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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0314

State of New Hampshire

v.

Keith Chandler

Appeal Pursuant to Rule 7 from Judgment
of the Belknap County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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* Citations to the record are as follows:
"AD" refers to the appendix to this brief containing the appealed decisions;
"A" refers to the appendix to this brief containing documents other than the appealed decisions;
"H1" refers to the transcript of the motions hearing on February 4, 2019;
"H2" refers to the transcript of the hearing on Chandler's motion for a new trial on April 21, 2021; and
"T1," T2," etc., refer, by volume number, to the transcripts of trial on April 8–11, 2019.

STATEMENT OF THE CASE

In December 2017, the State obtained from a grand jury in Belknap County six indictments charging Keith Chandler with aggravated felonious sexual assault (AFSA), two indictments charging him with attempted AFSA, and two indictments charging him with felonious sexual assault (FSA). A 3–12. During a four-day trial on April 8–11, 2019, the State nol prossed one of the AFSA indictments and the jury found Chandler guilty of the remaining nine indictments. T3 274–75; T4 376–90. On May 9, 2019, the court (O'Neill, J.) sentenced Chandler to nine consecutive sentences. A 59–86. On four of the AFSA convictions, the court sentenced Chandler to five to ten years, to serve, a total of 20 to 40 years. A 59, 62, 65, 71. The other sentences were suspended. A 68, 75, 78, 81, 84. On the remaining AFSA conviction and the two attempted AFSA convictions, the court sentenced Chandler to three to six years. A 68, 75, 78. On the two FSA convictions, the court sentenced Chandler to two to four years. A 81, 84. Chandler filed a mandatory appeal.

In December 2019, this Court remanded the case, in part, to permit the Superior Court to address a motion for a new trial. On June 16, 2021, the Superior Court denied Chandler's motion for a new trial. AD 26. Chandler filed a discretionary appeal, which this Court accepted and consolidated with the mandatory appeal.

STATEMENT OF THE FACTS

Trial

J.W. was born in March 2000. T1 46. Her biological parents divorced when she was young and her mother, Heather, then married Keith Chandler. T1 48–49, 106. J.W. lived with Heather and Chandler for most of her childhood. T1 48, 106. Chandler was like a father to J.W. T2 174–75.

J.W. moved frequently. Before she was five, she briefly lived with her biological father in Ashland. T1 49. She then lived with Heather and Chandler in Alaska. T1 49–50. When she was about six or seven, she lived again with her biological father. T1 50. She then moved back in with Heather and Chandler in Indiana, where she lived until she was about 10. T1 50–51. The family then moved back to New Hampshire and lived in Boscawen. T1 51–52. When J.W. was eleven or twelve, the family moved to Tilton. T1 52. When she was twelve, the family moved to a home in Sanbornton, and shortly thereafter, to a different home in Sanbornton. T1 52–53.

While the family was living in Sanbornton, J.W., at Heather and Chandler's urging, started seeing a counselor. T1 88–89, 115. J.W. remained in counseling for years. T1 116. During that time, she repeatedly told her counselor, police officers and social workers that everything was fine at home. T1 106–20.

When J.W. was thirteen, the family moved to a home in Laconia. T1 53–54. When she was thirteen or fourteen, the family moved to a second home in Laconia. T1 54–55. When J.W. was fourteen or fifteen, the family moved to a third home in Laconia. T1 55. J.W. started having boyfriends and dating. T1 71.

On New Year's Day, 2015, J.W. told Heather that Michael Chandler (Michael), Chandler's cousin whom J.W. called "uncle," sexually assaulted her during her family's New Year's Eve party. T1 90–91, 120–23; T2 175–76. Michael was the first man J.W. ever accused of sexual assault. T1 121. With Heather and Chandler's support, J.W. chose to go to the police and press charges. T1 90, 123–25. She gave a detailed interview about her allegations and discussed them with her therapist. T1 125–27.

When J.W. was fifteen or sixteen, the family moved to a fourth home in Laconia. T1 55–56. When she was sixteen, the family moved to a home in Belknap. T1 56.

J.W. was upset with the delay in bringing Michael to trial. T1 127–28; T2 176. She told her therapist that the delay caused her "to be rageful and to cry frequently." T1 128.

In August 2016, Michael was finally tried. T1 128–30. Chandler supported J.W. throughout the trial. T1 129. J.W.

testified, but Michael was acquitted. T1 129–30. J.W. was very upset by the acquittal. T1 130; T2 176–77.

The month after Michael's acquittal, J.W. started dating Andrew Laramie. T1 94; T2 215–16, 227. J.W. told Laramie about her allegations against Michael and the trial, but she did not tell him that Michael was acquitted. T2 234–36.

Following the acquittal, J.W. continued to be troubled by the allegations involving Michael. T1 130–31. J.W. told her therapist that the anniversary of the alleged assault — New Year's — was "a trigger for [her]." T1 131.

Shortly before the second anniversary of Michael's alleged assault, J.W. told Laramie that Chandler sexually assaulted her. T1 95, 104; T2 143, 221–24, 228–29. She told Laramie not to tell anyone and threatened to break up with him if he did. T1 95, 100; T2 223, 226. Using social media, she also told another friend, Mistique Mara, of her allegations against Chandler. T2 143, 155.

In late January 2017, J.W. and Laramie broke up. T1 100; T2 216, 229. At about the time of the breakup, J.W. told Mistique Mara that Laramie sexually assaulted her. T2 157–58, 165, 170–71.

Rumors of J.W.'s accusation against Laramie spread quickly at their high school. T2 237, 240–41. One student, Briana Lahey, heard the rumors and confronted J.W., resulting in the following exchange of text messages:

J.W.: If you have a fucking problem say it to me. Because you dont know shit

Lahey: It's about Andrew .

You tellin people how he raped you when you were together

I do have a problem Nd I am telling you hunny

It's fucked up!!!

You're telling people he forced you, which is a lie

J.W.: Okay and? He did. Having sex with someone with out their consent is rape [smiley face emoji] but thanks for trying sweetheart

Lahey: He wouldn't rape you he's not like that okay he dated my best friend for a year and NO HUNNY he's not like that all ik Andrew

Nice try sweetheart

J.W: I bet you know him real well [smiley face emoji]

Lahey: K dude stfu wit your lying ass

That's bs

J.W.: What are you gonna do fight me? Text me some more? Funny. Im not scared of you. You can talk shit all you want and tag me in comments but youre still dumb af

A 55–58; T2 162–66, 171–72.

When Laramie heard about J.W.'s accusations against him, he confronted her. T2 237–39, 242. J.W. responded by telling Laramie, "You know what you did." T2 168–69, 239, 241.

Despite her allegations against Laramie, J.W. and Laramie continued to communicate on social media. T2 231. Laramie encouraged J.W. to tell the authorities about her allegations against Chandler and gave her a deadline for doing so. T2 210, 231. When that deadline passed, Laramie told his therapist about J.W.'s allegations against Chandler, who reported the information to DCYF. T2 184, 226–27, 231.

Police and DCYF social workers immediately went to the family's home to interview J.W. T1 100–01; T2 140–41, 184–85. J.W. initially told them, twice, "I know why you're here but it's not true." T1 101; T2 140, 185–86, 203–04. Shortly thereafter, however, she told them that Chandler had sexually assaulted her. T1 56, 101; T2 188–89.

Following her allegations to authorities regarding Chandler, J.W. became estranged from Heather and went to live with her biological father. T1 45–46, 101–02. She was very angry at Laramie for telling his therapist about her allegations. T2 234.

At trial, J.W. testified that, while the family lived in Indiana, Chandler physically abused her. T1 86; T2 154,

178–79. She testified that Heather witnessed this abuse but did nothing to stop it. T2 154–55, 179.

J.W. testified that when the family lived in Tilton, while Heather was at work, Chandler would grab her breasts and touch her genitals. T1 57–58. She also testified that Chandler watched her shower. T1 60.

J.W. testified that, while the family was still living in Tilton, she told Heather about the sexual assaults. T1 87, 103–04. She testified that Heather made excuses for the assaults, telling her that Chandler only assaulted her "because he has a lot of health issues [such as] sleep apnea." T1 88.

J.W. testified that Chandler continued to sexually assault her while the family lived in Sanbornton and Laconia. T1 60. J.W. testified that, in those towns, Chandler used sex toys on her, inserted his fingers and penis in her vagina, attempted to insert his finger in her anus, first attempted to, and later succeeded in, inserting his penis in her anus, forced her to engage in fellatio and engaged in cunnilingus. T1 61–66, 68–70, 74–75, 83, 85; T2 150. J.W. testified that the assaults occurred about once a week and that, in total, Chandler had sexual intercourse with her about thirty times, forced her to engage in fellatio about twenty-five times, engaged in digital-vaginal penetration about twenty times, and engaged in cunnilingus about ten times. T1 67–68, 71,

91–93. She testified that the assaults stopped only when Chandler injured his knee. T1 93–94.

On cross-examination, J.W. testified to a specific sexual assault that took place in Heather's presence. T2 147–50. J.W. testified that she was sitting on the couch with Chandler and Heather, watching a movie, when Chandler held her down, placed his hand under her pants and inserted his fingers into her vagina. T2 147–49. J.W. testified that she physically resisted and tried to twist away, but that Chandler overpowered her. T2 149. She testified that Heather was on the couch the entire time. T2 150.

JW testified that Chandler accomplished the sexual assaults through physical force. T1 64–66, 71, 75. But she also testified that Chandler "bribed" her to engage in sexual activity. T1 71–74, 76. She testified that Chandler told her that she could only attend social events, such as prom or roller skating, if she engaged in sexual activity with him. T1 71–74. She testified that, "[i]f [she] wanted to see [her] boyfriends, [Chandler] would take away [her] phone or [her] computer for really no reason and use [sex] as a bribe for [her] to get those back." T1 76.

J.W. testified that she did not tell her counselor or any other authority figure about the assaults because Chandler told her that it would "break the family apart," and that he threatened to hurt or kill her. T1 76–77, 86. She testified

that she was also scared that she would have to live with her biological father, whom Heather had portrayed as "a bad person" whose home "would be so much more unsafe than where [she] was living." T1 86–87.

J.W. testified that Chandler often sent her sexually explicit content through Facebook, including pornography and "messages related to him wanting to have sex." T1 89–90. She testified that, because Chandler had her username and password, he was able to delete these messages after she read them. T1 89–90. Laramie testified that he once observed a pornographic photograph on J.W.'s phone that appeared to have been sent by Chandler. T2 218–19. J.W. told the police, however, that she didn't keep any of the messages on Facebook and that she no longer had any of the devices on which she received them. T3 268.

Despite the acquittal, J.W. maintained that her allegations against Michael were true. T1 90–91, 123; T2 175–76. J.W. gave conflicting testimony about the nature of her accusations against Laramie. On direct examination, she described Laramie as "a very toxic person to [her]." T1 95. Seconds later, she testified that she "trusted" him, explaining, "[W]hen he wasn't being a bad person, he was a really great person to talk to, and I felt like I could trust him with everything." T1 95.

On cross-examination, J.W. testified, "[Laramie] did force me to have sex with him." T2 164. A few seconds later, she testified, "[Sex] was just something I wasn't really in the mood for." T2 165. A few seconds after that, she testified, "I . . . never consented to [sex with Laramie]." T2 165. Despite her acknowledgment that sex "without consent is considered rape," T2 158, and the text message exchange quoted above, J.W. maintained that she never accused Laramie of "rape." T2 156–58, 163, 167, 172.

On redirect-examination, J.W. testified that she and Laramie had "a consensual sexual relationship." T2 169. Regarding one occasion, she testified, "[T]here was sex and I just wasn't in the mood for it." T2 169. She added, "I don't feel that it was very consensual, but I don't feel that it was forced." T2 170. Later still, she testified, "I wasn't completely forced into doing anything." T2 172.

J.W. claimed to lack memory of several notable events. She testified, for example, that she did not remember Laramie giving her a deadline to report her allegations against Chandler to the authorities, although she told the police about the deadline. T1 104–05, 131; T2 140, 210. She also testified that she had no recollection of Laramie confronting her about her accusations against him. T2 167. Chandler's lawyer asked, "That's not something that you would forget, is it, [J.W.]? When somebody comes to you and says, '[H]ow can

you accuse me of rape?'" T2 168. J.W. responded, "I believe that it is." T2 168.

J.W. also expressed the belief that Laramie went out of his way to send the authorities to her house as retaliation for the breakup. She testified that Laramie was "mad at [her]" for breaking up with him and used her allegations against Chandler "as a punishment." T1 100; T2 140–41. She testified that although Laramie had been to her house, he "asked [her] multiple times[,] '[W]here do you live[?]', '[W]here do you live[?]', '[W]here do you live[?]'". T1 100; T2 141. She testified that she saw Laramie drive by her house just before police and DCYF workers arrived, suggesting that Laramie led them to her house. T1 100.

Laramie testified that he was not particularly angry about the breakup, that he never asked her where she lived, and that he did not lead police and DCYF to her house. T2 216, 230. One of the responding detectives testified that she and others drove to J.W.'s house in response to a report from DCYF; she did not testify that Laramie lead them there. T2 184.

Hearing on Chandler's Motion for a New Trial

Chandler's attorneys did not call Heather to testify at trial. At the hearing on Chandler's motion for a new trial, his newly-retained attorney called Heather to testify. H2 4.

Heather testified that, prior to J.W.'s allegations to the authorities, J.W. never told her that Chandler was sexually assaulting her. AD 29; H2 10.

Heather also testified that she never saw Chandler strike J.W. or use any physical punishment on her. H2 22. Heather recounted a specific incident in which J.W. used makeup to simulate a black eye, then falsely claimed to a neighbor's daughter that Chandler punched her. H2 14. This allegation resulted in DCYF involvement and a police interrogation of Chandler. H2 13–14, 22.

Heather testified that it was she, not Chandler, who was ultimately in charge of J.W.'s social life, including whether she could go out with friends and roller skating. AD 28; H2 7, 19, 24–25. While J.W. could obtain permission to go out from either Heather or Chandler, it was ultimately Heather's choice. AD 28; H2 7–8, 19, 24–25. She testified, "It wasn't [Chandler] telling me that she was going to do something. If I said [']no,[’] that was [']no.[’]" H2 19. There were a few instances in which Chandler said "no," but Heather "overruled" him. AD 28; H2 19. Chandler never persuaded Heather to change her mind about such a decision. H2 8.

Heather testified that while she and Chandler both had access to J.W.'s social media accounts, she had a practice of routinely examining them, including incoming and outgoing messages. AD 29; H2 8–9, 19. Heather did not have set,

predictable times that she examined J.W.'s accounts; it was at "random times." AD 29; H2 10. Heather testified that she never saw any sexual or otherwise inappropriate messages between Chandler and J.W. AD 29; H2 9.

The only potentially unhelpful testimony Heather offered concerned an inappropriate comment Chandler once made to J.W. about shoveling the driveway. Heather testified that J.W. alleged that Chandler told her that, if she "g[a]ve him a blow job, she wouldn't have to shovel." AD 29; H2 11–12. Heather was concerned and angry, and she immediately confronted Chandler. AD 29–30; H2 12, 22, 32. Chandler explained that he did not propose that J.W. engage in any sexual acts. AD 29–30; H2 12, 33–34. Rather, he told J.W. that Heather did not have to shovel because Heather "give[s him] sexual favors." AD 30; H2 32–34. J.W. agreed that that was what Chandler actually said. H2 12, 32–33. Heather explained that Chandler "[wa]s known to say vulgar things," and she told him that his comment was "very inappropriate." AD 30; H2 12. She testified that she was "still disgusted by it, until this day," and that "there's no excuse for saying something like that." H2 27. After the clarification, Heather testified, the family "moved on." H2 32.

Before trial, Heather told Chandler's trial attorneys the substance of what she later testified to at the hearing on the motion for a new trial. H2 6–8, 10, 13–14, 19, 56–57, 61. She

specifically told them that she did not recall any incident where she, Chandler and J.W. were on a couch and J.W. fought or squirmed with Chandler. AD 33; H2 52.

Heather flew to New Hampshire to meet with Chandler's attorneys and offered to testify on his behalf. AD 28, 5; H2 7, 28, 57. Chandler's attorneys told her that she "would be a valuable asset to the case and . . . a good witness." AD 30; H2 16. They prepared her to testify. H2 19–20, 42, 44. They told her that she "would definitely be testifying." H2 20–21, 25–26. Up until trial, Heather expected to testify, and did not express any reservations about doing so. AD 30; H2 16. About ten minutes before trial, however, Chandler's lawyers told Heather that they were going to "hold off" on calling her as a witness. H2 25–26.

Nicholas Brodich, one of Chandler's two trial attorneys, testified that although he and co-counsel "completely prepared" Heather to testify, they "were on the fence all along about calling her." H2 42; AD 35. He testified that they decided not to call Heather for three reasons.

First, Brodich and his co-counsel expected the jury to find Chandler not guilty of all the charges, even without Heather's testimony. H2 49. They believed that they had "extensive material to erode [J.W.'s] credibility just on her cross[-examination]," and that they were "very successful in discrediting [her] testimony." H2 58, 62; AD 35, 37–38. They

believed that their cross-examination regarding her claim that Chandler sexually assaulted her in Heather's presence made the claim appear "absurd on its face," negating any necessity of calling Heather to contradict it. AD 32–33; H2 51–52. Brodich testified that he was "floored" when the jury returned guilty verdicts, adding, "I could not have been more off with my prediction of how I thought the case would go." H2 49; AD 37.

Second, Brodich believed that Heather was "very emotional," "very frail," and "not crazy about getting up there to testify," adding, "I can['t] imagine why she wouldn't be, being pitted directly on a witness stand between her daughter and her husband." AD 33–34; H2 41. Brodich testified that he and his co-counsel "worried about what would actually happen if she was up there." H2 41.

Finally, Chandler's attorneys decided not to call Heather because she might have been questioned about the inappropriate comment that Chandler made to J.W. about shoveling the driveway. AD 34; H2 41–42. Brodich testified, "[R]egardless of the veneer that you put on it, . . . I think it would have been horrible for the jury to hear that, horrible." H2 42; AD 34; see also H2 59 ("disastrous"). Brodich was surprised that the State did not elicit testimony about the comment from J.W. AD 34–35; H2 42. At the hearing on the motion for a new trial, he told the prosecutor, "[W]hen you did

not get into that comment, I think . . . our decision ha[d] been made. . . [T]hat tipped the scale. . . [W]e weren't going to be the ones to open the door on that." H2 42; AD 35–36.

SUMMARY OF THE ARGUMENT

1. A court cannot admit an item of evidence absent sufficient evidence to support a finding that the item is what its proponent claims it is, nor can it admit a writing, recording or photograph that is not an original or accurate duplicate without satisfying an exception to the best evidence rule. Here, the trial court erred by admitting a photograph of a screen shot of a text message because the evidence did not support a finding that Chandler was the author and because the evidence was not an original or accurate duplicate and the trial court did not find that any exception applied.

2. A defendant is entitled to counsel whose performance does not fall below an objective standard of reasonableness. Here, Heather's testimony would have directly rebutted several of the accuser's crucial claims and otherwise diminished the accuser's credibility. Counsel's decision not to call Heather was objectively unreasonable.

3. Following trial, this Court clarified the standard used to determine whether confidential records must be disclosed following in camera review. This Court should remand for the purpose of allowing the trial court to review the withheld records in accordance with the clarified standard.

I. THE COURT ERRED BY ADMITTING A PHOTOGRAPH OF A SCREENSHOT OF A FACEBOOK MESSAGE.

Prior to trial, Chandler filed a Motion in Limine to Preclude a Printed Image of Electronically Stored Information. A 42. He explained that J.W. told the prosecutor that she used her phone to take screenshot of a Facebook message she received from Chandler. A 43. She sent the screenshot to Laramie, attached to a text message. A 43. She then deleted the message from her Facebook account. A 43. Once Chandler's prosecution began, Laramie sent the screenshot back to J.W., again via text. A 43. J.W. printed the screenshot on paper and gave it to the prosecutor. A 43. Chandler moved to exclude the evidence, citing, among other provisions, "authenticity", "the best evidence rule," and the rule of completeness. A 44–48.

Regarding authenticity, Chandler argued that "the State cannot prove that [he] was the individual who wrote the message through either circumstantial or direct evidence." A 45. He noted that "there [wa]s nothing in the content of the message that suggests that [he] was the author," and "nothing that authenticates the social media page such as a known email address, user name, content, internal patterns or other distinctive characteristics." A 45. Indeed, Chandler noted, there was no indication "as to when this Facebook message was allegedly sent." A 46.

Regarding the best evidence rule, Chandler noted that "the print out is allegedly a screen shot of a social media site, then was texted to one individual, then texted back and then provided to the State." A 45. He noted that the State failed to conduct a forensic examination of any device or to obtain any records from Facebook. A 46–47.

Regarding the rule of completeness, Chandler noted that the State sought to admit "only one portion of an alleged exchange," thereby taking "the message . . . out of context." A 47. He noted that "[t]he State does not have the remainder of the message which may be exculpatory or may show the available part of the conversation in a different context." A 47.

At a hearing on the motion, Chandler submitted the document at issue. It purported to reflect the following messages:

Dad:	My dick is
	Wanna see
Account owner:	No
Dad:	Liar
Account owner:	No
Dad:	Yup
Account owner:	Please stop

A 49. Chandler emphasized that the context might shed the exchange in a different light if, for instance, it showed that

Chandler intended to send the text to Heather rather than J.W. H1 20.

The State objected. H1 21. It noted that it expected J.W. to testify that Chandler "sent many messages to her from this Facebook account," and that the avatar attached to messages at issue was a picture Chandler used on his Facebook account at that time. H1 22. It also expected Laramie to testify that he received the screenshot from J.W. at some point "back in 2016," and that he "still has it on his phone." H1 23. Chandler's objections, it argued, "[went] to the weight of the evidence, and not its admissibility." H1 23.

The State argued that "[e]lectronic evidence . . . is not that different from other evidence, in terms of determining admissibility and authentication." H1 22. Chandler, in response, argued that "[e]lectronically-stored information is extremely different than something such as a letter." H1 24. He explained, "[Y]ou can't take . . . a printout of electronically-stored information and pretend it's not electronically-stored information anymore." H1 24. "The issue with electronically-stored information," he added, "is dealing with the input and output of the information, determining who the sender was, determining if it has been altered, how it is stored, and all of that information. That's different than a letter." H1 24.

The court issued a written order denying Chandler's motion. AD 18. It found that "the State has offered sufficient

evidence to support a finding that the evidence in question is what it claims to be." AD 20. The court added that it "[wa]s unpersuaded that the doctrine of completeness bars the admission of this evidence." AD 19, n. 1.

At trial, J.W. testified that she and Chandler used Facebook Messenger to communicate multiple times a day. T1 96. She testified that she once took a screenshot of a Facebook message that Chandler sent to her and sent the screenshot to Laramie. T1 96. J.W. testified that State's Exhibit 1 was a photograph of the screenshot she sent to Laramie. T1 98. State's Exhibit 1 was a photograph of a cell phone displaying the screenshot submitted at the pretrial hearing. A 53. The State moved to admit the exhibit, and the court, noting Chandler's pretrial objection, granted the motion. T1 98.

Laramie later testified that, in December 2016, J.W. sent him a screenshot of messages between J.W. and Chandler. T2 225. He testified that State's Exhibit 1 was a photograph of his cell phone displaying that screenshot. T2 224–25. He also testified that the avatar was a photograph of J.W., Heather and Chandler. T2 225–26. A detective later testified that State's Exhibit 1 was a photograph he took of Laramie's phone. T3 257–58. He also testified that he searched for Chandler's name on Facebook and discovered an account with the profile picture portrayed in State's Exhibit 2.

T3 258–60. The photograph resembles the avatar in State's Exhibit 1. A 54.

By denying Chandler's motion to exclude the evidence, the court erred.

When reviewing a trial court's decision to admit evidence, this Court considers only the information available to the trial court at the time of its ruling. State v. Addison, 165 N.H. 381, 419 (2013). It limits its review in this manner "to avoid the pitfall of justifying the court's . . . ruling upon the defendant's response at trial to the evidence." State v. Gordon, 161 N.H. 410, 414 (2011).

If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. State v. Munroe, 173 N.H. 469, 479 (2020). Under that standard of review, the question is whether the ruling was clearly untenable or unreasonable to the prejudice of the appellant's case. Id.

The trial court's interpretation of the rules of evidence, however, is not afforded deference. Id. at 472 ("[W]e review the trial court's interpretation of court rules de novo, as with any other issue of law"); see also State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary."); Koon v. United States, 518 U.S. 81, 100 (1996) (abuse-of-discretion

"label" "does not mean a mistake of law is beyond appellate correction," because "[a] district court by definition abuses its discretion when it makes an error of law.").

Here, the trial court's ruling was based solely on its interpretation of the rules of evidence and not on any factual determination. Thus, its ruling should be reviewed de novo. But even if reviewed under an unsustainable exercise of discretion standard, the court's ruling was clearly untenable or unreasonable to the prejudice of Chandler's case.

A. Authenication

New Hampshire Rule of Evidence 901 requires that all items of evidence be authenticated: "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." "The principal justification . . . is that [judicial skepticism] constitutes a necessary check on the perpetration of fraud." 2 Kenneth S. Broun et al., McCormick on Evidence § 221, at 83–84 (7th ed. 2013).

For two reasons, the evidence here was not sufficient to support a finding that Chandler sent the messages. First, the evidence did not indicate the username of the account from which the messages were sent. It indicated only that the messages were sent from a Facebook account with the same profile picture that Chandler used on his Facebook account.

Unlike a username, a profile picture is not unique to an account; multiple accounts can use the same profile picture.

Second, the content of the messages did not indicate that Chandler was the author. The author merely offered to show the recipient his penis; he did exhibit knowledge of any matter that only Chandler would have.

The fact that an electronic communication is sent from an account that appears to belong to the defendant is not, by itself, sufficient to authenticate the communication. "Evidence that . . . electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant." Commonwealth v. Purdy, 945 N.E.2d 372, 381 (Mass. 2011); see also Tienda v. State, 358 S.W.3d 633, 641–42 (Tex. Crim. App. 2012) ("That an email on its face purports to come from a certain person's email address . . ., without more, has [not] typically been regarded as sufficient to support a finding of authenticity."). "There must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails." Purdy, 945 N.E.2d at 381.

Griffin v. State, 19 A.3d 415, 417 (Md. 2011) is analogous. In Griffin, the state sought to introduce a

comment purportedly posted on MySpace by the defendant's girlfriend. Id. at 418. The account on which the message was posted included a photograph of the defendant and his girlfriend and a date of birth and location matching the defendant's girlfriend's. Id. Maryland's highest court nevertheless held that the trial court erred by finding the comment authenticated. Id. at 423–24. "The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user," the court stated, "leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site." Id. at 424.

United States v. Vayner, 769 F.3d 125, 127 (2d Cir. 2014) is also analogous. In Vayner, the government sought to introduce evidence of information posted to a social media site, purportedly by the defendant. Id. at 128. The profile included the defendant's name and photograph, as well as his former place of employment. Id. The Circuit Court, however, held that the trial court erred by finding the profile authenticated. Id. at 131. While "information about [the defendant] appeared on the [social media] page . . . there was no evidence that [the defendant] himself had created the page or was responsible for its contents." Id. at 132.

State v. Palermo, 168 N.H. 387 (2015), is readily distinguishable. In Palermo, the State introduced messages posted to the defendant's Facebook page. Id. at 393. There was no dispute that the page, in fact, belonged to the defendant; the defendant's argument was that "someone else could have sent the messages from his open Facebook account." Id. at 391 (brackets omitted). Additionally, the messages themselves contained "identifying details to link the authorship of the messages to the defendant." Id. at 393. Here, by contrast, the evidence did not establish that the messages were sent from Chandler's account — only that they were sent from an account using the same profile picture; and the content of the message contained no "identifying details."

For these reasons, the court erred by finding that the evidence satisfied the authentication requirement.

B. Best Evidence

Even if the court did not err by finding that the evidence was authenticated under Rule 901, it erred by finding that it satisfied the best evidence rule.

When a party seeks to introduce a writing, recording or photograph, it must generally submit the original or a duplicate. N.H. Rs. Evid. 1002, 1003. This rule "originated at common law to guarantee against inaccuracies and fraud by insistence upon production of original documents." State v.

Leith, 172 N.H. 1, 9 (2019) (quotation marks omitted). A writing is defined as "letters, words, numbers, or their equivalent set down in any form," and a recording is defined as "letters, words, numbers, or their equivalent recorded in any manner." N.H. R. Evid. 1001. A duplicate is defined as "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Id.

A party is excused from submitting an original or duplicate only if:

> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

N.H. R. Evid. 1004.

The evidence here failed to satisfy the best evidence rule for two reasons. First, it was so far attenuated from the messages that J.W. received that it cannot be considered an

original or a duplicate of those messages. Second, it consisted of merely of a conversation, devoid of relevant context.

Regarding attenuation, there were four distinct items at issue. First, there were the messages that J.W. received. They consisted of both the content of the messages, as well as certain metadata, such as the sender's username and the date and time the message was sent.

Second, there was the screenshot of the messages, as they were displayed on J.W.'s phone. Although this screenshot displayed the content of the messages, it differed from messages themselves in two respects. First, the screenshot did not include information contained in the messages. The metadata attached to the message — the sender's username and the date and time the message was sent — were not displayed on J.W.'s phone and thus were not included in the screenshot she created. Second, the screenshot included information not included in the messages, such as the signal strength, battery life, and displayed time on J.W.'s phone when she created the screenshot. More importantly, it contained, as metadata, the date she created the screenshot, as well as the device used to create it.

Third, there was the text message J.W. sent to Laramie, which included the screenshot. This text message would have

included the date and time that J.W. sent the screenshot to Laramie, as well as any accompanying text.

Finally, there was the item the State introduced as evidence at trial — the photograph of the screenshot, as it was displayed on Laramie's phone, taken by the detective. A 53. While this photograph depicts the content of the screenshot, it omits much of the information contained in the first three items. The detective's photograph does not contain any of the metadata included in the messages, including the username of the sender and the date and time on which the messages were sent. It does not contain any of the metadata from the screenshot, including the date on which the screenshot was created. Finally, it does not contain any of the metadata from the text message that J.W. sent to Laramie, including the date and time the message was sent.

Considering the several degrees of attenuation between the messages received by J.W. and the photograph introduced at trial, it cannot reasonably be said the photograph is an original or duplicate of the messages received by J.W. The trial court, moreover, did not find that any of the exceptions in Rule 1004 applied.

Even overlooking J.W.'s deletion of the first item set forth above — the messages she received — the State easily could have secured the second item — the screenshot J.W. took of those messages. Laramie testified that he saved the

screenshot to his phone. T2 224. A prosecutor or detective could have simply asked Laramie to provide that screenshot electronically. The screenshot, after all, was simply an image file. It could be transmitted just as easily as any other image file on Laramie's phone.

When trial took place in 2019, it was already common for individuals of various generations and technological abilities to share image files with others over the internet — as an email attachment, a text attachment, or through a file sharing service such as Google Photos — with no optics involved. The detective's decision to instead prop Laramie's phone up and take a photograph of it was inexplicable. It is akin to an individual, in 1990, copying a VHS movie by videotaping the movie playing on a television, an individual in 1980 copying a vinyl record by placing a tape recorder next to a speaker, or an individual in 1970 hand copying a typed letter, despite the availability of a photocopier. The screenshot itself would have been of much higher quality, permitting examination for evidence of tampering, such as inconsistent text fonts. Obtaining the screenshot itself also would have preserved valuable information — most notably the screenshot's metadata indicating the date and time the screenshot was created, and the device used to create it — which could have supported or refuted the authenticity of the messages.

The evidence also failed to satisfy the best evidence rule because it constituted merely a fragment of a communication. Where a party seeks to prove a writing or recording, the Rules of Evidence require that, absent good cause, the party submit the complete writing or recording. This requirement is confirmed by Rule 106(a): "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time." Rule 106 would have little effect if a party could prevent an opponent from introducing a complete writing merely by producing a fragment. See Fed. R. Evid. 1003, Advisory Committee Notes (best evidence rule may require production of complete original "when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."); United States v. Yevakpor, 419 F. Supp. 2d 242, 252 (N.D.N.Y. 2006) (excluding "cherry-picked" segments of surveillance video and warning that, "if selected segments of a video or audio exhibit will be offered at trial, the entire video or audio exhibit had best be preserved.").

Here, the evidence offered by the State constituted merely a fragment. It starts with the author's assertion, "My dick is," clearly referencing some prior, unknown message.

As Chandler noted at the hearing on his motion to exclude, even assuming that he was the author, the context may very well have been exculpatory, as it could have indicated that Chandler believed he was sending the message to Heather, not J.W. H1 20–21.

For these reasons, the court erred by finding that the State's evidence satisfied the best evidence rule.

C. Prejudice

The error was prejudicial. Aside from the photograph of the screenshot of the Facebook message, there was virtually no corroboration of J.W.'s claims that Chandler had any sexually explicit communications with J.W. The evidence, purporting to contain Chandler's express invitation to J.W. to observe his penis, suggested to the jury that Chandler was not a normal stepfather, but rather, the type of stepfather who would sexually assault his stepdaughter.

II. ALTERNATIVELY, THE COURT ERRED BY DENYING CHANDLER'S MOTION FOR A NEW TRIAL.

If this Court does not reverse for the erroneous admission of State's Exhibit 1, it should address whether the court erred by denying Chandler's motion for a new trial.

In the motion for a new trial, Chandler argued that trial counsel provided ineffective assistance of counsel in violation of Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. A 87. He argued that trial counsel was ineffective for, among other things, failing to call Heather to testify at trial. A 93–96.

Chandler noted that Heather's testimony would have directly refuted J.W.'s claims on several points. First, Heather would have testified that, prior to March 2017, J.W. never told Heather that Chandler was sexually assaulting her. A 94. Second, Heather would have refuted J.W.'s claim that Chandler forcibly assaulted her in Heather's presence. A 95–96. Third, Heather would have testified that she had ultimate control over J.W.'s social life. A 93–94. Fourth Heather would have testified that she monitored J.W.'s social media, and she never saw any inappropriate material sent from Chandler. A 94. "Such testimony would have been even more compelling," Chandler argued, "because one would not

expect the mother of an alleged victim" to contradict her daughter's testimony. A 94.

The State objected. It argued that "[d]ecisions as to whether to call a particular witness . . . are paradigmatically strategic decisions, often made in the heat of the moment, based upon the attorney's best judgment." A 108. It maintained that the "the decision to not call Heather . . . was . . . based upon [trial counsel's] concern that [she] would have had a difficult time maintaining her composure, and a calculation that the risk of something damaging to the defense outweighed the benefit from calling her." A 109.

Following an evidentiary hearing, the court denied Chandler's motion. AD 45–48. It found that "trial counsel's decision not to call [Heather] to testify d[id] not constitute deficient performance." AD 46. The court was "unpersuaded" that Heather's testimony would have refuted J.W.'s. AD 46. It found that cross-examination of J.W. regarding her claim that Chandler forcibly assaulted her in Heather's presence "may have suggested that the incident was absurd," and that it "[could]not use the benefit of the guilty verdict to conclude that the jury did not find the incident absurd." AD 48. It also found that "the jury might [have] f[ou]nd" Chandler's comment about snow-shovelling "inappropriate." AD 47. It declared that it "[could]not substitute its judgment for that of trial counsel's in determining whether trial counsel should

have put [Heather] on the stand and risk introducing this evidence." AD 47.

By finding "that trial counsel's performance was not deficient," the court erred.

Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant's right to effective assistance of counsel at a criminal trial. The ineffective-assistance analysis is the same under both the State and Federal Constitutions. State v. Fitzgerald, 173 N.H. 564, 573 (2020).

"To prevail upon a claim of 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." Id. Because the trial court addressed only the deficient-performance prong, and not the prejudice prong, Chandler will focus on the deficient-performance prong in this brief. To satisfy the deficient-performance prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," in other words, "that counsel made such egregious errors that he failed to function as the counsel that the State Constitution guarantees." Id.

The ineffective-assistance analysis involves mixed questions of law and fact. Id. at 574. For factual findings, the issue is whether they "are not supported by the evidence or are erroneous as a matter of law." Id. The court's "ultimate determination of whether [counsel's performance was deficient] is reviewed de novo." Id.

Although basic decisions, such as whether to plead guilty and whether to testify, belong to the client, the lawyer has "full authority to manage the conduct of the trial." Taylor v. Illinois, 484 U.S. 400, 417–18 (1988); accord Puglisi v. State, 112 So. 3d 1196, 1204–06 (Fla. 2013). Accordingly, the decision of whether to call a particular witness belongs to the lawyer, not the client. Taylor, 484 U.S. at 418; Puglisi, 112 So. 3d. at 1206. The lawyer alone is responsible for this "tactical" or "strategic" decision. Taylor, 484 U.S. at 418; Puglisi, 112 So. 3d. at 1206. It cannot "be delegated to the accused." Puglisi, 112 So. 3d. at 1207.

Chandler acknowledges the "high degree of deference" afforded to trial counsel's strategic decisions. Fitzgerald, 173 N.H. at 573. Courts "judge the reasonableness of counsel's conduct based upon the facts and circumstances of the particular case, viewed from the time of the conduct at issue." Id. They make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

evaluate the conduct from counsel's perspective at the time." Id. at 573–74. Chandler "must overcome the presumption that trial counsel reasonably adopted his trial strategy." Id. at 573.

The presumption of reasonableness, however, is not absolute. Bryant v. Comm'r of Correction, 964 A.2d 1186, 1199 (Conn. 2009) ("[I]t does not follow necessarily that, in every instance, trial counsel's strategy concerning [whether to call a particular witness] is sound"). In Toliver v. Pollard, 688 F.3d 853 (7th Cir. 2012), for instance, the Seventh Circuit held that trial counsel provided deficient performance by failing to call the defendant's wife and cousin, "the only two witnesses that would have corroborated [the defendant's] theory of defense." Id. at 862. The Court noted that the defendant's wife "also would have helped to impeach one of the State's witnesses." Id. Counsel's belief that "the jury would disbelieve [the witnesses] based on their family relationship," the Court held, did not justify his decision. Id. at 861.

Here, trial counsel's decision not to call Heather fell below an objective standard of reasonableness. The State argued at trial that Chandler was able to sexual assault J.W. for years, even though Heather was aware the assaults, because Heather did not care that her husband was assaulting her daughter. J.W. testified that Heather

witnessed Chandler physically assaulting her but did nothing to stop it. T2 154–55, 179. She testified she told her Heather about the sexual assaults, but that Heather just made excuses for them. T1 88. She even testified that Chandler once sexually assaulted her in Heather's presence, but that Heather did not intervene. T2 147–50.

If called to testify, Heather would have directly rebutted these claims. She would have testified that she never saw Chandler strike J.W. or physically punish her. H2 22. She would have testified that, prior to her allegations to the authorities, J.W. never told her that Chandler was sexually assaulting her. AD 29; H2 10. And she would have testified that she did not recall any incident where she, Chandler and J.W. were on a couch and J.W. fought or squirmed with Chandler. AD 33; H2 52. In short, Heather's testimony may have persuaded the jury that she was not the dismissive, uncaring mother J.W. claimed she was.

Heather's testimony would have been helpful in other ways as well. J.W. testified that Chandler "bribed" her to engage in sexual activity by threatening to withhold permission for her to attend social events. T1 71–74, 76. Heather would have directly rebutted this claim by testifying that it was she, not Chandler, who was ultimately in charge of J.W.'s social life. AD 33; H2 7, 19, 24–25.

Additionally, Heather would have testified to a specific instance reflecting negatively on J.W.'s credibility. She would have testified that J.W. used makeup to make it appear that she had a black eye, then falsely alleged to a neighbor's daughter that Chandler punched her. H2 14.

Trial counsel's optimism about the outcome of the trial did not justify their decision not to call Heather. Although trial counsel testified that he and co-counsel believed that the jury would return not-guilty verdicts, even without Heather's testimony, H2 49, "the circumstances . . . from counsel's perspective at the time," Fitzgerald, 173 N.H. at 573–74, demonstrate that this expectation was unfounded. J.W.'s claim that Chandler sexually assaulted her in Heather's presence was not "absurd on its face," as trial counsel believed, H2 51–52. Unfortunate as it is, there are unfit parents in the world, and J.W. testified that her mother was one of them. Because nothing in the record contradicted that claim, trial counsel needed to rebut it, or the jury was likely to believe it. Their failure to recognize this necessity was objectively unreasonable.

Trial counsel's belief that Heather was "very emotional," "very frail" and "not crazy about getting up there to testify," H2 41, also did not justify their decision not to call her. The fact that Heather would have been "pitted directly on a witness stand between her daughter and her husband,"

H2 41, is precisely what would have given her testimony credibility. A mother who eagerly contradicts her own daughter's claims of sexual assault is not credible. One who does so only cautiously is.

Finally, trial counsel's concerns regarding Chandler's comment about shoveling the driveway did not justify their decision not to call Heather. The jury was already going to receive evidence that Chandler sent J.W. a Facebook message referring to his "dick" and inviting her to "see" it. Chandler's comment about shoveling the driveway would not have added to the harm that evidence caused. Heather's explanation of the comment, moreover, would have established that Chandler "[wa]s known to say vulgar things," H2 12, which would have provided an innocent explanation for both the comment and the text message.

For these reasons, trial counsel's decision not to call Heather was objectively unreasonable. Because the trial court did not reach the prejudice prong of analysis, this Court should vacate the denial of Chandler's motion for a new trial and remand for a determination of whether counsel's deficient performance prejudiced him.

III. THE COURT MAY HAVE ERRED BY FAILING TO DISCLOSE RECORDS SUBMITTED FOR IN CAMERA REVIEW.

In March 2018, Chandler moved for in camera review of [redacted]. A 13. The State objected. A 19. The court granted Chandler's motion but limited the scope of records subject to review. A 23.

In May 2018, following in camera review, the court issued several orders disclosing some records, finding them "discoverable under the applicable standards." AD 3, 6, 9. Although they are not entirely clear on this point, the court's orders appear to suggest that some records were not disclosed. AD 3, 6, 9.

In December 2018, Chandler filed a partially assented-to motion for discovery of, among other things, J.W.'s [redacted] mental health records, a police report, and recordings of two interviews conducted by DCYF. A 30. The court ordered in camera review of this material. A 40. Chandler submitted a "guide for the [c]ourt's in camera review," setting forth "what types of information the [c]ourt should be looking for." A 50.

In February 2019, following in camera review, the court issued several more orders disclosing some records, again finding them "discoverable under the applicable standards." AD 10, 13, 23. Like the prior set of orders, these orders, while

not entirely clear, appear to suggest that some records were not disclosed. AD 10, 13, 23.

In State v. Girard, 173 N.H. 619 (2020), an opinion issued after trial in this case, this Court clarified the standard used to determine whether confidential records must be disclosed following in camera review. Id. at 628–29. Because the trial court did not have the benefit of this Court's opinion in Girard when it made its disclosure determinations, this Court should remand for the purpose of reviewing the withheld records in accordance with the standard set forth in Girard. See State v. Clark, 174 N.H. 586, 595 (2021) ("remand[ing] . . . for the limited purpose of reviewing the withheld confidential records in accordance with the standard set forth in Girard").

CONCLUSION

WHEREFORE, Keith Chandler respectfully requests that this Court reverse, and, alternatively, vacate and remand.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions are in writing and are set forth in a separate appendix containing no other documents.

This brief complies with the applicable word limitation and contains 9,158 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Zachary L. Higham, Assistant Attorney General, through the electronic filing system's electronic service.

/s/ Thomas Barnard
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