rested on factual findings against the weight of the evidence. Here, trial counsel consulted with the defendant on a strategy to use the texts, and the defendant "pushed" trial counsel to disclose them knowing he would need to explain incriminating texts when he testified.

Even assuming trial counsel's decision to disclose the texts as part of a trial strategy was deficient, he would have been required to disclose them pursuant to his ethical and discovery obligations. The texts contained "objectively incriminating statements" of Marion and the defendant, which both contradicted continuously on the stand. An ethical trial counsel would have been obligated to disclose them. Further, the defendant's insistence that Marion testify necessitated the disclosure of the texts as "statements" of a witness.

III. Disclosing the texts did not prejudice the verdicts. The State presented overwhelming evidence, aside from the texts, to convict the defendant of the reckless use of his parents' assets. This included the State's summary of the defendant's use of his parents' assets, the medical evidence, and the defendant's pre-trial statements. In addition, both Marion's and the defendant's testimony, apart from the texts, provided a wealth of evidence solidifying his guilt.

IV. The trial court erred by granting the defendant a sentence review hearing. The trial court's decision rested on the fact that trial counsel's disclosure of the texts was deficient. Because trial counsel's disclosure of the texts was not deficient, the trial court's decision to grant him a sentence review hearing must be reversed.

V. O'Brien's testimony that he could tell when a person is lying did not prejudice the verdicts. The State presented ample additional, cumulative evidence bearing on the defendant's credibility. Further, admission of the audiotaped interviews to which O'Brien's testimony was

directed allowed the jury to assess the defendant's credibility for itself. Additionally, the jury's decision to acquit the defendant on the Honeywell check indictment, to which the challenged evidence related, establishes that the evidence was not substantially prejudicial.

VI. The trial court did not unsustainably exercise its discretion in excluding the substance of alleged statements by the defendant's parents and others. The trial court allowed the defendant to testify that these conversations purportedly occurred and explain what he did as a result. Its ruling allowed the defendant to testify and trial counsel to argue that his parents directed him to use their money in a certain way and that he made decisions only after consulting with experts. Even if the trial court unsustainably exercised its discretion, any error was harmless beyond a reasonable doubt.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT TRIAL COUNSEL RENDERED CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN CALLING MARION TO TESTIFY.

"Part I, Article 15 of the State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant reasonably competent assistance of counsel." *State v. Labrie*, 172 N.H. 223, 236 (2019); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Because the State Constitution is equally as protective as the Federal Constitution in this area, this Court need only address the parties' arguments under the State Constitution. *See Labrie*, 172 N.H. at 236.

To prevail on an ineffective assistance of counsel claim, the defendant must prove "that counsel's representation was constitutionally deficient" and "counsel's deficient performance actually prejudiced the outcome of the case." *Id.* Both prongs present "mixed questions of law and fact." *Id.* at 237. This Court does "not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law." *Id.* The Court reviews "the ultimate determination of whether each prong is met *de novo*." *Id.*

A. Trial counsel was not deficient in following the defendant's directive to call Marion to testify.

To prove counsel's representation was constitutionally deficient under the first prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at

236. The defendant must overcome the strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "[T]rial counsel, while held to a standard of 'reasonable effectiveness,' is still only an *assistant* to the defendant and not the master of the defense." *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985).

"When a defendant preempts his attorney's strategy by insisting that a different [course] be followed, no claim of ineffectiveness can be made." *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985). "This is not to say an attorney has no professional independence to act without the explicit permission of his client." *Mulligan*, 771 F.2d at 1442. "Rather, if he 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.*

State v. Candello, 170 N.H. 220 (2017) is instructive on this point. In *Candello*, this Court considered whether "trial counsel rendered ineffective assistance by allowing [his client] to make the decision to admit two audio recorded telephone calls" at trial. *Id.* at 226. "The recordings included statements by the defendant referencing the assault for which he was being tried and his rationale for the assault, as well as his mental health issues and potential drug use." *Id.* at 227. "The recordings also included threatening

and homophobic statements made by the defendant . . ., [and] derogatory remarks about [the victim].” *Id.*

At trial, the prosecution played a portion of the tapes that did not include this incriminating information. *See id.* at 226. Trial counsel made a foundation objection and suggested they “play the whole tape,” to include the incriminating and derogatory statements. *Id.* The judge told counsel to “talk to his client,” and make sure the decision represented his client’s “specific request.” *Id.* at 226-27. Counsel had a “brief discussion” with the defendant as to whether or not it was a “good idea” to pay the tapes. *Id.* at 227. The defendant wanted to play the entirety of the calls, and trial counsel believed the defendant knew what was on them. *Id.* Trial counsel “let the defendant ultimately make the call,” and the defendant chose to play the tapes. *Id.*

On appeal, this Court held trial counsel’s actions were not constitutionally deficient. *Id.* at 230. This Court concluded that the defendant chose to play the tapes, and this decision was informed by the brief consultation with trial counsel. *Id.* The Court noted this was to be distinguished from circumstances where a defendant merely acquiesces to trial counsel’s decision. *Id.* Ultimately, this Court recognized, “[c]utting through the smoke, it is apparent that we are being asked to permit a defendant to avoid conviction on the ground that his lawyer did exactly what he asked him to do. That argument answers itself.” *Id.* at 231 (*quoting United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990)).

In this case, trial counsel cautioned the defendant that calling Marion would incriminate him. DAI 263-64. He repeated the warning, including a final warning at a “come to Jesus” meeting before trial. *Id.* The defendant

acknowledged he understood, but directed that if Marion wanted to testify, she was going to testify. DAI 264. The defendant is now asking this Court to allow him "to avoid conviction on the ground that his lawyer did exactly what he asked him to do." *Candello*, 170 N.H. at 231 (*citations omitted*). This argument should answer itself. *Id.*

The defendant concedes that a fully informed client can make the decision to call a witness over the advice of trial counsel. DB 37. He argues, however, that trial counsel was constitutionally deficient here because trial counsel did not "fully inform" him of the consequences of calling Marion. DB 38. He contends that he was not fully informed because trial counsel's decision to disclose the texts was ill-advised and fundamentally flawed. *Id.* His argument fails for three reasons.

First, he has not preserved the argument for this Court's review. Below, the defendant argued that "as an unsophisticated car mechanic," he could not make this decision. DAI 105-111; MNT 11. At no point did he contend that trial counsel's "views of the texts" failed to fully inform his decision to call Marion. MNT 3-23. Because he failed to make the argument before the trial court, it is not preserved, and this Court should not consider it. *See State v. Edic*, 169 N.H. 580, 583 (2017) (arguments not specifically raised before the trial court are not preserved for review).

Second, he fails to explain how trial counsel's views of the texts impacted his advice to the defendant on the decision to call Marion. That is, he does not explain how trial counsel's advice would have been different as a result. Trial counsel warned the defendant in the strongest terms possible that Marion should not testify, explaining that the testimony would incriminate him. DAI 263-64. An alternative view on the texts would not

have changed his advice. While the defendant notes the State's argument that a decision to call Marion likely necessitated disclosure of the texts under discovery and ethical rules, he does not concede these points. DB 39. Without this concession, his argument provides no link between trial counsel's views of the texts and his warnings that Marion should not testify. Further, his argument fails to appreciate that the State also contends the defendant's contradictory testimony, not simply Marion's, required an ethical counsel to disclose the texts.

Finally, the defendant's argument rests upon the premise that trial counsel's decision to disclose the texts was constitutionally deficient. The State has appealed this issue. If this Court concludes trial counsel was not constitutionally deficient in disclosing the texts, the defendant's argument necessarily fails.

B. The defendant cannot establish constitutional prejudice.

The trial court did not consider the prejudice prong in analyzing the decision to call Marion. SA 77. If it had, no prejudice would be found. "To satisfy the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Labrie*, 172 N.H. at 237. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To show prejudice, the defendant must show he would have followed counsel's advice. *Cf. State v. Fitzgerald*, 173 N.H. 564, 577 (2020) (prejudice alleged after rejecting a plea offer because of counsel's deficient performance requires a showing the defendant would have accepted the plea).

The defendant cannot satisfy his burden to prove constitutional prejudice in the face of the undisputed facts. The defendant rejected counsel's advice and insisted Marion testify even after being warned her testimony would incriminate him. DAI 263-64. Trial counsel made every effort to dissuade the defendant from calling Marion. DAI 263-64. It strains credulity to suggest this defendant would have reversed course if he had been advised Marion's cross-examination could open the door to the texts at issue—and especially because the defendant urged counsel to disclose the texts, and believed the unflattering texts could be "explained." DAI 274-79.

II. THE TRIAL COURT ERRED IN CONCLUDING TRIAL COUNSEL'S DISCLOSURE OF THE TEXTS WAS DEFICIENT.

A. The trial court erred in finding *State v. Candello* inapplicable.

In concluding that trial counsel's decision to disclose the texts was constitutionally deficient, the trial court found *Candello* inapplicable. SA 78-79. The court determined that the defendant did not "direct" trial counsel to disclose the texts, as he did regarding the decision to call Marion to testify. *Id*. In so concluding, the trial court erred.

Candello and the cases underlying that decision, do not *require* that a defendant "direct" or "insist" upon a certain course of action. Rather, the fundamental inquiry is whether the decision reflects that of counsel and mere acquiescence of the client, or the defendant's fully informed "choice." *See Candello*, 170 N.H. at 230. The defendant in *Candello* did not direct trial counsel to play the audio tapes; instead, trial counsel left the decision to the defendant, after "brief" consultation. *Id.* Nor was it relevant that trial counsel was the first to suggest that the entire tapes be played because thereafter, trial counsel "did consult with the defendant and . . . the defendant's choice was to play the recordings." *Id.* at 231.

On this point, *United States v. Weaver*, 882 F.2d 1128 (7th Cir. 1989) is also instructive. The defendant in *Weaver* was convicted on several conspiracy and fraud charges stemming from his participation in a scheme to alter money orders. *See id.* at 1136-37. On appeal, the defendant argued his counsel was constitutionally deficient for failing to request that a

psychiatrist examine him prior to trial, as his mental condition was "crucial to his defense." *Id.* at 1140.

The court rejected his argument finding that, after discussion, both counsel and the defendant decided against the appointment of a psychiatrist. *Id.* The Court observed,

> 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. To allow that would be to exempt defendants from the consequences of their actions at trial and would debase the right to effective assistance of counsel….

Id. The Court concluded, "[A]fter being informed of the relevant options, [the defendant] participated in the decision" and he was therefore "stuck with it." *Id.*

The trial court cited three facts to distinguish *Candello* from this case. *See* SA 78-79. These facts are wholly against the weight of other evidence supporting that, fully informed of the options, the defendant chose and even "pushed" to disclose the texts.

First, the trial court relied on the fact that when the defendant initially asked whether trial counsel wanted the texts, the defendant asked whether trial counsel believed they could be "relevant." SA 78. However, this does not change the fact that the defendant wanted them disclosed believing they could "absolutely prove that he was not reckless" with his parents' assets. DAI 325. Further, this single question does not negate that trial counsel consulted with the defendant on a strategy to use the texts once trial counsel received them. DAI 263-64.

Next, the trial court highlighted that the defendant, when discussing certain derogatory texts with trial counsel, asked whether trial counsel could redact them. SA 78. But the trial court failed to recognize trial counsel's testimony that he thereafter consulted with the defendant on what they could redact. DAI 331-32. The trial court also ignored the fact that trial counsel informed the defendant that he may need to "explain" the inculpatory texts when he testified, and the defendant "believed" he could. DAI 281, 332.

Finally, the trial court relied on trial counsel's deposition testimony that he was not sure whether the defendant found some of the texts as relevant as trial counsel, or whether the defendant told him to include certain texts. SA 78. The trial court misapprehended that this testimony concerned a supplemental document trial counsel created, by the trial court's order, to narrow down the texts he would use at trial. DAI 337-38. Trial counsel created this document *after* the texts were turned over to the State, and therefore, the statements are not probative of the defendant's choice to disclose them in the first place. *See id.*

Concerning the decision to disclose the texts and use them at trial, trial counsel repeatedly confirmed in his deposition that the defendant wanted the texts disclosed to the State in the first place. DAI 290, 326-27, 340. As in *Candello*, the defendant knew what was in the texts. He believed they would exonerate him, and not just the "helpful" ones. DAI 333-34. He and Marion believed the State would drop the charges when it saw them, and the defendant "pushed" for their disclosure. DAI 326-27. He believed he could explain the allegedly incriminating texts. *Id.* When asked during his deposition who wanted to turn the texts over to the prosecution, trial

counsel was clear and unequivocal: "I *know* [the defendant] did, and then *we* did." DAI 290 (emphasis added).

The defendant's behavior throughout the representation supports that the strategy to use the texts was the defendant's choice, rather than mere acquiescence. The defendant was, to say the least, strongly opinionated, and had no qualms expressing disagreement with trial counsel whenever he had concerns. DAI 315, 317, 321-23; SA 126-27. The defendant explained his theory of the defense and provided hundreds of pages of what he viewed as "exculpatory" evidence. DAI 318-19; SA 105-121. He provided trial counsel with points to argue to the jury. SA 126-27. He even lectured trial counsel as to his body language, instructing him to look the jury in the eye because he had a habit of "looking down." SA 127.

Further, this choice was fully informed. Trial counsel consulted with the defendant on a strategy that would involve using the texts. DAI 332-33. Trial counsel reviewed each text and asked the defendant to explain the seemingly inculpatory texts. *Id.* Both he and the defendant "agreed" the texts as a whole were consistent with his defense. DAI 339. They also consulted on which texts they could redact. DAI 331-32. The defendant was aware using the texts meant that he may have to explain the seemingly inculpatory texts when he testified. DAI 281, 332. The defendant believed he could do so, and he "pushed" trial counsel to disclose them, believing the State would drop the charges when it received them. DAI 326-27. Trial counsel testified that, in his view, the decision to disclose and use the texts was the defendant's choice, following consultation. DAI 340.

Trial counsel's views of the texts as helpful may have proven unreasonable, but this does not negate the defendant's fully informed

choice to disclose them. Importantly, trial counsel in *Candello* first suggested they play the entirety of the tapes. *See Candello*, 170 N.H. at 227. The trial court in that case found that such a decision, if made solely by trial counsel, "would fall below established standards of reasonable attorney conduct." *Id.* Instead, because trial counsel briefly consulted with the defendant as to whether or not it was a good idea to play the tapes, and the defendant chose to play them, counsel's actions were not deficient. *Id.* at 230. Here, far more than a brief consultation in the middle of trial occurred. Trial counsel and the defendant thoroughly discussed the strategy to use the texts, and the defendant pushed for disclosure, knowing their contents. The defendant actively participated in the decision, and "he is now stuck with it." *Weaver*, 882 F.2d at 1140.

B. Ethical and discovery obligations required the disclosure of the texts.

Trial counsel was not deficient in disclosing the texts because the defendant's choice to testify and call Marion required any ethical trial counsel to disclose the objectively incriminating texts to the State. A defendant has no constitutional right to offer false evidence. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). If defense counsel knows that his client or a witness has offered false testimony, counsel must make "such disclosure to the tribunal as is reasonably necessary to remedy the situation." *N.H. R. Prof. Conduct* 3.3, *comment 10*; *see Nix*, 475 U.S. at 169 (prevailing professional norms *require* a lawyer to disclose frauds upon the court); *State v. Hischke*, 639 N.W.2d 6, 9 (Iowa 2002) (counsel who in good faith believes client has perjured himself may reveal this fact to the

court.) Moreover, defense counsel has an ethical duty to disclose evidence of his client's crime within his possession. *See*, *e.g.*, *State v. Carlin*, 640 P.2d 324, 328 (Kan. App. Ct. 1982) (defense counsel had a duty to disclose incriminating tapes of client to the prosecution). Complying with these obligations will not constitute ineffective assistance of counsel. *See Nix*, 475 U.S. at 168.

Here, the trial court concluded, at the defendant's insistence, that the texts the State introduced were "objectively inculpatory." SA 80; DAI 32-33. That is, the defendant concedes that trial counsel was in possession of evidence—his and Marion's own words through written text exchanges—*objectively* establishing his guilt. DAI 100. For example, the defendant below described the "for them" conversation as "devastating" and "objectively" a "conspiratorial plan to raid William Newton's IRA." DAI 32.

As the trial unfolded, the defendant and Marion (at the defendant's insistence) each testified contrary to these messages. They both testified there was no "plan" to steal from the defendant's parents. T 288-89, 459. They testified that the purchases using William and Hazel's assets were for William and Hazel's benefit. T 473-74. The defendant testified that the trailer was a purchase that was in his parents' best interests. *Id.* Marion testified that she and the defendant were "absolutely not" having money problems. T 294. She also testified that she "loved" and "honored" Hazel. T 297-99.

The defendant's argument assumes he could have testified in his own defense, insisted that Marion testify, and an ethical trial counsel could have nonetheless withheld the texts. This is inconceivable. The "objectively

incriminating" texts, including the "for them" message, directly contradicted aspects of the defendant's and Marion's testimony, which is supported by the number of times the State used the messages to impeach them. T 358-59, 363, 366-67, 474, 519-21. Thus, regardless of whether trial counsel used the texts as a part of trial strategy, an ethical counsel would have been required to disclose the messages at the latest, when the defendant or Marion testified. In fact, appellate counsel acknowledged below that Marion's direct testimony may have necessitated disclosing some of the incriminating texts. MNT 14-15.

The defendant's objection is, thus, reduced to one of the timing of the disclosure, as opposed to the ultimate deficiency of turning over the incriminating messages. However, the State did not use a single one of the messages in its case-in-chief. T 24-268. That is, the texts would have been introduced at the precise moment the jury heard the texts for the first time. Because of this, trial counsel was not ultimately deficient and such decision did not result in prejudice.

Additionally, discovery rules also compelled disclosure of the substance of the texts prior to Marion testifying. New Hampshire Rule of Criminal Procedure Rule 12 requires the disclosure of all witness statements. *N.H. R. Crim. P.* 12(b)(4)(B), (C). The definition of statements includes both written and oral statements of a witness. *Id.* Here, once the defendant insisted Marion testify, trial counsel was required to disclose the content of the texts as witness statements. Trial counsel acknowledged that he disclosed the statements partly as "reciprocal discovery." DAI 332-33. Prior to trial, trial counsel knew that Marion was responsible for making such statements within the texts. DAI 229-40. To allow a witness to testify

without disclosing the substance of "objectively incriminating" written communications of that witness would violate this discovery rule.

III. THE TRIAL COURT CORRECTLY RULED THAT DISCLOSURE OF THE TEXTS DID NOT PREJUDICE THE VERDICTS.

To convict the defendant, the jury needed only to conclude that he acted *recklessly* with respect to his fiduciary obligations to Hazel. "A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." RSA 626:2, I(c) (2016). The trial court correctly concluded that "overwhelming evidence" of the defendant's reckless use of Hazel's assets, aside from the text messages, precluded a finding of constitutional prejudice as to the guilty verdicts. SA 83.

The defendant must prove that but for counsel's error, there is a reasonable probability the result would have been different. *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). The Court considers the "totality of the evidence presented at trial." *Labrie*, 172 N.H at 237. "When there is overwhelming evidence of guilt presented, it may be impossible to demonstrate prejudice." *Christenson v. Ault*, 598 F.3d 990, 997 (8th Cir. 2010).

The defendant argues the jury's acquittal on the Honeywell charge reflects that the evidence to convict him was not "overwhelming." His argument ignores that the Honeywell indictment comprised only 1% of his spending the State alleged to be reckless. T 22-24. Some evidence supported that he used a portion of the Honeywell funds to cover a single

$7,200 payment on Hazel's behalf at Pine Rock. T 479-80. From this evidence, the jury could reasonably conclude that the defendant did not use this small fraction of the total assets recklessly.

The totality of the evidence, however, was overwhelming that the defendant recklessly utilized the remaining 99% of Hazel's assets for his own benefit. In September 2015, the defendant took control of more than $325,000 of his parents' funds. T 13, 108: SA 205, 256-57. He did so under the strict obligations his parents imposed on him to use these assets for their care, comfort, and maintenance. T 57, 60-61, 68, 70; SA 173-97, 256-57. They did not authorize him to gift to himself or others from their assets, nor could he alter any beneficiary designations. SA 194, 196. He was required to account for his spending. SA 192.

The undisputed evidence proved he exhausted these funds with lightning speed, when, by his own admission, they were supposed to have lasted "decades." T 467; DAII 1-43. He used more than $80,000 from his parents' personal account to pay his credit card debt, the mortgage on Marion's unoccupied second home, and his business's bills. DAII 29-43. He transferred thousands more into his personal and business accounts. *Id*. He used nearly $20,000 more from the Trust account, purchasing a car for Marion's daughter. T 353-54; DAII 22-28. If that were not enough, he took more than $225,000 from William's IRA, using "a lot" for his own needs, and needlessly incurring significant withdrawal penalties. T 485; DAII 1-17. Nine months after he "took control" as fiduciary, Hazel had only $732 and a few garbage bags of clothes and yarn left to her name, and she needed state financial assistance. T 502; DTD 8.

Importantly, the defendant could not substantiate his spending, contrary to his obligation to do so. T 517. He admitted there could be a substantial difference between the amounts he used for his parents and amounts he used himself. T 517-18. Of 22 "concerning" transactions Medicaid identified, he was responsible for more than 80% of them. T 505-06. Thus, the defendant's frivolous and selfish spending and his failure to properly account, rather than a few inculpatory texts, were the reason he was convicted.

Further, just as trial counsel warned, Marion's testimony also proved his guilt. She conceded that many of the expenses the defendant used to justify his spending were indeed not for his parents' benefit. T 326-27, 333. She admitted that hair and nail appointments, and other purchases were for her and her daughters, not Hazel. *Id.* She testified the car purchased with Trust funds was a gift for her daughter, who totaled it, and Hazel was not reimbursed. T 353-54. She conceded the defendant did not believe the receipts would be "gone through." T 336.

Marion's testimony also undercut the defendant's narrative that they planned to take care of Hazel in Marion's unoccupied second home, justifying payments on the mortgages. Marion admitted that while this plan allegedly included providing Hazel with "full-time care," they did not secure any care even when Hazel lived in the home. T 382-83. Marion's testimony revealed the true disdain she and the defendant carried for Hazel. When Hazel went to the hospital, the defendant and Marion would not allow Hazel back in the home. T 384-85. They gave a "bunch of her stuff" away, and then had a yard sale, giving Hazel none of the proceeds. T 386-87.

The defendant argues that the trial court erred because it "overlooked" several portions of his own testimony. DB 30-31. This argument reflects his fundamental misunderstanding of the evidence because it ignores the fact that his testimony was, perhaps, the most damning of all. To start, the defendant asked the jury (and now this Court) to believe that he obtained the IRA funds lawfully, after consulting (at an unspecified time) with his father and a financial adviser. *Id.* He testified that this decision was made to preserve the assets for Hazel's use for decades. T 466-67. The evidence forecloses his version of events.

This story ignores that William and Hazel carefully created estate plans that imposed strict obligations on their fiduciary to act in their best interests. T 53-55, 83, 152; SA 173-97, 256-57. In September 2015, William executed a document designating Hazel the sole primary beneficiary on the IRA account. SA 214-15. These documented actions negated any need for William to authorize the defendant to take the money for himself. The defendant was already "in control" of his parents' decision-making. SA 205-06.

What is more, the defendant testified several times that he "changed the beneficiary." T 467. This is not what he did. Instead, he created an entirely new account and then signed William's name to the transfer form, all while William was unconscious and dying at Pine Rock. T 103-04, 130-32, 163-66; SA 231-32. The defendant attempted to hide the fact that Hazel

was still alive in creating the account by listing William as "widowed" on the application.[4]

Most damning to his narrative are his own words. The version of events he testified to at trial was not the one he originally told when speaking with O'Brien before trial. Prior to trial, the defendant insisted William changed the beneficiary "6 to 7" months prior to his death. DAII 45. The defendant said that William "willed" the money to him. *Id.* He claimed that it was a "surprise" because he "didn't know" William gave the money to him. *Id.* These diverging stories reflect the defendant's consciousness of guilt. *See State v. Evans*, 150 N.H. 416, 421 (2003) (exculpatory statements later discovered to be false are evidence of consciousness of guilt).

Further, as quickly as he explained at trial that he took the IRA funds to care for Hazel pursuant to his father's wishes, he admitted that he did not use the funds for this purpose. T 466-67, 484-85. Thus, by his own admission, he ignored his father's dying wish to care for his mother, and made that admission after lying about it under oath on the stand. On these facts, it is reasonable to conclude the jury would have rejected his version of events even without the texts.

The defendant also argues that the trial court overlooked that it was reasonable based on the evidence to infer that his parents would want to

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[4] The defendant testified this was a mistake because he later spoke with a TD Ameritrade representative and said his mother was "alive." T 499. On appeal, he includes a document in his appendix he claims supports his testimony. DAII 80. This document was not entered into evidence or shown to the jury, and its inclusion is inappropriate. *See Lake v. Sullivan*, 145 N.H. 713, 717 (2001) (The Court considers "only evidence and documents presented to the trial court."); *see Sup. Ct. R.* 13.

cover $40,000 in business losses, and that payments on Marion's home benefitted his parents. DB 32. These are unreasonable conclusions based on the State's evidence. The defendant used thousands of dollars of his parents' assets to pay off debt that *pre-existed* his trips to Arkansas. T 192-94; DAII 37, 40, 41. Further, while paying Marion's mortgage (including back payments), the defendant was also paying William and Hazel's rent at Pine Rock. T 187-88; DAII 31-35. The defendant told Pine Rock staff that he had planned to keep Hazel there "indefinitely." SA 258. Using his parents' money to pay multiple mortgages and rent at a long-term facility is the epitome of reckless. This explanation also wholly ignores the fact that the medical evidence and his own words established his parents were not competent to authorize his spending.

Lastly, the defendant relies on the State's use of the texts in its closing argument and the trial court's statement during sentencing that the texts formed part of the jury's decision. DB 33-35. What he ignores is that the State did not use the texts in its opening statement or its case-in-chief, supporting the strength of the State's case without texts. T 24-238. While the State relied on a few of the texts in its closing, it also relied heavily on the wealth of other evidence proving his guilt, including the financial summary, its witnesses, and the defendant's lies regarding his use of the IRA. T 556-76. Thus, while the texts were inculpatory and the State used them to its advantage at times, the overwhelming amount of other evidence proved the defendant's guilt.

As to the trial court's comments, the defendant conveniently leaves out from his quotation the trial court's statements on the incriminating nature of his *conduct*, aside from the texts. DB 35. The court provided,

"And really, what you were *doing* with the assets and how fast, how extremely fast you depleted your mother's assets. I would find it hard to spend money that fast, but I am not you." ST 44. Thus, the trial court recognized the equally damning nature of the defendant's conduct in completely depleting the assets in such a short time. The trial court correctly used this evidence in its determination that the texts did not prejudice the verdicts. SA 81-83.

Based on the foregoing, the trial court did not err, on the totality of the evidence, in concluding the evidence of the defendant's guilt was overwhelming and that the verdicts were not prejudiced.

IV. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT A SENTENCE REVIEW HEARING.

The trial court granted the defendant a sentence review hearing. SA 86. Its decision rested on the fact that trial counsel's disclosure of the texts was deficient. *Id.* However, trial counsel's disclosure was not deficient, as argued above. If this Court agrees and reverses the trial court's determination, then the trial court's decision to grant a sentence review hearing must also be reversed.

V. THE TRIAL COURT CORRECTLY CONCLUDED THAT INVESTIGATOR O'BRIEN'S CHALLENGED TESTIMONY DID NOT RESULT IN PREJUDICE.

The defendant argues the trial court erred in concluding that he failed to prove constitutional prejudice as to O'Brien's challenged testimony. DB 40. The trial court, however, correctly concluded that the evidence was merely cumulative of other evidence undermining the defendant's credibility. SA 83-84.

State v. McDonald 163 N.H. 115 (2011) supports the trial court's ruling. In *McDonald*, a police officer testified about a defendant's body language and demeanor during a pre-trial interview. *Id.* at 120. The officer testified that the defendant's emotion during the interview "seemed very feigned." *Id.* After this testimony, the State played the audio recording of the interview for the jury. *Id.* On appeal, this Court concluded the officer's description of the defendant's emotions as "feigned" was "an invasion of the province of the jury to determine credibility." *Id.* The Court found that while the officer did not expressly testify he believed the defendant's statements were false, his testimony was "tantamount" to such evidence. *Id.*

The Court concluded, however, that any error in allowing the evidence was harmless beyond a reasonable doubt. *Id.* While finding the evidence of guilt overwhelming, the Court also relied on the fact that the credibility evidence was "cumulative" of other evidence, including the tape recording itself. *Id.* The Court found it relevant that the recording was played for the jury, allowing it to "assess the defendant's demeanor." *Id.* The Court acknowledged that the jury could not observe the defendant's body language, but concluded the jury could still "evaluate [the

defendant's] inflection and tone of voice, the volume and speed at which he spoke, and any hesitation in answering questions." *Id.*

The jury here heard the audio recordings of O'Brien's interviews with the defendant and could assess his credibility for itself. T 253-58. The defendant also testified, allowing the jury to assess his credibility at trial. T 443-522. The State had ample other evidence undermining the defendant's credibility, to include an extensive financial summary and Marion's testimony. In *McDonald*, this Court concluded, under similar circumstances, that the State met its burden to prove harmless error beyond a reasonable doubt. Here, where the defendant holds the burden to prove prejudice, his argument surely fails.

The cases the defendant cites to support his argument are inapposite. Each involved *recognized expert witnesses* testifying to the credibility of a sexual assault victim. *See, e.g., State v. Marden*, 172 N.H. 258, 264-65 (2019); *see also, e.g., also State v. Collins*, 166 N.H. 210, 214-15 (2014). Those cases reject the notion that such comments can merely be "cumulative" of other evidence on credibility precisely because they come from "witnesses[] recognized as an expert." *Marden*, 172 N.H. at 265. O'Brien was not a recognized expert. Thus, this case is like *McDonald*, and unlike *Marden* and *Collins*.

The trial court also correctly observed that the jury acquitted the defendant on the Honeywell indictment to which the challenged evidence was directed. The defendant nevertheless contends that while the jury may not have utilized the challenged testimony to acquit him on the Honeywell indictment, it *may* have limited the import to whether he was lying about the IRA funds. DB 43. His argument ignores that the challenged testimony

related directly to the interview concerning the Honeywell checks. If the testimony carried substantial constitutional prejudice, the jury would have convicted him on this count.

VI. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN EXCLUDING OUT OF COURT STATEMENTS AND ANY ERROR WAS HARMLESS.

The defendant argues that the trial court unsustainably exercised its discretion when it prohibited him from testifying to the substance of alleged out-of-court conversations he had with his parents and others. DB 44-45. He argues these conversations were probative of his state of mind and were not hearsay. DB 44. The purported statements' substance concerned, among other things, whether his parents authorized him to make certain expenditures and whether William directed him to "change the beneficiary on his IRA." DB 44.

Prior to trial, the defendant moved to admit several statements allegedly made by his parents arguing they were not hearsay. DAII 69. The State objected. DAII 75-77. The trial court reserved ruling on the admissibility of particular statements until trial. PTHI 7.

During trial, the State objected to the defendant's and Marion's attempts to testify to the substance of out-of-court statements, which the trial court sustained. T 302, 448, 453-54. After several sustained objections, trial counsel asked to approach. T 454. During the bench conference, the trial court ruled that trial counsel could properly ask the defendant whether conversations occurred and what he did "as a result of those conversations." T 455.

This ruling, and, at times, the lack of a State's objection, allowed the defendant and Marion to testify to their version of conversations the defendant had with his parents and others, as follows:

- The defendant's parents seemed interested in coming to New Hampshire, but then "waffled," T 454;
- In mid-August, the defendant's parents "reached the decision" to come to New Hampshire, T 456;
- The "family plan" was for the defendant's parents to move into Marion's second home, and the defendant's parents "agreed to it," T 324;
- The defendant and his parents "decided" to buy the trailer and reimburse the defendant for his time and costs, T 474;
- Hazel required the defendant and Marion to take her out shopping, T 479; and
- After conversations between the defendant, William, and a financial planner, they reached a decision to change the beneficiary of William's IRA from Hazel, to the defendant, due to Hazel's mental state, T 467.

The defendant's account of conversations he purportedly had with his parents were also memorialized in both State's and the defendant's own exhibits entered into evidence. SA 198-210, 258-59.

The testimony and evidence allowed trial counsel to argue in closing the following points:

- Investigator Sullivan's financial summary was not evidence of recklessness because he was not "there for conversations" surrounding the spending of the money, T 540;
- The defendant received "instruction" from "lawyers" and other "financial" advisers, T 542;
- Carney was not present when the "Newton family got together and talked," T 543;
- When the defendant used his parents' money to make improvements on Marion's unoccupied second home, he believed his parents were going to move into the home, T 545-56;

- The defendant moved the IRA funds only after meeting with William and a financial planner, where they all decided that the defendant should be the beneficiary, T 547; and
- The defendant made withdrawals from his parents' accounts only after "consultation" with them, T 550.

"The trial court has broad discretion to determine the admissibility of evidence." *State v. Plantamuro*, 171 N.H. 253, 255 (2018). This Court will not reverse the trial court's ruling "absent an unsustainable exercise of discretion." *Id.* The question is "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *Id.* "The defendant bears the burden of demonstrating that the trial court unsustainably exercised its discretion." *Id.*

The trial court did not unsustainably exercise its discretion by excluding the substance of certain statements purportedly made by the defendant's parents and others. The defendant concedes that had the trial court admitted the statements, the jury could not have relied on them for their truth, but only the effect on the defendant. DB 45-46. The trial court's ruling was the functional equivalent: it allowed the defendant to testify that conversations occurred and explain what he did as a result.

While the defendant argues the court's exclusion of the substance of statements precluded him from explaining why he took certain actions, the record establishes otherwise. For example, he contends that the trial court "prevented him from explaining how he relied on advice of an expert, a financial adviser." DB 48. In fact, the trial court allowed the defendant to testify that he spoke with a "financial planner," and "after the conversation" that included William, they "reached the determination that the best course of action was to change the beneficiary." T 467. This allowed trial counsel

to argue at closing that the defendant was not reckless because he relied on the financial adviser and William authorized his actions. T 542. Because the trial court's ruling allowed the defendant to testify on such topics, it did not unsustainably exercise its discretion in excluding the substance.

Even if the trial court did not sustainably exercise its discretion, any error was harmless beyond a reasonable doubt. "An error is harmless if [the Court] can say beyond a reasonable doubt that it did not affect the verdict." *State v. Ramsey*, 166 N.H. 45, 47 (2014). "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity or weight, and if the contested evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id.*

Here, regardless of the trial court's rulings excluding the substance of the statements, the jury heard the evidence anyway. All of the categories of statements the defendant points to as improperly excluded, were covered by the substance of statements admitted through the defendant's and Marion's testimony. Further, evidence of the defendant's alleged conversations with his parents can be found in the e-mails he sent to Carney and Pine Rock, which were admitted into evidence. In the end, sufficient evidence was introduced to allow trial counsel to argue that the defendant was not reckless because he consulted with his parents and financial advisers. For this reason, any error is harmless.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the trial court's rulings that trial counsel was deficient in disclosing the texts, and granting the defendant a sentence review hearing. The State requests this Court affirm the trial court's other judgments raised on appeal.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

April 6, 2021

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CERTIFICATE OF COMPLIANCE

I, Bryan J. Townsend, II, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 13,794 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 6, 2021 */s/Bryan J. Townsend, II*
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CERTIFICATE OF SERVICE

I, Bryan J. Townsend, II, hereby certify that a copy of the State's brief shall be served on Theodore M. Lothstein, Esquire and Kaylee C. Doty, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 6, 2021 *<u>/s/Bryan J. Townsend, II</u>*
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