THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0047

State of New Hampshire

v.

Brim Bell

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

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(Oral argument waived)

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II. Whether the defendant waived his ability to challenge joinder on appeal because defense counsel assented to one of the State's motions for joinder.

III. Whether the trial court erred by granting the State's motion for joinder when the State presented support that (1) the cases occurred in the same time period and in similar locations, (2) each victim was a client of the defendant's business, (3) the defendant's mode of operation was substantially the same for each victim, (4) the law regarding the crimes charged was identical, and (5) there were witnesses and facts common to all cases.

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VI. Whether the defendant's trial counsel provided ineffective assistance by making the strategic decision not to call a police officer to testify at trial when the potential advantages rested upon questionable legal and factual grounds and the potential disadvantages were substantial.

STATEMENT OF THE CASE AND FACTS

A. Factual background leading to the defendant's theft by deception charges.

In the early 1990s, the defendant began working at an automobile dealership in New Jersey. TT[1]663. In 1995, the defendant moved to New Hampshire. TT664. The following year, the defendant founded "Brim's Restoration"—a vehicle restoration business in Brentwood, New Hampshire.TT665. In 1998, the defendant closed the Brentwood facility and moved his facility to Somersworth, New Hampshire. TT666. In 2001, the defendant opened another facility in Barrington, New Hampshire. TT666. Between these two facilities, the defendant restored a variety of cars, including British sports cars, American muscle cars, and vintage Volkswagen cars. TT666-67. Over time, the defendant increasingly specialized in Volkswagen restorations and became well-regarded in the vintage automotive community for his work. *See* TT670-71, 679-80.

In 2002, the defendant sought to open a third location to accommodate increased demand for his services. TT667-68. To that end,

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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 defendant's addendum attached to his brief and page number.
"DA__" refers to the defendant's appendix and page number.
"PSB__" refers to the *pro se* defendant's supplemental brief and page number. For each of the *pro se* defendant's filings, the State relies upon those page numbers provided by the *pro se* defendant.
"PSAA__" refers to the *pro se* defendant's Appendix A and page number.
"PSAB__" refers to the *pro se* defendant's Appendix B and page number.
"SA__" refers to the State's appendix and page number.
"TT__" refers to the consecutively paginated jury trial transcript from September 26-28, 2018 to October 2-4, 2018 and page number.
"ST__" refers to the sentencing hearing transcript from January 2, 2019 and page number.

the defendant entered into a lease with an individual named James Lund for a portion of a large warehouse in Strafford, New Hampshire owned by Mr. Lund (the "Strafford facility"). TT483-85, 502, 667-68. Unlike the defendant's other automobile restoration facilities, the defendant typically worked alone in the Strafford facility on "higher-end jobs." TT668-70.[2]

Over time, Mr. Lund and the defendant became friendly and would see each other socially. *See* TT498, 513, 697. Mr. Lund also loaned the defendant money on occasion and engaged in business dealings with the defendant outside of their landlord-tenant relationship. *See, e.g.*, TT512, 667-68. Mr. Lund leased additional space to the defendant at the Strafford facility and, eventually, the defendant occupied the entire warehouse. TT485-86. Due in part to this expansion, the defendant's operational costs became substantial. *See* TT502, 507, 671-73. Because the defendant's business was successful, however, the defendant was generally able to keep up with his expenses. *See* TT486-87, 684-85, 744-45.

In 2005, the defendant met a woman named Rebecca at a Volkswagen car show. TT681. Rebecca and the defendant developed a romantic relationship and began living together. *See* TT681-82. Rebecca also became the defendant's business partner, assumed several roles within the defendant's company, and helped the defendant financially. TT682.

In late 2009, the defendant's relationship with Rebecca began to deteriorate, and, in 2010, their relationship ended. TT682. The defendant fell into a "deep depression" and began "drinking constantly." TT683. The

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[2] The defendant also established a "small" vehicle restoration facility in Connecticut. TT669.

defendant became "miserable" and his "motivation level dropped to an all-time low." TT683. The defendant did not work diligently on his clients' vehicles, and his clients became increasingly frustrated and dissatisfied with the defendant. TT683, 699-700. As a result, the defendant's business started "going down the tubes." TT699-700.

In April 2011, the defendant severely injured himself after falling from a twenty-foot ladder. TT684-87, 689-90. The defendant was in the hospital for approximately a month, and medical staff advised him not to do strenuous activity or heavy lifting for the following year. TT687. The defendant closed his business for roughly six months during his recovery. TT687.

As a result of the defendant's unwillingness and, at times, inability to work, the defendant's debt became "overwhelming." TT687-90. This was due, in part, to the fact that the defendant's business depended heavily on labor. *See* TT678. According to the defendant, for most projects, the cost of restoration consisted of 10%-20% for parts and 75%-80% for labor.[3] TT678, 726.

Despite being "well aware of bankruptcy," the defendant did not pursue this form of debt relief because he felt it was "dishonest." TT760. Instead, in late 2011, the defendant decided to try gambling at casinos in New England—even though he had no prior gambling experience. *See* TT690-92, 728, 754-55, 760.

The defendant financed his expenditures at casinos—including gambling, meals, and hotel rooms—through contributions from his

[3] Presumably, the remaining percentage was for other, incidental costs.

Volkswagen restoration clients. *See, e.g.*, TT547-645, 693, 728, 759-60. According to the defendant, he was a "natural" at gambling and "won a very large amount of money." TT692. The defendant recalled that, after his first year of gambling, his debt was "way down to almost nothing." TT693. Although the defendant could have transitioned back to working at his Volkswagen restoration business full time, the defendant continued to gamble. *See* TT692-94, 754, 760. According to the defendant, gambling was "a real way to win money," gave him "a feeling of independence," and "helped [him] with [his] depression," *see* TT693-94. In his second year of gambling, the defendant broke even, and in his third year, "definitely lost a lot." TT694, 755. By 2014, the defendant's debt exceeded $100,000. *See* TT695.

The defendant "really didn't tell anybody at all" about his gambling. *See* TT720-21; TT 755-57 (the defendant conceding that none of his clients gave him permission to use their money for gambling); *see also* TT701 (the defendant testifying that he did not tell his clients about his substantial debt because "didn't want to make people worry or panic because that's never good for business"). The defendant viewed his gambling as a "top-secret thing," concluding that "[i]t's probably not something to advertise and boast to my clients about. It seemed like common sense. I would consider myself an intelligent person, and I just thought it made sense to keep it a classified situation." TT756.

After the defendant started gambling, Mr. Lund seldom saw the defendant working at the Strafford facility—even though Mr. Lund lived on the same property as the Strafford facility and "stop[ped] in quite often." *See* TT489-90; TT514 (Defense counsel: "[T]he bigger the debt got, the

more you went down to talk to him about collecting money, right?" Mr. Lund: "Well, he wasn't there. So it was more over the phone."); TT517 (Mr. Lund saying that the defendant "just was never there"). In the summer of 2016, the defendant left New Hampshire and ceased to perform any work on his clients' vehicles. *See* TT701, 745-46. At that time, the defendant owed Mr. Lund between $150,000 and $180,000. TT701-02.

In the fall of 2016, Mr. Lund contacted the Strafford Police Department to discuss the defendant's back rent, "other loans and deals" between Mr. Lund and the defendant, and his desire to return the vehicles and car parts belonging to the defendant's clients that the defendant had "left behind" so that he could free up space for new tenants at the Stafford facility.[4] *See* TT505, 515, 518-19, 522-23; PSAA5. On October 20, 2016, Strafford Police Sergeant Randy Young responded to the Strafford facility. PSAA5. Sergeant Young understood from his discussion with Mr. Lund that the defendant "was already out of the building." PSAA5; *see also* PSAA61 (Sergeant Young telling the defendant in a recorded phone call that the defendant "had been evicted. According to Jim Lund, you were evicted, because you owed him so much money."); *see also* PSAB54-55 (deposition of Mr. Lund); TT706-07 (the defendant testifying that the landlord of the Somersworth facility evicted the defendant in late 2016 and sold some of the property there "to recoup some of the . . . rent money that [the defendant] owed him"); TT670 (the defendant testifying that the "bitter

[4] Mr. Lund testified that, around this time, a colleague of the defendant "reactivate[d] [the defendant's] website" so that the defendant's clients could contact Mr. Lund to retrieve their property. *See* TT493.

end" of his business came in 2016).[5] Mr. Lund let Sergeant Young into Strafford facility. *See* TT522-23 (Mr. Lund testifying that he was the only one with keys to the facility); TT712 (Defense counsel: "[W]ho else would have access to that building?" The defendant: "Well, I didn't want anyone to have access to it, but somehow Mr. Lund would always find a way to get in."); PSAA5; PSAB75. Sergeant Young retrieved the vehicle identification numbers ("VINs") from the vehicles to determine the identities of the defendant's clients. PSAA5. Mr. Lund contacted several of the defendant's clients so that they could retrieve their property from the Strafford facility. *See, e.g.*, TT115; PSAA5; PSAB45.

In January 2017, Mr. Lund told the defendant to contact Sergeant Young. TT519-20, 704. On January 31, 2017, the defendant telephoned Sergeant Young, who told the defendant that he needed to reimburse his clients approximately $200,000 or risk substantial prison time. TT704-05; PSAA37-39. Sergeant Young advised the defendant to return to New Hampshire as soon as possible. *See* TT 705; PSAA32-34. The defendant did not. TT705-06. On September 28, 2017, police arrested the defendant while he was hitchhiking on the side of a Mississippi highway. *See* ST31; SA51.

[5] Although Mr. Lund sought to evict the defendant several times, he never completed the eviction process. TT488-89, 509-10, 699.

B. The defendant's clients involved in the defendant's thefts by deception.

1. A.M.

A.M., a resident of Boston, Massachusetts, purchased a 1974 Volkswagen Super Beetle in 2010. TT42-43. A.M. adored the car and wanted it fully restored. *See* TT43-44.

On November 2, 2011, A.M. contacted the defendant for a complete restoration of her Super Beetle. TT45-46. The defendant agreed to do so, estimating that it would cost $17,440. TT46, 50. On November 10, 2011, the defendant took the vehicle to one of his New Hampshire facilities. TT46-47, 720.

On February 18, 2012, A.M. visited the defendant's shop and saw that, over three months, the defendant had only managed to disassemble her car. TT47-48. The defendant's lack of progress on restoring A.M.'s Super Beetle made A.M. feel "uncomfortable." *See* TT48.

In the months that followed, the defendant repeatedly asked A.M. for money, claiming that he needed additional funding for parts and labor. TT52-101. A.M., who wanted to get her car back, reluctantly paid the defendant—often via wire transfer to locations outside of New Hampshire. *See* TT53. The defendant would then spend A.M.'s money at casinos in Connecticut, Rhode Island, and Maine. *See, e.g.*, TT547-51, 553-71, 585-86, 589-605, 609-16, 618-33, 635-45.

A.M. asked the defendant to finish the project by March 2014, but he did not. TT101. A.M. eventually told the defendant to stop contacting her. TT101-02. In total, A.M. paid the defendant $81,900. TT121, 793. A.M.

never received her Super Beetle back—restored or otherwise. TT102-03, 793.

2. J.M.

J.M., a resident of West Palm Beach, Florida, purchased a 1957 "small window" Volkswagen for his fiancée, W.M., in 1977. TT132-33. J.M. and W.M. stopped using the vehicle in the 1980s, but held onto it in the hopes of one day restoring it. *See* TT137-38.

In the late summer of 2012, J.M. contacted the defendant to restore their 1957 Volkswagen. TT138-39. The defendant quoted J.M. that it would cost $10,000-$15,000 to restore the vehicle. TT145-47. J.M. agreed and shipped the vehicle to the defendant in New Hampshire. TT139.

Similar to A.M., J.M. sent the defendant numerous money transfers over the subsequent months—ostensibly for costs associated with restoring his vehicle. TT148-75. The defendant, however, would spend J.M.'s money at casinos in Connecticut. *See, e.g.*, TT570-85, 586-89, 606-09, 616-18.

When J.M. asked the defendant to send him pictures of the progress on his 1957 Volkswagen, the defendant instead sent him pictures of other people's cars. TT143, 204. On one occasion, the defendant asked J.M. for money that the defendant claimed was needed for shipping costs. TT175-76. Rather than pay the defendant, J.M. paid the shipping company directly. TT175-76. After learning of this, the defendant became "furious" and "scream[ed] at [J.M.] using profanity because [he] wasn't sending [the defendant] the money." TT176.

In total, J.M. paid the defendant $24,100. DA33; TT793. As with A.M., J.M. never received his car back from the defendant. TT177, 794.

3. J.K.

J.K., a resident of Raynham, Massachusetts, purchased a 1957 Volkswagen "oval ragtop" Beetle in 2014. TT293-96. J.K. had been "chasing Volkswagens for 20, 25 years" and considered this vehicle to be "the pinnacle car." TT300. Although the car was operational, J.K. wanted it restored because it was an "ugly color" and because it had sustained some minor damage while sitting in J.K.'s garage. TT300-01.

On November 17, 2015, J.K. contacted the defendant to see if he could restore his Beetle. TT301-02. The defendant agreed and quoted J.K. a price of $9,000. TT303-04.

Over the following months, the defendant "harass[ed]" J.K. for money. TT305 (J.K. testifying: "I would wake up to phone calls. I would wake [up] to text messages. I would live and die requests from [the defendant] concerning money."); TT306 (J.K. testifying that the defendant has "got more stories than Dr. Seuss. It [was] constant stories. Constant meetings, constant requests."). On several occasions in 2015 in 2016, J.K. sent money to the defendant for costs supposedly associated with restoring J.K.'s vehicle. TT305, 307-17; DA37-43.

J.K. asked the defendant for pictures of his car, but the defendant responded only with pictures of different cars. TT318-23, 327. In 2016, J.K. visited the Strafford facility and saw that his vehicle was "stripped down to the bare shell" and had only minimal work done to the body. *See* TT327-32. J.K. gave the defendant "30 days to get his act together and get some work done." TT334. According to J.K., the defendant performed only "a half hour[] worth of work" on his vehicle in that timeframe. TT334.

J.K. picked up his dissembled car and those parts he identified as belonging to the car from the Strafford facility. TT336-37. In total, J.K. paid the defendant $11,520.59. DA37; TT796.

4. J.T.

J.T., a resident of Bristol, Tennessee, purchased a 1977 Volkswagen Convertible Super Beetle in 2006. TT421. Although the car was operational, J.T. wanted to restore and "hot rod" the vehicle. TT422-23.

J.T. contacted the defendant about restoring his car in the fall of 2010. TT426. Although his agreement with the defendant was "a little open-ended," according to J.T., the defendant said the cost of restoration would be $25,000-$30,000. TT427.

In January 2011, J.T. shipped the vehicle to one of the defendant's facilities in New Hampshire. TT426-27. Within the next few weeks, J.T. sent the defendant $20,000. TT428. In addition to this initial sum, the defendant requested supplemental funds from J.T. for "parts" and other expenses related to the vehicle restoration. *See* TT430-51; DA44. The defendant, however, would spend J.T.'s money at casinos in Connecticut and Maine. *See, e.g.*, TT551-53, 602-04.

All told, J.T. paid the defendant $55,055. TT455; DA44. J.T. chose not to ship his car back—in part because he was located 900 miles away, and in part because, according to J.T., the car "looked like it was chopper

for parts, because the only thing that was left behind was a shell. No interior, no doors, no wheels, no top." TT451-54.[6]

C. Relevant procedural history.

1. Pretrial litigation

Following a police investigation, the State charged the defendant with six counts of theft by deception involving six of the defendant's Volkswagen restoration clients—A.M., J.M., J.K., J.T., E.P., and C.T.[7] DA17-19; RSA 637:4; RSA 637:11, I(a).

On January 30, 2018, the State moved to join all six counts in one trial. DA19-23. The State argued that joinder was appropriate because, among other reasons, (1) the offenses occurred over an overlapping period, (2) the offenses constituted part of a common scheme or plan, (3) the offenses had logical and factual connections to one another, and (4) joining all cases into one trial would promote judicial economy and would be more convenient for those witnesses common to all cases. DA19-22; *State v. Brown*, 159 N.H. 544, 551 (2009); *N.H. R. Crim. P.* 20.

On February 9, 2018, the defendant's counsel—Attorney Kristen Guilmette—objected. DA24-26. Attorney Guilmette argued against joinder because, among other things, the defendant allegedly "would be subject to significant undue prejudice." DA24-25.

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[6] J.O. and E.P.—two other clients of the defendant's vehicle restoration business—had similar experiences to A.M., J.M., J.K., and J.T. TT217-92 (J.O.), 383-420 (E.P.).

[7] The State later chose not to prosecute the defendant for the theft by deception charge involving C.T. *See* TT7-10; DA3-8; SA30.

On April 25, 2018, the Strafford County Superior Court (*Howard*, J.) granted the State's motion for joinder. DD45-47; DA28. The trial court, in relevant part, held:

> In this case, the charges are so clearly part of a common scheme or plan as to defy further explanation. Over a relatively brief period of time, the defendant engaged in the same conduct with each victim; employed the same deceptive tactics to convince victims to part with additional money; and not only did none of the promised work, but also in fact stripped the cars and sold the parts.

DD 47.

On August 28, 2018, the State filed a second motion for joinder to join an additional case of theft by deception involving J.O.—another client of the defendant. DA27-30. The defendant's new counsel—Attorney Robert Watkins—assented to this second motion for joinder. DA30. On August 29, 2018, the trial court (*Houran*, J.) granted the State's August 28, 2018 motion for joinder in a margin order. DA27.

In September 2018, the State obtained six indictments from a Strafford County grand jury charging the defendant with theft by deception involving A.M., J.M., J.K., J.T., E.P., and J.O.[8] DA3-8.

2. Trial, conviction, and sentencing.

On September 26, 2018, the trial court (*Howard*, J.) held a jury trial. TT1. The State called the defendant's clients A.M., J.M., J.K., J.T., E.P.,

[8] These indictments replaced earlier indictments. SA30.

and J.O.[9]; Mr. Lund; and Somersworth Police Department detectives Richard Campbell and John Sunderland. TT2, 182, 379, 539. The defendant testified in his own defense. TT539. Neither the State nor the defense called Sergeant Young to testify. *See* TT37; ST31 (the prosecutor stating: "Randy Young did not testify. The State, again, opted not to call him. I had notified Defense counsel that he was going to be left under subpoena, and he was, in fact, left under subpoena as he could have been called as a witness by Defense counsel. They chose not to call him."). *See generally* TT.[10]

On October 4, 2018, following five days of trial, the jury found the defendant guilty of four counts of theft by deception involving A.M., J.M., J.K., and J.T., and not guilty of two counts of theft by deception involving J.O and E.P. TT845-47.

On January 2, 2019, the trial court held a sentencing hearing. ST1. During allocution, the defendant gave a lengthy statement in which, among other things, he blamed the representation of Attorney Watkins for his convictions. *See* ST39-52; ST51 ("Attorney Watkins only worked for the State, not for me . . . . [H]e set me up to lose my case. . . . I was cheated . . . . We did not find justice, but we did find ineffective counsel."). The trial court disagreed with the defendant's characterization of Attorney Watkins's representation, telling the defendant that his counsel's "conduct at trial was exemplary. It's because of him that you were acquitted on a couple of these indictments." ST54. The trial court then told the defendant:

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[9] The State also called J.M.'s wife, W.M. TT124-29. Her testimony is duplicative of J.M.'s testimony and is not examined herein.

[10] The defense also never sought to suppress evidence from Sergeant Young's October 20, 2016 visit to the Strafford facility. *See generally* TT; SA148-86.

"You are, in my judgement, an inveterate liar. You are a fraud, and you are a thief. Among the many things that you called yourself during your allocution, you excepted out criminal. You are definitely a criminal. And you do deserve to go to state prison." ST55; *see also* ST60 (the trial court stating that the defendant "showed absolutely no remorse for this conduct, blamed everybody but himself for stealing all of this money from these people").

For the conviction of theft by deception involving J.M., the trial court sentenced the defendant to serve five-to-ten years, stand committed, with six months suspended from the minimum sentence. ST57-58; DA9-10. For the other three convictions involving A.M., J.K., and J.T., the trial court sentenced the defendant to serve five-to-ten years, concurrent with one another, and consecutive to the first, stand committed sentence. ST58-59; DA11-16. The trial court ordered each of these three sentences suspended for ten years from release. ST58-59; DA11-16. The trial court also ordered the defendant to pay restitution to A.M. in the amount of $82,380.00, to J.M. in the amount of $24,481.00, to J.K. in the amount of $17,220.50, and to J.T. in the amount of $63,572.79—for a total restitution amount of $187,654.29. ST57-59; DA9-16.

3. Post-trial litigation.

On January 22, 2019, Attorney Watkins filed a notice of appeal on behalf of the defendant (the "Direct Appeal"). SA4-22; *State v. Bell*, Case No. 2019-0047. In this notice of appeal, the Attorney Watkins raised one issue: "Whether trial counsel erred by not calling as a witness Sgt[.] Randy Young of the Strafford Police Department." SA6. Concurrent with filing

this Notice of Appeal, Attorney Watkins filed a motion to withdraw because there had "been a breakdown in the attorney-client relationship." SA23-24. On February 26, 2019, this Court appointed the Appellate Defender's Office to represent the defendant in the Direct Appeal, and on February 28, 2019, this Court granted Attorney Watkins's motion to withdraw. SA25-29.

Notwithstanding the pending Direct Appeal with this Court, on July 18, 2019, the defendant acting in his *pro se* capacity (the "*pro se* defendant") filed a motion for a new trial in the trial court. SA58-85. The *pro se* defendant alleged, among other things, "Prosecutorial Misconduct, [I]neffective Coun[s]el, Missing Key Evidence, Criminal Contempt, [and] Obstruction of Justice." SA58. On August 23, 2019, the trial court denied this motion. SA99, 119-20.

On August 9, 2019, the defendant's newly appointed appellate counsel filed an "Assented-to Motion for Partial Remand and Stay" in the Direct Appeal. SA30-32. Appellate counsel explained that the *pro se* defendant was intending to file a motion in the trial court for a new trial based on a claim of ineffective assistance of trial counsel. SA30. On August 15, 2019, this Court granted the defense's motion for a partial remand to the trial court, and stayed the Direct Appeal pending the resolution of the *pro se* defendant's motion for new trial. SA33.

On August 26, 2019, the *pro se* defendant filed a second motion for new trial in the trial court. *See* SA34, 86-89. In this motion, the *pro se* defendant claimed that Attorney Watkins was ineffective because, among other things, (1) he did not introduce the transcript of the January 31, 2017 call between the defendant and Sergeant Young at trial, (2) he did not

introduce the deposition of Mr. Lund at trial, (3) he did not call Sergeant Young to testify at trial, and (4) he and the prosecutor were amicable at times during the proceedings. SA86-89.

On September 29, 2019, the *pro se* defendant filed a third motion for new trial in the trial court. *See* SA91. In this motion, the *pro se* defendant claimed that the trial was "[u]nfair" because, among other things, the prosecutor "never allowed . . . 'Material Evidence' to be submitted into evidence, during my trial." SA91. On November 5, 2019, the trial court denied the defendant's August 26, 2019 and September 29, 2019 motions for new trial.[11] SA124, 126, 129.

On January 31, 2020, the *pro se* defendant filed a notice of discretionary appeal in this Court challenging the trial court's denials of his motions for new trial (the "Discretionary Appeal"). *See* PSAB2-11; *State v. Bell*, Case No. 2020-0012; SA101-45. In his notice of discretionary appeal, the *pro se* defendant alleged, among other things: (1) "prosecutorial misconduct" because the prosecutor acted improperly when she did not provide or present evidence potentially favorable to the defendant, *see* PSAB3, 6, 8-9, 11; (2) ineffective assistance of his trial counsel, Attorney Watkins, *see* PSAB3-6, 9, 11; (3) "illegal search and seizure" involving Sergeant Young's October 20, 2016 visit to the Strafford facility, *see* PSAB2, 4, 8-11; and (4) criminal wrongdoing by several individuals involved with the defendant's investigation and trial, *see* PSAB2-3, 5-7, 10;

[11] Subsequently, the *pro se* defendant filed, and continues to file, numerous motions for new trial and for other relief in the trial court. *See generally Bell*, Case No. 2019-0047; SA148-86.

SA105-15. On March 11, 2020, this Court declined to accept the Discretionary Appeal.[12] SA146-47.

On May 27, 2020, following this Court's denial of the Discretionary Appeal, the *pro se* defendant filed a motion with this Court to amend this Direct Appeal. SA35-37. The *pro se* defendant sought to include, among other claims, (1) "prosecutorial misconduct" because the prosecutor did not present evidence potentially favorable to the defendant, (2) "ineffective assistance of counsel" by Attorney Watkins, and (3) "unlawful search and seizure" involving Sergeant Young's visit to the Strafford facility. SA35-36. On June 8, 2020, this Court denied the motion. SA38.

On July 28, 2020, the *pro se* defendant filed another motion to amend this Direct Appeal alleging similar claims to his May 27, 2020 motion to amend. SA42-47. On August 19, 2020, this Court denied the *pro se* defendant's motion "to amend the direct appeal issues included in the brief filed by his attorney." SA48. This Court, however, allowed the *pro se* defendant to file a supplemental brief in the Direct Appeal without ruling "on whether those issues have been properly preserved or are otherwise properly before this [C]ourt." SA48.

On August 5, 2020, the defendant's appellate counsel filed a brief in this Direct Appeal, alleging that (1) there was insufficient evidence to convict the defendant of each count of theft by deception, and (2) the trial court erred in granting the State's motion for joinder.[13] *See* DB5.

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[12] On April 13, 2020, this Court also denied the *pro se* defendant's motion to reconsider. SA147.

[13] On July 13, 2020, the defendant's appellate counsel filed an assented-to motion to add these two issues. SA39. On July 16, 2020, this Court granted the motion. SA41.

In September through December of 2020, the *pro se* defendant submitted numerous letters and motions to this Court requesting documents, asking for expansions of time to file his supplemental brief, and seeking various forms of legal and equitable relief. *See generally Bell*, Case No. 2019-0047. On December 15, 2020, in response to one of the *pro se* defendant's filings, this Court provided the *pro se* defendant with a copy of his notice of appeal in the Discretionary Appeal. SA49. In its December 15, 2020 order, this Court noted that it "declined to accept [the *pro se* defendant's] appeal from the trial court order denying his request for a new trial in which he asserted that he had received ineffective assistance from his trial counsel." SA49.

On January 6, 2021, the *pro se* defendant filed his supplemental brief in this Direct Appeal. *See* PSB. In this supplemental brief, the *pro se* defendant raises numerous claims, including four claims that are identical to those he previously raised in his Discretionary Appeal: (1) "prosecutorial misconduct"; (2) ineffective assistance of his trial counsel, Attorney Watkins; (3) illegal search and seizure; and (4) criminal wrongdoing by several individuals involved with the defendant's investigation and trial. *See* PSB1. In the appendices to his supplemental brief, the *pro se* defendant included, among other documents, excerpts of his Discretionary Appeal. *See* PSAB2-11.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court for the following reasons:

Arguments in Response to the Defendant's Brief

I. The defendant's challenge to the sufficiency of the evidence is without merit. The State presented overwhelming evidence at trial that the defendant committed class A felony theft by deception involving his vehicle restoration clients A.M., J.M., J.K., and J.T. These victims testified that the defendant solicited substantial funding from them by claiming that it was needed to restore their vintage Volkswagen cars. The State presented evidence that the defendant, however, did not attempt to use his clients' money for restoration, and instead spent it on unrelated expenses, including gambling, meals, and lodging in and around out-of-state casinos. The defendant never restored his clients' vehicles despite having months or years to complete the restorations. Some clients never received their cars back from the defendant.

II. The defendant's challenge to the trial court's joinder of the theft by deception cases fails for two reasons:

a. First, the defendant waived his ability to challenge joinder on appeal because the defense—presumably for tactical reasons—assented to one of the State's motions for joinder.

b. Second, the trial court acted within its discretion by joining all theft by deception cases in one trial. The State did not seek joinder solely to demonstrate that the accused had a propensity to engage in criminal conduct. Rather, the State set forth independent support for

> joinder that was equal to—if not greater than—the support this Court has found sufficient for joinder in recent decisional law, including: (1) the defendant used deception tactics common to all victims, (2) each case involved common witnesses and contained similar facts, and (3) the trial process would be more efficient if the cases were consolidated in one trial.

Arguments in Response to the Pro Se *Defendant's Supplemental Brief*

III. The issues raised in the *pro se* defendant's supplemental brief are not properly before this Court because the *pro se* defendant failed to raise these issues before the trial court, develop them on appeal, or address them in the notice of appeal.

IV. The *pro se* defendant is barred by the doctrines of res judicata and collateral estoppel from raising his (1) prosecutorial misconduct claim, (2) illegal search and seizure claim, (3) ineffective assistance of trial counsel claim, and (4) allegations of criminal wrongdoing against those involved in his investigation and trial. The *pro se* defendant raised these identical issues in his prior Discretionary Appeal and cannot do so again in this Direct Appeal.

V. The defendant's trial counsel, Attorney Watkins, did not provide ineffective assistance of counsel for making the strategic decision not to call Sergeant Young to testify at trial. Sergeant Young's testimony would not have helped the defense and, instead, may have resulted in the jury finding the defendant guilty of all six counts of theft by deception—rather than merely four.

ARGUMENT

Arguments in Response to the Defendant's Brief

I. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL THAT THE DEFENDANT COMMITTED THEFT BY DECEPTION INVOLVING A.M., J.M., J.K., AND J.T.

The defendant claims that the State failed to present sufficient evidence for the trial court to convict him of theft by deception involving A.M., J.M., J.K., and J.T. *See* DB19-31.

A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, the standard of review is *de novo*. *State v. Vincelette*, 172 N.H. 350, 354 (2019). To prevail on a claim that there was insufficient evidence to convict, "the defendant must show that no rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Devaney*, 139 N.H. 473, 475 (1995) (quotation omitted); *see also State v. Germain*, 165 N.H. 350, 362 (2013) ("The State does not have the burden of removing all doubt, but it must remove all *reasonable* doubt." (emphasis in original)), *holding modified by State v. King*, 168 N.H. 340 (2015). The defendant "bears a heavy burden on appeal in that the evidence and reasonable inferences drawn therefrom will be viewed in the light most favorable to the State." *State v. Allcock*, 137 N.H. 458, 461 (1993) (quotation omitted).

The New Hampshire theft by deception statute states in relevant part:

> A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof. . . .
>
> [D]eception occurs when a person purposely:

> (a) Creates or reinforces an impression which is false and which that person does not believe to be true, including false impressions as to law, value, knowledge, opinion, intention or other state of mind . . . ; or
>
> (b) Fails to correct a false impression which he previously had created or reinforced and which he did not believe to be true . . . ; or
>
> (c) Prevents another from acquiring information which is pertinent to the disposition of the property involved . . . .

RSA 637:4. Theft by deception is a class A felony if the value of the property or services stolen exceeds $1,500. RSA 637:11, I(a).

The State presented overwhelming evidence at trial that the defendant committed class A felony theft by deception involving clients A.M., J.M., J.K., and J.T. Each client testified that, at various times between 2011 and 2016, he or she sent the defendant money totaling in excess of $1,500 to locations outside of New Hampshire that was ostensibly for "parts" and other expenses related to restoring their Volkswagen vehicles. Det. Sunderland also testified that from 2011-2014, the defendant made financial transactions in and around casinos located in New England shortly after receiving money from A.M., J.M., and J.T.

When a client would ask the defendant for photographs of the vehicle restoration, the defendant would send photographs of different cars to give the false impression that he was doing more than he was. Despite the defendant's assurances of progress, and despite the defendant receiving significantly more money than initially estimated, A.M., J.M., J.K., and J.T. each testified that the defendant made little to no progress on their vehicles over the course of months or years. Of these clients, A.M., J.M., and J.T.

never received their vehicles back—in large part because the defendant had disassembled their cars, rendering them inoperable. J.K. did retrieve his disassembled vehicle after the defendant had failed to perform meaningful restoration work on it in a timely fashion.

The defendant himself testified at trial that he financed his expenditures at casinos—including gambling, meals, and hotel rooms—through contributions from his restoration clients. *See, e.g.*, TT547-645, 693, 728, 759-60. The defendant also admitted that he did not tell his clients about his gambling. The defendant testified that he viewed his gambling as a "top-secret thing," reasoning that "[i]t's probably not something to advertise and boast to my clients about. It seemed like common sense. I would consider myself an intelligent person, and I just thought it made sense to keep it a classified situation." TT756. The defendant stated at trial that although he was "well aware of bankruptcy," he did not pursue this form of debt relief because, unlike gambling, he felt it was "dishonest." *See* TT760.

Despite the substantial risks inherent in gambling, the defendant testified that he was so successful in his first year that his debt was "way down to almost nothing." TT693. The defendant, however, did not transition back to working full time at his Volkswagen restoration business. The defendant instead continued to gamble, in part, because gambling gave him "a feeling of independence" and "helped [him] with [his] depression." *See* TT693-94.

The defendant purposely deceived his clients by (1) not telling them that their money was being spent at casinos and other non-restoration costs, (2) not correcting their mistaken impression that their money was being

used for vehicle restoration, and, (3) for at least some of his clients, sending them pictures of other vehicles to give the misleading impression that he was making more progress on their vehicles than he was. *See* RSA 637:4. Based on the foregoing, the State presented prodigious evidence to prove beyond a reasonable doubt that the defendant committed class A felony theft by deception involving A.M., J.M., J.K., and J.T. *See* RSA 637:4; RSA 637:11, I(a); TT659-60.

Despite the overwhelming evidence of the defendant's guilt, the defendant argues that the evidence was insufficient because the defendant, although "moving at a snail's pace, was working on each person's vehicle when he requested money from them." DB20. This argument fails for several reasons.

First, this argument is immaterial because, at a minimum, the defendant induced the victims to send him money for restoration work, much or which he used to gamble without their knowledge or permission. The defendant, in short, purposely stole from and deceived his clients in violation of RSA 637:4.

Second, the defendant did not intend to restore his clients' vehicles. To the contrary, the defendant testified that, after the first year of gambling, his debt was "way down to almost nothing," TT693—yet, the defendant did not transition back to working full time at his Volkswagen restoration business and continued to gamble with his clients' money.

Third, the defendant's argument leads to an absurd result. *See State v. Breest*, 167 N.H. 210, 214 (2014) ("It is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute." (brackets and quotation

omitted)). On the defendant's theory, a defendant could avoid criminal liability simply by alleging that he intended to give stolen property back to the victims or to eventually complete the agreed-upon task, or by using a small portion of the victims' funds for legitimate purposes while using the rest of illegitimate purposes. Allowing defendants to evade criminal prosecution in this manner would undermine the purpose and intent of RSA 637:4.

The defendant's argument that his misconduct was strictly civil in nature is similarly unavailing. *See* DB21. Although accurate that, in most instances, persons do not subject themselves to criminal liability for run-of-the-mill breach of contract, *see, e.g.*, *Holloway Auto. Grp. v. Giacalone*, 169 N.H. 623 (2017); *Cleasby v. Phoenix Auto Body, Inc.*, No. 2005-0124, 2006 WL 8418214 (N.H. Mar. 3, 2006) (unpublished), the defendant's misconduct, by virtue of its egregious and deceptive nature, subjected him to both civil *and* criminal liability. Further, limiting the defendant's exposure to monetary damages would have been inadequate to make the victims whole—even if the victims prevailed in one or more civil actions against the defendant, they would not have received any meaningful financial recovery because the defendant was, and probably continues to be, mired in debt. *See, e.g.*, *Mentis Scis., Inc. v. Pittsburgh Networks, LLC*, __ A.3d __, No. 2019-0548, 2020 WL 5637697, at *2 (N.H. Sept. 22, 2020) ("The goal of money damages for a breach of contract is to place the injured party in as good a position as [he or she] would have been in had the contract been performed." (Quotation omitted)).

Considering the evidence and all reasonable inferences drawn in the light most favorable to the State, a rational juror easily could have found

that the defendant committed theft by deception involving A.M., J.M., J.K., and J.T. *See State v. Breed*, 159 N.H. 61, 67 (2009). This Court should affirm.

II. THE DEFENDANT'S JOINDER CHALLENGE FAILS BECAUSE IT IS WAIVED AND BECAUSE IT IS WITHOUT MERIT.

The defendant argues that the trial court erred in joining all theft by deception cases in one trial. *See* DB32-39. This argument fails because the defendant waived this challenge, and, even if this challenge is not waived, it is without merit.

A. The defendant waived his ability to challenge joinder because the defense assented to the State's second motion for joinder.

"Waiver is the voluntary relinquishment or abandonment—express or implied—of a legal right or notice." *State v. Cancel*, 149 Conn. App. 86, 100 (2014) (ellipses, brackets, and quotation omitted); *see also State v. Richard*, 160 N.H. 780, 785-86 (2010) (explaining that the invited error doctrine, which is sometimes classified as "waiver," precludes appellate review of "error into which a party has led the trial court, intentionally or unintentionally"). When a party consents to or expresses satisfaction with an issue at trial, "claims arising from that issue are deemed waived and may not be reviewed on appeal." *Cancel*, 149 Conn. App. at 100 (quotation omitted). "Waiver may be effected by action of counsel." *Id.* (quotation omitted)

In *State v. Cancel*, the Appellate Court of Connecticut (the "appellate court") examined whether a defendant had waived his ability to challenge joinder on appeal. 149 Conn. App. 86. The State of Connecticut ("Connecticut") charged the defendant with one count of attempt to commit sexual assault, one count of sexual assault, and two counts of risk of injury

to a child involving one victim; and, in a separate case, one count of sexual assault and two counts of risk of injury to a child involving a second victim. *Id.* at 91. Connecticut moved to join the two cases in one trial. *Id.* The appellate court granted the motion after defense counsel raised no objection. *Id.* Following trial, the jury found the defendant not guilty of attempt to commit sexual assault in the first degree involving the first victim, but found him guilty of the remaining charges. *Id.*

On appeal, the defendant challenged the joinder of the two cases involving the two victims. *Id.* at 99. In response, Connecticut argued that the defendant had waived any claim challenging joinder because defense counsel did not file an objection to Connecticut's motion for joinder and, instead, "expressly stated that there was no objection to the motion." *See id.* at 99-101.

The appellate court agreed with Connecticut. *Id.* Because the defense did not object to Connecticut's motion for joinder, which the appellate court presumed was for "tactical purposes," the appellate court found that the defense had "waived any constitutional claims he may have had regarding the joinder." *Id.* at 99-102 & n.9. The appellate court explained that a defendant "may not pursue one course of action at trial for tactical reasons and later on appeal argue that the path he rejected should now be open to him" because this would give him "a second bite at the apple." *See id.* at 102 (quoting *State v. Kitchens*, 299 Conn. 447, 480 (2011)).[14]

[14] Further, the appellate court found that waiver "thwarts plain error review of a claim." *Cancel*, 149 Conn. App. at 102-03 (quotations omitted).

Similar to the defendant in *Cancel*, the defendant in this appeal has waived his joinder claim. Before trial began, the defendant's counsel—Attorney Watkins—assented to the State's August 28, 2018 motion for joinder. DA30. Attorney Watkins did so presumably for tactical reasons, such as reducing "the harassment, trauma, expense, and prolonged publicity of multiple trials," "a faster disposition of all cases," and "increase[ing] the possibility of concurrent sentences in the event of conviction." *Brown*, 159 N.H. at 552; *Cancel*, 149 Conn. App. at 101 n.9 (holding that when there is no record as to why defense counsel chose not to oppose joinder, it "must presume that defense counsel's acquiescence . . . was for tactical purposes"); *State v. Moore*, 274 N.W.2d 505, 506-07 (Minn.1979) (noting that a defendant may make a deliberate decision not to request severance of charges for strategic reasons or to avoid having to defend himself in separate trials). By assenting to the State's motion for joinder, the defendant forfeited his ability to challenge joinder on appeal. To hold otherwise would give the defendant an unfair advantage to argue issues on appeal that he previously forfeited. *See Cancel*, 149 Conn. App. at 102.

The defendant may argue in a Reply that he did not waive his joinder claim because (1) the defense objected to the State's January 30, 2018 motion for joinder, (2) any objection to the State's August 28, 2018 motion for joinder would have been "futile," and (3) the State's August 28, 2018 motion for joinder addressed only the joinder of J.O. *See, e.g.*, DB32 n.6. Each of these arguments is without merit.

First, the defendant's objection to the State's January 30, 2018 motion for joinder is irrelevant because it was superseded by changes in defense counsel and litigation strategy. When the defendant objected to the

State's January 30, 2018 motion for joinder, Attorney Guilmette represented him. DA24-26. When the defendant assented to the State's August 28, 2018 motion for joinder, however, Attorney Watkins had replaced Attorney Guilmette as defense counsel. Presumably, Attorney Watkins believed that, unlike Attorney Guilmette, objecting to joinder was not a sound tactical decision. *See Cancel*, 149 Conn. App. at 101 n.9. Attorney Watkins may have concluded, for example, that the defendant was better served by joining all cases in one trial to streamline the litigation and potentially reduce the defendant's sentence if the jury found him guilty of two or more charges. *See Brown*, 159 N.H. at 552. If Attorney Watkins thought that the State's second motion for joinder would have resulted in "significant undue prejudice"—as Attorney Guilmette argued in her February 9, 2018 objection, DA24-25—he could have, and should have, filed an objection.

The defendant's argument that objecting to the State's August 28, 2018 motion for joinder would have been "futile" is similarly unavailing. *See* DB3 n.6. Although support for joinder was substantial, *see infra* section II.B; DD47, the trial court would have revisited its earlier decision if prompted. Further, nothing required Attorney Watkins to give his *assent* to the State's second motion for joinder. Attorney Watkins, for example, could have (1) objected to the State's motion, (2) filed a motion to reconsider the trial court's April 25, 2018 order granting the State's first motion for joinder, (3) filed a motion to sever the joined cases, or (4) at minimum, taken no position. *See State v. Hudson*, 281 N.W.2d 870, 872-73 (Minn.1979) (stating that "failure to move for severance constitutes a waiver unless [the] defendant can show good cause for relief from the

waiver"). If Attorney Watkins had chosen one or more of these alternative approaches, it is more likely that the defendant would have preserved his joinder claim. But Attorney Watkins did not do so, probably because he reasoned assent was the best strategy for his client—even if it meant the defendant forfeited his ability to later challenge joinder on appeal.

Finally, the State's August 28, 2018 motion for joinder was not confined to the joinder of J.O. The State's August 28, 2018 motion for joinder incorporated its prior motion by reference, *see* DA30, contained identical reasoning to its first motion for joinder, *compare* DA17-22 *with* DA27-30, and addressed all cases involving all victims—not just the case involving J.O., *see* DA27-30. Notably, the State's August 28, 2018 motion included broad language justifying joining every theft by deception case against the defendant in one trial:

> The above [seven] docket numbers should be joined pursuant to the State's request. The cases all share common witnesses, circumstances, evidence and law. Joining the cases for trial would not be more prejudicial than trying each case individually because much of the evidence in each case is inextricably intertwined. Each of the cases has an almost identical fact pattern, occurred in the same time frame, and demonstrates a common scheme or plan. Additionally, several of the victims will need to be called as witnesses in each Trial, due to the fact that the cases are all intrinsically intertwined.

DA30. By assenting to this motion, the defense agreed with the State's premise for joining *all* cases—i.e., that it would streamline the trial process without unduly prejudicing the defendant. *See N.H. R. Crim. P.* 20(a).

This Court should reject the defendant's joinder claim because it is waived.

B. The trial court acted within its discretion by joining all the theft by deception cases in one trial.

Even if the defendant did not waive his joinder challenge, this Court should affirm because the trial court did not err in granting the State's January 30, 2018 motion for joinder.[15]

This Court will uphold the trial court's decision regarding joinder unless it constitutes an unsustainable exercise of discretion. *Brown*, 159 N.H. at 550. To establish an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id.*

Under New Hampshire Rule of Criminal Procedure 20, if the State requests that the trial court join charges alleging multiple "related offenses" brought against a single defendant, the trial court "*shall* join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice." *N.H. R. Crim. P.* 20(a)(2) (emphasis added). The purposes of joinder include "avoid[ing] the duplication of evidence[,] . . . reduc[ing] the inconvenience to victims and witnesses, . . . minimiz[ing] the time required to dispose of the offenses, and . . . achiev[ing] a variety of other economies in connection with prosecutorial and judicial resources." *Brown*, 159 N.H. at 552 (quotation omitted).

As relevant in this appeal, two or more offenses alleged to have occurred during separate criminal episodes are "related" if they (1) "[c]onstitute parts of a common scheme or plan," or (2) "are logically and

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[15] The defendant does not contest the trial court's grant of the State's August 28, 2018 motion for joinder. *See* DB32-39 & n.6.

factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct."[16] *N.H. R. Crim. P.* 20(a)(1)(B)-(C). The following factors are relevant in assessing relatedness:

> (1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant's mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony and other evidence related to the offenses.

Brown, 159 N.H. at 551-52. "[N]o single factor is dispositive on the question of relatedness." *Id.* at 552. Any potential prejudice that might result from joinder is a factor for the trial court to consider under the "best interests of justice" prong of Rule 20(a)(2). *See id.*; *N.H. R. Crim. P.* 20(a)(2).

The trial court did not err in granting the State's January 30, 2018 motion for joinder—the six cases involving A.M., J.M., J.K., J.T., E.P. and C.T. were related because they were part of a "common scheme or plan" and were "logically and factually connected." *N.H. R. Crim. P.* 20(a)(1)(B)-(C).

In its January 30, 2018 motion for joinder, the State asserted that "[b]etween 2011 and 2016, [the defendant] . . . engaged in a series of deceptive practices for the purpose of obtaining or exercising unauthorized control over U.S. currency and vehicles from customers of his automotive

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[16] The defendant does not address this alternative ground for joinder in his brief because the trial court granted the State's motion on the basis that the cases were part of a common scheme or plan. DB32 n.7; DD47. This Court, however, may affirm the trial court's ruling on this alternative ground. *See State v. Berry*, 148 N.H. 88, 91 (2002) (holding that this Court will not reverse the trial court "when it reaches the correct result and valid alternative grounds exist to reach that result").

shop." DA18. The State explained that the defendant "solicited thousands of dollars" from A.M., J.M., J.K., J.T., E.P. and C.T.—each of whom had previously given the defendant their vehicles for restoration work. DA18. The State described how the defendant "sent the victims fake pictures of vehicles, . . . claiming that he was 'working on' the vehicle still, but needed additional money." DA18. And, the State noted, after Mr. Lund invited the defendant's clients to view their vehicles, "each determined that not only had the defendant not done any work on their vehicle, but had actually stripped each car for parts . . . ." DA18-19.

The State argued that, based on these facts, the six cases involving the six victims should be joined because (1) the defendant used deception tactics common to all victims; (2) each case involved a common witness—Mr. Lund—and contained similar facts; and (3) the trial process would be more efficient if the cases were consolidated in one trial rather than six separate trials. *See* DA20-22. The trial court granted the State's motion for joinder, holding in relevant part:

> In this case, the charges are so clearly part of a common scheme or plan as to defy further explanation. Over a relatively brief period of time, the defendant engaged in the same conduct with each victim; employed the same deceptive tactics to convince victims to part with additional money; and not only did none of the promised work, but also in fact stripped the cars and sold the parts.

DD47.

The trial court did not unsustainably exercise its discretion by granting the State's motion for joinder. In its January 30, 2018 motion, the State provided substantial factual and legal support for why the defendant's

cases should be joined. Specifically, the State's motion for joinder plainly satisfied each of the five *Brown* factors[17]:

- First, "the temporal and spatial relationship among the underlying charged acts" was substantial—each charge occurred in the same time period (i.e., between 2010 and 2016) and in similar locations (e.g., the Strafford facility and out-of-state casinos);
- Second, there was "the commonality of the victim(s) and/or participant(s) for the charged offenses" in that, among other things, each victim was a client of the defendant's vehicle restoration business;
- Third, "the defendant's mode of operation" was substantially the same for each victim—the defendant would solicit funds from each of his clients, claiming that they were needed for "parts" and other vehicle restoration expenses, and then spend this money on gambling and other unrelated expenditures;
- Fourth, "the law regarding the crimes charged" was identical—each case involved the charge of theft by deception; and
- Fifth, "the duplication of witnesses, testimony and other evidence related to the offenses" would have occurred if the cases were not joined—Mr. Lund, the investigating police officers, and the defendant himself were expected to testify and present similar evidence at each trial.

See Brown, 159 N.H. at 551-52.

The State did not seek joinder "solely [to] demonstrate that the accused has a propensity to engage in criminal conduct." *N.H. R. Crim. P.*

[17] This Court has traditionally applied these factors in the context of determining whether cases are "logically and factually connected." *See, e.g.*, *Brown*, 159 N.H. at 551-52. The trial court, however, considered these factors in concluding that the defendant engaged in a "common scheme or plan" against the victims and, consequently, are also considered here. *See* DD47.

20(a)(1)(C). Rather, the State set forth independent support for joinder that was equal to—if not greater than—the support this Court has found sufficient for joinder in recent decisions. *See, e.g.*, *Brown*, 159 N.H. at 551-58 (upholding joinder); *State v. Girard*, No. 2018-0608, 2020 WL 6106923 (N.H. Oct. 16, 2020) (unpublished) (same); *State v. Stratton*, No. 2018-0545, 2019 WL 6525640 (N.H. Dec. 4, 2019) (unpublished) (same); *State v. Orme*, No. 2018-0284, 2019 WL 3934771 (N.H. Aug. 20, 2019) (unpublished) (same); *State v. Magoon*, No. 2018-0280, 2019 WL 2184829 (N.H. May 21, 2019) (unpublished) (same). This Court should affirm the trial court.

The defendant's challenge to the trial court's grant of the State's January 30, 2018 motion for joinder has no legal or factual basis. First, the defendant erroneously relies upon this Court's case law interpreting the more stringent joinder standard in existence prior to January 1, 2008. *See* DB34-39 (relying predominantly on cases dated before January 1, 2008 and cases decided after that date that relied upon the prior joinder rule); *Brown*, 159 N.H. at 551-58 (reviewing history of Superior Court Rule 97-A, which later became New Hampshire Rule of Criminal Procedure 20, and finding that the trial court sustainably granted joinder under the new rule); *Breed*, 159 N.H. at 68. Under the current joinder standard that governs this case, the trial court plainly did not err in granting the State's motion for joinder.

Second, the defendant does not demonstrate how joinder prejudiced him. *Brown*, 159 N.H. at 551-52, 556; *N.H. R. Crim. P.* 20(a)(2). In the defendant's two-page objection to the State's first motion for joinder, the defense advanced only conclusory support that joining the six cases would "subject [the defendant] to significant undue prejudice." *See* DA24-25. The

defendant's brief on appeal similarly contains scant argument on how joinder prejudiced him. *See* DB38-39. If anything, the defendant *benefitted* from joinder because (1) the jury did not find him guilty of two of the six joined charges, (2) he did not have to sit for six separate trials, and (3) the trial court suspended three of the defendant's sentences and ordered the defendant to serve these three sentences concurrently. *See Brown*, 159 N.H. at 552 (stating that the joinder can be "beneficial to the defendant" because it can result in the reduction of "the harassment, trauma, expense, and prolonged publicity of multiple trials," "a faster disposition of all cases," and an "increase [in] the possibility of concurrent sentences in the event of conviction"); *Magoon*, 2019 WL 2184829, at *4 (finding no prejudice because, in part, the jury followed the trial court's instructions and did not find the defendant guilty of two of the six joined charges). If the defendant's cases had not been joined, he probably would not have enjoyed these advantages in litigation and sentencing.

This Court should affirm.

Arguments in Response to the Pro Se *Defendant's Supplemental Brief*

III. THE *PRO SE* DEFENDANT FAILED TO PROPERLY PRESERVE, DEVELOP, AND RAISE EACH CLAIM IN HIS SUPPLEMENTAL BRIEF.

This Court should not consider the issues raised in the *pro* se defendant's supplemental brief on appeal because the *pro se* defendant failed raise these issues before the trial court, develop them on appeal, or address them in his notice of appeal. *See generally* PSB.

As relevant to this case, this Court will decline to consider issues on appeal in three different instances. First, this Court will not review any issue that the defendant did not raise before the trial court. "The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." *State v. McMinn*, 141 N.H. 636, 642 (1997) (quotation omitted). "This rule, which is based on common sense and judicial economy, recognizes that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id.* (quotations and citations omitted). As the appealing party, it is the defendant's burden to provide this Court with a record demonstrating that he raised his appellate arguments before the trial court. *See Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004). Although the plain error rule allows this Court to consider errors not brought to the attention of the trial court, *see Sup. Ct. R.* 16-A, this Court should exercise its discretion to consider plain error only when the defendant specifically argues the issue pursuant to the plain error rule, *Halifax-Am. Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 574-75 (2018).

Second, "in the realm of appellate review, a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review." *Douglas v. Douglas*, 143 N.H. 419, 429 (1999) (citation omitted). Thus, this Court confines its review to only those issues that the defendant has fully briefed. *See State v. Blackmer*, 149 N.H. 47, 49 (2003).

Third, this Court does not review any issue addressed in the defendant's brief that he did not also raise in his notice of appeal. *See State v. Blair*, 143 N.H. 669, 672 (1999).

Based on these rules—which apply equally to represented and self-represented parties, *see State v. Porter*, 144 N.H. 96, 100-01 (1999)—this Court should not address the following issues raised in the *pro se* defendant's supplemental brief[18]:

No.	***The* pro se *defendant's issue***	***Reasons for not addressing***
1.	Whether the trial court erred when, after the jury retired to deliberate, defense counsel, the prosecutor, and the trial court discussed a legal issue in response to a jury question while the defendant was not present. *See* PSB6, 14-15, 31; TT831-36.	• Not raised at trial • Not developed on appeal • Not addressed in notice of appeal[19]

[18] To the extent the State has not addressed all of the claims raised in the *pro se* defendant's supplemental brief, this Court should deny these claims for the reasons set forth herein.

[19] Further, this claim is without merit because defense counsel may discuss legal issues outside the presence of the defendant. *See Fed. R. Crim. P.* 43(b) ("A defendant need not be present . . . [when] [t]he proceeding involves only a conference or hearing on a question of law."); *Pearson v. Morris*, 920 F.2d 933 (6th Cir. 1990) (table) (finding that the defendant "was not constitutionally entitled to be present during the in-chambers conference which determined the responses to the jurors' messages" (quotation omitted)); *United States v. Gagnon*, 470 U.S. 522, 527 (1985) ("The encounter between the judge, the juror, and [the defendant]'s lawyer was a short interlude in a complex trial; the conference

No.	*The* **pro se** *defendant's issue*	*Reasons for not addressing*
2.	Whether the trial judge erred when he, with the consent of the prosecutor and defense counsel, personally retrieved an exhibit from the jury and delivered the exhibit and an accompanying instruction to the jury. PSB33-34; TT840-44.	• Not raised at trial • Not developed on appeal • Not addressed in notice of appeal[20]
3.	Whether the prosecutor acted improperly when she did not present evidence potentially favorable to the defendant at trial, including, among other things, Sergeant Young's testimony. *See* PSB8, 12-13, 25-30, 35-36, 38, 40.	• Not raised at trial[21] • Not developed on appeal • Not addressed in notice of appeal[22]

was not the sort of event which every defendant had a right personally to attend . . . ."); *see also State v. Hoyt*, 141 N.H. 371, 371-73 (1996) (holding that defense counsel could represent the defendant at a motion hearing when the defendant was not present at the hearing).

And even if this constituted error, which it did not, the error was harmless because the State presented overwhelming evidence of the defendant's guilt at trial. *See supra* section I; *State v. Peters*, 162 N.H. 30, 36 (2011). Moreover, the *pro se* defendant does not articulate how, and the record does not suggest that, his absence affected the verdicts or otherwise prejudiced him. *See, e.g.*, *State v. Hannan*, 137 N.H. 612, 615-16 (1993); *State v. Bailey*, 127 N.H. 416, 421 (1985).

[20] For similar reasons to those described in footnote 19, this claim also fails on the merits because (1) the defendant was not constitutionally entitled to be present for these brief interactions, (2) the attorneys for the State and the defendant consented to this method of communicating with the jury, and (3) even if the trial judge's actions constituted error, which they did not, the error was harmless.

[21] The *pro se* defendant raised this challenge to his conviction only after trial. *See Sup. Ct. R.* 3; *supra* Statement of the Case and Facts section C.3.

[22] This claim also fails on the merits because "[t]he defendant was not inhibited by the State in presenting his case, and the State [took] reasonable steps to assist in procuring the witness's appearance." *See State v. Guaraldi*, 127 N.H. 303, 306 (1985).

No.	*The* **pro se** *defendant's issue*	*Reasons for not addressing*
4.	Whether Sergeant Young's search of the Strafford facility was illegal and should have been suppressed. *See* PSB6-7, 11-13, 16-18, 21, 23-26, 31-32, 34, 36, 39-40.	• Not raised before or at trial[23] • Not developed on appeal • Not addressed in notice of appeal
5.	Whether Attorney Watkins provided ineffective assistance of counsel by (1) not calling Sergeant Young to testify at trial, (2) not attempting to introduce the January 31, 2017 transcript of the phone call between the defendant and Sergeant Young at trial,[24] (3) not attempting to introduce the entire August 14, 2018 deposition transcript of Mr. Lund at trial,[25] (4) not making proper objections at trial, and (5) having an amicable relationship with the prosecutor. *See* PSB7-11, 13-14, 16-24, 27, 29, 31-32, 38, 40.	• Not raised at trial[26] • Not developed on appeal • Aside from Attorney Watkins's strategic decision not to call Sergeant Young to testify, not addressed in notice of appeal

[23] The *pro se* defendant raised this challenge only after trial. *See Sup. Ct. R.* 3; *supra* Statement of the Case and Facts section C.3.

[24] The trial court reviewed this transcript after trial at the sentencing hearing. *See* PSB14; ST53-54.

[25] During the cross examination of Mr. Lund, Attorney Watkins referenced Mr. Lund's deposition and was prepared to use it for impeachment if necessary. *See* TT495; PSB11. Generally speaking, deposition transcripts may not be admitted into evidence except for impeachment purposes or when the witness is unavailable. *See N.H. R. Ev.* 607, 613, 801, 804; *see also Fed. R. Civ. P.* 32.

[26] The *pro se* defendant raised this challenge only after trial. *See Sup. Ct. R.* 3; *supra* Statement of the Case and Facts section C.3.

No.	*The* **pro se** *defendant's issue*	*Reasons for not addressing*
6.	Numerous allegations of criminal wrongdoing—including perjury, extortion, theft, and criminal threatening—against individuals involved with the defendant's criminal investigation and trial. *See* PSB12, 17, 25-27, 30, 35-37, 40.	• Not raised at trial[27] • Not developed on appeal • Not addressed in notice of appeal[28]

Because the *pro se* defendant's claims are not properly before this Court, this Court should affirm the defendant's convictions.[29]

[27] The *pro se* defendant raised these allegations only after trial. *See Sup. Ct. R.* 3; *supra* Statement of the Case and Facts section C.3.

[28] Additionally, these allegations are beyond the scope of the defendant's trial, which addressed the defendant's theft by deception charges only. *See generally* TT.

[29] If, however, this Court determines that one or more of these issues are properly before this Court and require further briefing, the State respectfully requests the opportunity to address these issues in a supplemental filing.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL BAR CERTAIN OF THE *PRO SE* DEFENDANT'S CLAIMS ON APPEAL.

The *pro se* defendant is barred by the doctrines of res judicata and collateral estoppel from raising the following claims: (1) the prosecutor acted improperly when she did not present evidence potentially favorable to the defendant at trial, including, among other things, Sergeant Young's testimony, *see* PSB8, 12-13, 25-30, 35-36, 38, 40 [hereinafter, the "prosecutorial misconduct claim"]; (2) the evidence resulting from Sergeant Young's visit to the Strafford facility was inadmissible and should have been suppressed, *see* PSB6-7, 11-13, 16-18, 21, 23-26, 31-32, 34, 36, 39-40 [hereinafter, the "illegal search claim"]; (3) Attorney Watkins provided ineffective assistance of counsel, *see* PSB7-11, 13-14, 16-24, 27, 29, 31-32, 38, 40 [hereinafter, the "ineffective assistance claim"]; and (4) that individuals involved with the defendant's investigation and trial committed criminal wrongdoing, *see* PSB12, 17, 25-27, 30, 35-37, 40 [hereinafter, the "criminal wrongdoing claim"].

The doctrines of res judicata and collateral estoppel apply in both criminal and civil cases. *See State v. Kowal*, 116 N.H. 699, 700 (1976); *State v. Grande*, 168 N.H. 487, 491 (2016) (holding that the collateral estoppel analysis applies to the defendant's pursuit of post-conviction relief "such as a motion for a new trial based upon ineffective assistance of counsel" (quotation omitted)). "The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that *could have* been litigated in the first action." *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (emphasis in original). Res judicata applies if three elements are met: "(1)

the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Id.*

Similarly, the doctrine of collateral estoppel "bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in the prior action." *Hansa Consult of N. Am., LLC v. Hansaconsult Ingenieurgesellschaft mbH*, 163 N.H. 46, 50 (2011). Collateral estoppel applies when: "(1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment." *Grande*, 168 N.H. at 491 (quotation omitted).

A. Res judicata

Res judicata bars the *pro se* defendant's prosecutorial misconduct claim, illegal search claim, ineffective assistance claim, and criminal wrongdoing claim. First, the *pro se* defendant is the same party to the first cause of action (i.e., the Discretionary Appeal) and this cause of action (i.e., the Direct Appeal). *Gray*, 161 N.H. at 164. Second, the *pro se* defendant raised the same causes of action before this Court in both appeals. *Id.* As described above, the *pro se* defendant raised the identical four claims in his Discretionary Appeal. *See supra* Statement of the Case and Facts section C.3. Finally, the first action ended with a final decision on the merits. *Gray*, 161 N.H. at 164. The trial court denied the *pro se* defendant's motions for a

new trial on the merits, and this Court declined to accept the *pro se* defendant's Discretionary Appeal challenging the trial court's decisions. *See supra* Statement of the Case and Facts section C.3.

B. Collateral estoppel

The doctrine of collateral estoppel also bars the *pro se* defendant's prosecutorial misconduct claim, illegal search claim, ineffective assistance claim, and criminal wrongdoing claim. First, the *pro se* defendant raised these exact issues in his Discretionary Appeal. *Grande*, 168 N.H. at 491. Second, the Discretionary Appeal resolved these issues finally on the merits. *Id.* Third, the *pro se* defendant is same party to both the Discretionary Appeal and this Direct Appeal. *Id.* Fourth, the *pro se* defendant has had a full and fair opportunity to litigate these four issues in both the trial court and in his Discretionary Appeal. *Id.* And, lastly, the trial court's findings were essential to the Discretionary Appeal, *id.*—i.e., the trial court found that the *pro se* defendant should not be granted a new trial based on any of the four claims raised by the *pro se* defendant.

Because the *pro se* defendant's prosecutorial misconduct claim, illegal search claim, ineffective assistance claim, and criminal wrongdoing claim are barred by the doctrines of res judicata and collateral estoppel, the *pro se* defendant cannot relitigate these issues in this appeal.

V. ATTORNEY WATKINS WAS NOT INEFFECTIVE FOR MAKING THE STRATEGIC DECISION NOT TO CALL SERGEANT YOUNG TO TESTIFY AT TRIAL.[30]

"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, 236-37 (2019) (quoting *State v. Brown*, 160 N.H. 408, 412 (2010)); *see Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). This Court first addresses a claim of ineffective assistance of counsel under the State Constitution, citing federal opinions for guidance only. *State v. Ball*, 124 N.H. 226, 231-33 (1983).

To prevail upon a claim for ineffective assistance of counsel, the defendant must demonstrate first "that counsel's representation was constitutionally deficient," and second "that counsel's deficient performance actually prejudiced the outcome of the case." *Brown*, 160 N.H. at 412 (quotation omitted). To satisfy the first prong of the test (i.e., the "performance prong"), the defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* (quotation omitted). This Court judges the reasonableness of counsel's conduct based upon the facts and circumstances of that particular case, viewed at the time of that conduct. *Id.* As this Court has previously stated:

> Judicial scrutiny of counsel's performance must be *highly deferential*. A fair assessment of attorney performance requires

[30] In addition to the reasons stated above, *see supra* sections III-IV, this Court should reject this claim because it is a "collateral challenge to a[] conviction or sentence" and, therefore, is not suitable for a direct appeal. *See Sup. Ct. R.* 3. The State nonetheless conducts the ineffective assistance of counsel analysis because Attorney Watkins plainly provided competent representation.

> 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. Because of the difficulties inherent in making the evaluation, a court must indulge *a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 412-13 (emphases added) (quotation omitted). Strategic or tactical decisions, made after a thorough investigation of the law and facts, "are virtually unchallengeable" in an ineffective assistance claim. *Id.* The State and Federal Constitutions guarantee only "reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.* To establish that his trial attorney's performance fell below a standard of reasonableness, the defendant must show that "no competent lawyer" would have engaged in the challenged conduct. *State v. Cable*, 168 N.H. 673, 680-81 (2016) (quotation omitted).

To satisfy the second prong (i.e., 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 (quotation omitted). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Brown*, 160 N.H. at 413 (quotation omitted). In making this determination, this Court considers "the totality of the evidence presented at trial." *Id.* (quotation omitted).

Both the performance and prejudice prongs of the ineffectiveness inquiry present mixed questions of law and fact. *Id.* This Court will not

disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and this Court will review the ultimate determination of whether each prong is met *de novo*. *Id.* "On appeal, when [this Court] determine[s] that a defendant has failed to meet either prong of the test, [this Court] need not consider the other one." *Cable*, 168 N.H. at 681 (quotation omitted).

A. The *pro se* defendant fails to satisfy the "performance prong" of his ineffective assistance of counsel claim because Attorney Watkins's strategic decision not to call Sergeant Young to testify at trial did not fall below an objective standard of reasonableness.[31]

According to the *pro se* defendant's recollection of his conversations with his counsel, Attorney Watkins said that he chose not to call Sergeant Young because "he is like Rambo. He is too hard to deal with, and frankly, [the prosecutor] and I have decided Randy Young is not competent to testify. And so Sgt. Young will not be here for your trial." ST45; PSB9. The *pro se* defendant alleges that Sergeant Young should have testified because it would have come to light that Sergeant Young's October 20, 2016 visit to the Strafford facility was illegal and the evidence from it should have been suppressed. *See, e.g.*, PSB8-9. 16. The *pro se* defendant

[31] The *pro se* defendant's other bases for his ineffective assistance of counsel claim, *see supra* section III, are not examined here because, in addition to the State's arguments above, they were not included in the notice of appeal and, therefore, are waived, *see Halifax-Am. Energy Co.*, 170 N.H. at 574-75; SA6. If, however, this Court determines that one or more of these issues are properly before this Court and require further briefing, the State respectfully requests the opportunity to address these issues in a supplemental filing.

further alleges that Sergeant Young would have provided testimony that he tried to extort $200,000 from the defendant. *See, e.g.*, PSB17-18.

As an initial matter, the *pro se* defendant's allegations that Sergeant Young's October 20, 2016 visit to the Strafford facility constituted an "illegal search and seizure" are without merit. Based on the limited documentation the *pro se* defendant submitted on appeal, Sergeant Young understood from his conversations with Mr. Lund and his observations of the Strafford facility that (1) the defendant had left the state and abandoned the Strafford facility, and (2) Mr. Lund had evicted the defendant because he owed Mr. Lund thousands of dollars in back rent. *See* PSAA5 (Sergeant Young writing in his police report that he understood that the defendant "was already out of the building"); PSAA61 (Sergeant Young telling the defendant in a recorded phone call that the defendant "had been evicted. According to Jim Lund, you were evicted, because you owed him so much money."). Even if the defendant retained an expectation of privacy in the Strafford facility on October 20, 2016, Sergeant Young's visit to the Strafford facility was not an illegal search because he reasonably believed that the defendant had abandoned the premises, Mr. Lund had evicted him, or both. *See, e.g.*, *State v. Sawyer*, 147 N.H. 191, 194 (2001) ("The doctrine of apparent authority validates a search if the police reasonably, but mistakenly, believe that a third party consenting to the search has the authority to do so."), *cert. denied*, 537 U.S. 822 (2002); *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (similar); *United States v. Brazel*, 102 F.3d 1120, 1148 (11th Cir. 1997) (similar); *United States v. Harrison*, 689 F.3d 301 (3d Cir. 2012) (holding that a dwelling can be abandoned for Fourth Amendment purposes, and that it was reasonable for police officers to

conduct a warrantless entry of the premises because, based on their observations of the property, "whoever once had an expectation of privacy in the property had since effectively relinquished it"—even though the defendant actually continued to rent the space); *see also Gudema v. Nassau Cty.*, 163 F.3d 717, 722 (2d Cir. 1998) ("[A]lthough an owner retains some privacy interest in property that is merely lost or stolen, rather than intentionally abandoned, that interest is outweighed by the interest of law enforcement officials in identifying and returning such property to the owner."). Given the facts and law surrounding Sergeant Young's visit to the Strafford facility, Attorney Watkins made a reasonable strategic determination not to address this potential issue before or during trial.

The *pro se* defendant's allegations that Sergeant Young attempted to "extort" money from him are similarly meritless. *See* PSB17-18. The January 31, 2017 phone call between Sergeant Young and the defendant plainly shows that Sergeant Young was urging the defendant to reimburse his vehicle restoration clients the $200,000[32] he owed them. *See* PSAA39. Contrary to the *pro se* defendant's insinuations, *see, e.g.*, PSB18, Sergeant Young never said that he was intending to keep this money for himself, *see* PSAA39. But even if, improbably, Sergeant Young testified at trial that he attempted to solicit money from the defendant for personal gain, it would have done nothing to undermine the State's substantial independent evidence that the defendant purposely and repeatedly stole from and deceived his clients. *See* ST60 (trial court stating during sentencing that the

[32] This figure was an accurate estimate—the trial court sentenced the defendant to pay $187,654.29 in restitution to his clients. ST57-59; DA9-16.

pro se defendant's allegation of extortion against Sergeant Young "has no relationship whatsoever to his guilt or innocence. . . . [I]t has absolutely no impact on the crime itself.").

Attorney Watkins reasonably decided that any potential upsides of calling Sergeant Young to testify were outweighed by the potential downsides. If Sergeant Young had taken the witness stand, he may have, for example, commented on his investigation into whether the defendant had stolen a vehicle. *See, e.g.*, PSB18; PSAA20. Sergeant Young also may have volunteered information about the full extent of the defendant's fraudulent activity, *see, e.g.*, PSAA20 (Sergeant Young telling the defendant over the phone that he had "14 different complaints against [him] with 34 felony charges"), and that the defendant had been "hiding" from law enforcement during the criminal investigation, *see, e.g.*, PSAA41. Such testimony probably would have increased the chances of the jury finding the defendant guilty.

Rather than pursuing peripheral legal issues involving Sergeant Young, Attorney Watkins instead adopted a focused litigation strategy that consisted of framing the defendant's gambling as a means to pay off his debts; painting the defendant as a sympathetic figure who had fallen on hard times; arguing that the defendant's conduct only exposed him to civil liability; and seeding uncertainty as to whether the State proved beyond a reasonable doubt that the defendant committed theft by deception against each of his clients. *See, e.g.*, TT769-88. Attorney Watkins's approach was sound—it resulted in the jury finding the defendant not guilty of two of the six counts of theft by deception despite overwhelming evidence of the

defendant's guilt. Attorney Watkins' representation did not fall below an objective standard of reasonableness.

B. The *pro se* defendant also fails to satisfy the "prejudice prong" of his ineffective assistance of counsel claim.

The *pro se* defendant's ineffective assistance of counsel claim also fails because the *pro se* defendant has not shown 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 236-37 (quotation omitted). The *pro se* defendant's contention that the jury would not have found him not guilty of all charges if Attorney Watkins had called Sergeant Young is speculation. As explained above, Sergeant Young's testimony was more likely to hinder than help the defense. Considering the tremendous evidence of guilt the State presented at trial, the defendant was fortunate that the jury found him guilty of only four of the six charges of theft by deception. If Attorney Watkins had called Sergeant Young, it is possible that the jury would have convicted the defendant of all six counts.

This Court should affirm.

CONCLUSION

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

March 8, 2021

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CERTIFICATE OF COMPLIANCE

I, Weston R. Sager, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 13,938 words, which is fewer than the words permitted by this Court's February 22, 2021 order granting the State permission to file a brief of no more than 14,000 words. Counsel relied upon the word count of the computer program used to prepare this brief.

March 8, 2021 *<u>/s/ Weston R. Sager</u>*
Weston R. Sager

CERTIFICATE OF SERVICE

I, Weston R. Sager, hereby certify that I have arranged to send a copy of the foregoing to Thomas Barnard, Senior Assistant Appellate Defender and counsel for the defendant, through the Court's electronic filing system, and a copy to Brim Bell, the defendant, via first-class mail at the following address:

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March 8, 2021 */s/ Weston R. Sager*
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