THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0314

State of New Hampshire

v.

Keith Chandler

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Sam M. Gonyea, Bar No. 273264
Attorney
New Hampshire Department of Justice
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671
sam.m.gonyea@doj.nh.gov

(Fifteen-minute oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUES PRESENTED

I. Whether the trial court erred in denying the defendant's Motion *in Limine* to Preclude a Printed Image of Electronically Stored Information.

II. Whether the trial court erred in denying the defendant's Motion for a New Trial.

III. Whether the trial court erred in not disclosing certain confidential records submitted for *in camera* review.

STATEMENT OF THE CASE

In December 2017, the defendant, Keith Chandler, was indicted on six counts of aggravated felonious sexual assault (AFSA), two counts of attempted AFSA, and two counts of felonious sexual assault (FSA). DA2[1] at 3-8 (AFSA), 9-10 (attempted AFSA), 11-12 (FSA). One of the AFSA indictments was *nol prossed* by the State during trial. T2 at 274. At the conclusion of the four-day trial, which took place on April 8-11, 2019, the jury returned guilty verdicts on the remaining nine indictments. DA at 26; T4 at 376-90.

On May 9, 2019, the court (*O'Neill*, J.) sentenced the defendant to nine consecutive sentences. DA2 at 59-86. The court sentenced the defendant to five to ten years on four of the AFSA convictions, for a total of 20 to 40 years, stand committed. DA2 at 59, 62, 65, 71. The remaining five sentences were suspended. DA2 at 68, 75, 78, 81, 84. The defendant received suspended sentences of three to six years on one AFSA conviction and on the two attempted AFSA convictions. DA2 at 68, 75, 78. The defendant received suspended sentences of two to four years on the two FSA convictions. DA2 at 81, 84. The defendant filed a mandatory appeal,

[1] Citations to the record are as follows:
"DB" refers to the defendant's brief;
"DA" refers to Volume I of the appendix to the defendant's brief containing the appealed decisions;
"DA2" refers to Volume II of the appendix to the defendant's brief containing documents other than the appealed decisions;
"H1" refers to the transcript of the motions hearing held on February 4, 2019;
"H2" refers to the transcript of the hearing on the defendant's motion for a new trial held on April 21, 2021; and
"T1," "T2," etc., refer, by volume number, to the transcripts of the trial held on April 8-11, 2019.

which this Court remanded, in part, to permit the trial court to address a motion for a new trial.

On August 11, 2020, the defendant filed a motion for a new trial. DA2 at 87-102. A hearing on the motion was held on April 21, 2021, at which the defendant's wife, Heather Chandler, and defendant's trial counsel, Nicholas Brodich, testified. DA at 26, 28. The trial court credited Attorney Brodich's testimony and concluded that his representation of the defendant did not fall below an objective standard of reasonableness. DA at 43-45, 48-49. Accordingly, the court denied the defendant's motion. DA at 49. The defendant then filed a discretionary appeal, which this Court accepted and consolidated with the mandatory appeal.

STATEMENT OF FACTS

A. Pre-Trial Motion in Limine

On January 29, 2019, the defendant filed a motion *in limine* to preclude the State from admitting into evidence a picture of a cell phone in which an exchange of Facebook messages between the defendant and J.W. (victim) appeared on the screen of the cell phone. *See* DA2 at 42-49 (Motion *in Limine*), 53 (State's Exhibit 1 at trial). The defendant's motion articulated four arguments. *Id*. First, the defendant argued that the evidence was inadmissible because the State failed to provide it to the defendant until a week before trial. DA at 19; DA2 at 43-44. Second, the defendant argued that the State could not properly authenticate the messages. DA at 19; DA2 at 44-47. Third, the defendant argued that the probative value of the evidence was substantially outweighed by its danger of unfair prejudice. DA at 19; DA2 at 47. Fourth, the defendant argued that the State's evidence should only be admitted if the entire conversation is admitted pursuant to *N.H. R. Ev*. 106(a). DA at 19; DA2 at 47-48.

The State orally objected to the defendant's motion *in limine* at the motions hearing held on February 4, 2019. DA at 16; H1 at 17. During that hearing, defense counsel sought to be brief because his motion was "pretty straightforward and pretty thorough." H1 at 18. "[O]ne of [counsel's] main arguments" was that the evidence was not timely provided to the defendant. *Id*. at 18-19. Another of "the main issues" was "the doctrine of completeness." *Id*. at 19. Counsel argued that the messages the State intended to introduce were a "very incomplete" conversation in that we "have no idea what was said before . . . [or] after" the depicted

messages. *Id*. at 20. Counsel contended that what appeared to be inappropriate messages sent from the defendant to the victim could be innocuously explained if the next message sent was "oh my gosh, I thought this was your mother, not you." *Id*. Thus, defense counsel asserted that it would not be fair to admit the State's evidence without requiring the entire conversation to be introduced. *Id*. at 21. Aside from those two points, counsel represented that "everything else" he articulated in his motion was "pretty straightforward." *Id*.

The State argued that "any prejudice caused by the late disclosure is cured by the fact that we now have a continuance until April." *Id*. Considering the continuance, the State contended that the defendant was "still free to do" any "forensic analysis" it wished and if the defendant "would like more time to do that forensic analysis" then the State would "give them more time to do whatever they'd like to do." *Id*.

As to authenticity, the State argued that it was premature for the court to rule on that issue before the State had an opportunity to lay a foundation for admission of the evidence. *Id*. at 22. Nevertheless, the State outlined the methods through which it would authenticate the messages. *Id*. at 22-23. The State explained that the "victim will testify" that "she received messages like this from the Defendant routinely" and that "he'd sent many messages to her from this Facebook account." *Id*. at 22. There would be testimony that the "avatar, the little picture there that goes with these messages, is the avatar or picture that the Defendant used on his Facebook account at about the same time that this message was sent to [the victim.]" *Id*.

The State continued that the victim would testify that she took a screenshot of the Facebook messages and sent them to Andrew Laramie (Laramie), who would testify to receiving the screenshot from the victim and "that he still has this image on his phone." *Id*. at 22-23. The State averred that any argument the defendant raised concerning the messages being manufactured or doctored, or any argument contending that the account from which the messages were sent might not really belong to the defendant or could have been logged into by someone other than the defendant, went "to the weight of this evidence, and not to its admissibility." *Id*. at 23. Accordingly, the State asserted that the messages would be sufficiently authenticated for admissibility purposes. *Id*. at 23-24.

On February 13, 2019, the court issued an order addressing pending motions, including the defendant's motion *in limine* to exclude evidence. DA at 16-22. The court began by summarizing the defendant's arguments for exclusion:

> First, the defendant argues that this evidence should be excluded because of the State's failure to provide this evidence until the week prior to trial. Second, the defendant asserts that this evidence should be excluded because the State cannot authenticate this message. Third, the defendant argues that the evidence's probative value is substantially outweighed by its danger of unfair prejudice. Fourth, and finally, the defendant argues that the screenshot of the messages should only be admitted if the entire conversation is admitted under Rule 106.

DA at 19.

As to the first argument, the court concluded that any concern surrounding the State's untimely disclosure was cured by the continuance of trial. DA at 20. As to the second argument, the court ruled that "the

State has offered sufficient evidence to support a finding that the evidence in question is what it claims to be." *Id*. The court observed that, in support of authentication, the victim would testify that she communicated with the defendant over Facebook regularly and "received messages like this from [him] routinely," that the defendant had "sent many messages to her from this account," that "the avatar on the messages is the photograph the defendant used for his Facebook account around the same time, and that she was the recipient of this message." *Id*. Further, the court noted that the victim would testify that she took a screenshot of the messages and sent them to Laramie, and Laramie would testify that he received the screenshot from the victim and that he still had the screenshot. *Id*. The court concluded that those proffers were sufficient to support a finding that the messages were sent by the defendant, "and the ultimate determination of the author of the messages is left to the jury." *Id*.

As to the third argument, the court explained that the evidence was probative of the victim's credibility because it supported her testimony that the defendant sent her inappropriate messages on Facebook. *Id*. The court stated that the danger of unfair prejudice did not outweigh the evidence's probative value because the "only possibility of unfair prejudice comes from the phrases within the messages, 'My dick is' and 'wanna see,' which are vague, at best" and because the messages were "not likely to have a great emotional impact on the jury" in relation to "the other evidence presented related to the alleged sexual assaults." *Id*. The defendant's fourth argument was addressed in a footnote, stating: "[p]resently, the Court is unpersuaded that the doctrine of completeness bars the admission

of this evidence." *Id*. at 19 n. 1. Accordingly, the court denied the defendant's motion *in limie*. *Id*. at 21.

B. Trial

The victim was the central witness at trial. The victim testified that she was born on March 21, 2000, and her parents divorced before she was in kindergarten. T1 at 46, 49. The defendant married the victim's mother, Heather Chandler (Heather), when the victim was young and, for the most part, the victim lived with them growing up. T1 at 48. The victim testified that she "didn't really have the best relationship" with her biological father and the defendant was "like [her] dad." T1 at 86; T2 at 174.

The victim's testimony recounted the harrowing account of sexual abuse she endured at the hands of the defendant. T1 at 56-100. She testified that the abuse started when she was 11 or 12 years old. T1 at 56-57. The abuse started with the defendant coming into her room at night and touching her breasts underneath her shirt, kissing her neck, and putting his hands down her pants and touching her vagina. T1 at 57-58. The abuse changed and escalated over time. T1 at 59. The victim testified that, when she was 13, the defendant began coming into the bathroom while she showered and would open the curtain and look at her. T1 at 60. The victim was 13 years old "when [the defendant] had started putting his penis inside of [her] vagina." T1 at 61.

The victim testified that "a lot of things were different" on the first day the defendant forced her to have intercourse with him. T1 at 62. In addition to forcing the victim to have sex with him for the first time, "that is the day where [the defendant] had used [her] mother's sex toys on [her]"

and "attempted to put his finger in [her] anus." *Id*. On other occasions, the defendant forced the victim to perform oral sex on him and forcibly performed oral sex on the victim. T1 at 66-67.

The abuse continued when the victim turned 14 and 15. T1 at 69, 73. During one incident when the victim was 15 or 16, the victim testified that the defendant forcibly put his penis inside her anus. T1 at 83. At that point, the victim was in high school, she had a social life, and she had started dating. T1 at 71-72. The defendant capitalized on that — the victim testified that the defendant would withhold permission to see her friends and boyfriends, or access to her phone or computer, and use those things to "bribe" the victim for sex. T1 at 71, 73, 76. If she tried to stop the defendant from abusing her, he would tell her that she would "break the family apart. He'd threaten to hit [her]. He'd threaten to kill her." T1 at 76. All told, the victim estimated that the defendant forcibly had sexual intercourse with her 30 times, forced her to perform oral sex on him 25 times, and forcibly performed oral sex on her 10 times. T1 at 92.

The victim testified that she mentioned the abuse to her mother when she was 12 or 13 years old and her mother "asked [her] what [she] wanted to do." T1 at 87. The victim replied that she did not know, she did not "know what [she] was supposed to do." T1 at 87-88. The victim testified that her mother told her that "[the defendant] has a lot of health issues" and that is "why he would do something like that." T1 at 88. The victim "was scared" to report the abuse to any figure of authority. T1 at 85. She figured that if her "mom doesn't do anything about it, why would anybody else." T1 at 88. The victim testified that she did not tell her counselor about it

because she knew her counselor would be required to report it "and that would make things worse." T1 at 89.

In addition to the sexual abuse, the victim testified to inappropriate conversations the defendant would try to engage her in on Facebook. T1 at 89-90. The victim testified that she communicated with the defendant on Facebook "[m]ultiple times a day." T1 at 96. The defendant would "send [the victim] pictures of pornography, video links to different pornography sites, [and] messages relating to him wanting to have sex." T1 at 90.

Eventually, the victim told her boyfriend at the time, Laramie, about the sexual abuse. T1 at 95. Unsure if Laramie believed her, the victim sent Laramie a screenshot of some messages that the defendant sent to her on Facebook. T1 at 96. When the victim was shown State's Exhibit 1 at trial, *see* DA2 at 53, she recognized it as the "messages [the defendant] had sent [her]" and as the "screenshot [she] had sent Andrew Laramie." T1 at 97. The victim testified that she knew from the screenshot that the defendant sent the messages because of the "photo icon next to each message that [the defendant] had sent." T1 at 97-98. The photo icon was the "profile picture of the [defendant's] Facebook profile," and was "a picture taken of [the victim], her mother, and [the defendant] at a Halloween party." T1 at 99.

Laramie also testified at trial. T2 at 215. Laramie testified to an instance in which he and the victim were watching a movie at the victim's house and a message from the defendant "came up on [the victim's] phone." T2 at 218. The message contained "a pornographic picture" and, "once [the victim] opened her phone, [Laramie] could see it was from [the defendant]." *Id*. Laramie inquired about the picture, but the victim "just

shut [him] down and dismissed all [his] questions;" the victim told him to "just leave it alone." T2 at 219.

Laramie testified that, a couple of months later, the victim "broke down and told [him] that [the defendant] had raped her." T2 at 87. Laramie later received a screenshot of a message thread between the victim and the defendant in which the defendant appeared to ask the victim if she wanted to see his penis and the victim replied "[n]o" and "[p]lease stop." T2 at 224-225; DA2 at 53. Laramie testified that the cell phone pictured in State's Exhibit 1, the screen of which depicted the screenshot sent to Laramie by the victim, was a photograph of his cell phone. T2 at 91. Laramie testified that he recognized the avatar next to the messages sent by the defendant as the defendant's "profile picture." T2 at 226. Laramie identified the avatar as a picture of the victim, her mother, and the defendant on Halloween. *Id*. Laramie knew that because he "was with them on Halloween" and may have taken the picture himself. *Id*.

Laramie was insistent on the victim reporting the abuse from the time he found out about it but had promised not to tell anyone because the victim threatened to break up with him if he did. T2 at 223. When the couple broke up for other reasons, Laramie figured "she can't break up with [him] again" and reported the abuse to his therapist. T2 at 227. When Laramie was asked why he saved the screenshot the victim sent to him, he replied "[f]or this purpose." T2 at 224.

The defendant did not testify at trial and did not put on any witnesses, but defense counsel methodically attacked the victim's credibility on cross-examination. Counsel painstakingly took the victim through the number of authority figures that the victim could have, but did

not, report the sexual abuse to over the years. T1 at 108, 110, 114, 117, 125, 127.

Counsel characterized the victim's choice not to disclose the abuse during an interview with the Portsmouth Child Advocacy Center (CAC) as "denial of sexual abuse number one." T1 at 108. Her choice not to disclose the abuse to a police sergeant during an interview was "direct denial of sexual abuse number two." T1 at 110. Not disclosing the abuse to a second child protection worker was "firm and direct denial number 3," T1 at 114, and not telling her counselor about the abuse was "firm, direct, and ongoing denial of abuse number 4." T2 at 117. Not disclosing the abuse during a CAC interview related to an allegation of sexual assault the victim made against the defendant's cousin was characterized by defense counsel as "excellent opportunity to tell about [the defendant], but didn't, number 6." T1 at 125. The victim's choice not to disclose the abuse to her counselor during sessions in which she discussed the same sexual assault was referred to by defense counsel as "excellent opportunity to tell on [the defendant] but didn't number 7." T1 at 127. Defense counsel made it abundantly clear for the jury that the victim had numerous opportunities to report the abuse she was suffering to authority figures and, instead, she "always said yes" when she was asked by those figures "if [she] was safe or not." T1 at 109; *see* 110, 113, 114, 116.

Defense counsel also took the victim through the allegation of sexual assault she made against the defendant's cousin Michael, T1 120-134, whom the victim referred to as "Uncle Mike" at the time. T1 at 122. Defense counsel reminded the victim that the defendant supported her during that time and that the victim never mentioned the defendant abusing

her to anyone during that investigation. T1 at 123-127, 29. Counsel painted it as unbelievable that Michael putting his "hand on [her] breast" could cause the victim the pain and suffering she described to investigators but that she could remain silent about "being raped and sodomized regularly at [her] home." T2 at 126. Counsel pointed out that Michael's trial was difficult for the victim, that Michael was found not guilty, and that Michael's acquittal bothered the victim. T2 at 129-131.

To further impeach the victim's credibility, defense counsel took her through a specific CAC interview in which the victim reported that the defendant put his fingers in her vagina. T2 at 146. According to the CAC interview, the victim reported that she was on the couch watching a movie seated between her mother and the defendant when the defendant put his hands down her pants and moved them toward her crotch area. T2 at 147-48. The victim reported that she tried to pull away, but the defendant held her down and put his fingers in her vagina. T2 at 148-49. During that line of cross-examination, defense counsel frequently pointed out that the victim's mother was "sitting right next to [her]" while this was allegedly going on and somehow "didn't know it was happening." T2 at 149-50. Defense counsel also stated that the victim accused the defendant of sexual assault "[j]ust the way [she] accused Mike Chandler." T2 at 149.

As a final attack on the victim's credibility, defense counsel asserted that the victim had "accused three men of sexually assaulting her" — the defendant, the defendant's cousin Michael, and Andrew Laramie. T2 at 156. Counsel asked, "[t]hat makes for at least three men you've accused of rape, right?" T2 at 176. The victim denied ever accusing Laramie of rape. T2 at 156. However, counsel confronted the victim with messages in which

the victim appeared to allege that Laramie raped her. T2 at 164; DA2 at 55. When confronted with those messages, the victim stated that Laramie "did force [her] to have sex with him." T2 at 164. The victim later testified that she "wasn't completely forced to do anything." T2 at 172. Laramie testified that he never raped or sexually assaulted the victim. T2 at 238.

C. Motion for New Trial

On August 11, 2020, the defendant filed a Motion for New Trial. DA2 at 87-102. In his motion, the defendant alleged that his trial counsel provided ineffective assistance in two respects: (1) failing to conduct a forensic analysis of the defendant's Facebook account and devices used to access that account, DA2 at 89; and (2) failing to call the victim's mother, Heather, as a witness to refute the victim's testimony, DA2 at 93. Only the second claim is addressed in this brief because the defendant's appeal only pursues that claim. DB at 39-46.

A hearing on the defendant's motion was held on April 21, 2021, at which Heather and defendant's trial counsel, Nicholas Brodich, testified. DA at 26, 28. Heather testified that she, not the defendant, had ultimate control over the victim's social life and that she had discussed various instances of the victim lying with defense counsel. H2 at 7, 13-14. Heather testified that she had access to the victim's Facebook account and never saw any sexual messages between the defendant and the victim. H2 at 9. Heather also testified that the victim never disclosed any sexual abuse or sexual assaults to her. H2 at 10. In discussions with the defendant's attorneys, Heather stated that she did not have any recollection of an

incident in which she, the defendant, and the victim were on the couch and the victim fought or squirmed with the defendant. DA at 33; H2 at 52.

Heather testified to one inappropriate comment the defendant made to the victim. DA at 29; H2 at 11-12. She testified that the victim told her that the defendant "told [the victim] that if she would give him a blow job, she wouldn't have to shovel" the driveway. H2 at 11. When Heather confronted the defendant about that, he stated that he was misunderstood, and what he said was that Heather did not have to shovel the driveway because Heather "give[s] [him] sexual favors." DA at 30; H2 at 32-34.

Heather testified that she anticipated testifying at trial and that she was told by the defendant's attorneys that she "would be a valuable asset to the case and that they felt that [she] would be a good witness." H2 at 16. She said she was "nervous about testifying" but "never expressed that it would be an issue." *Id*. She later testified that it "was expressed that [she] would definitely be testifying."

Attorney Brodich, who had practiced primarily criminal law for 32 years, testified that he "put forth 110 percent effort" on this case and brought in co-counsel to ensure that "no stone was unturned." H2 at 36-37. Brodich's overarching trial strategy was to paint the victim as a liar during cross-examination so that the jury would not believe her. DA at 32.

The defendant was an active participant in his defense, DA at 31, and Brodich testified to having "several ongoing conversations" with the defendant "about the pros and cons of calling [Heather]." H2 at 39; DA at 32. Brodich testified that there were two concerns he had in calling Heather — one specific concern and a more general one. DA at 33. The general concern was that Heather "seemed very emotional and frail, and he

and Attorney Brown were worried about what would happen if she were put on the witness stand." DA at 34. When Brodich discussed this with the defendant, the defendant "deferred" to his attorneys, but the defendant's "perspective" was that Heather was "hanging on by a thread." H2 at 41. The defendant was not sure how Heather's testimony would go, did not "think it would help [the defense] very much," and hoped they would not have to call her. *Id*. Brodich "received the same kind of information from [Heather]." *Id*. Heather told Bordich that she "was not crazy about . . . being pitted on the witness stand between her husband and daughter," but would testify if she was needed. DA at 34; H2 at 41. Brodich did not recall any conversation with Heather in which he said to her that he wanted to call her as a witness. DA at 34.

Brodich's more specific concern was the defendant's comment to the victim about shoveling the driveway. DA at 34. To defense counsel's surprise, the State did not bring that comment up during its case-in-chief. DA at 34-35; H2 at 42. Brodich testified that this comment, "regardless of the veneer he put on it, would have been horrible for the jury to hear given what the defendant was accused of." DA at 34; T2 at 42. Brodich "indicated that he was on the fence about calling [Heather] at trial, but when the State failed to bring up the [shoveling] incident, the scales were tipped in favor of not calling" her. DA at 35; T2 at 42, 60. Defense counsel believed the State made an error by not bringing that comment up and he wanted to capitalize on it by not calling Heather and opening the door to that comment. DA at 35; T2 at 43.

Brodich recognized Heather's ability to undermine the victim's credibility and testified that Heather's "importance would have risen" if

there was not "an abundance of material to cross [the victim] on." H2 at 58. However, Brodich "felt that [they] had extensive material to erode [the victim's] credibility just on her cross." H2 at 58. Moreover, Brodich felt that Heather's ability to undercut the victim's testimony relating to the defendant's control over her social life and sending her inappropriate messages was not "airtight." DA at 35-36. Counsel testified that the defendant could have still exerted pressure on the victim's social life despite Heather's belief that she controlled it, and just because Heather never saw inappropriate messages between the defendant and victim did not mean that such messages did not exist. *Id*.

The court credited Brodich's testimony throughout its order, DA at 43, 44, 48, and concluded that the defendant failed to show that Brodich's decision not to call Heather was not sound trial strategy. DA at 47. Bordich spent 90 minutes undermining the victim's credibility on cross-examination. *Id*. The court observed that Heather "could not refute much of the testimony the defendant claims she could." DA at 48. Further, the court stated that Brodich "undoubtedly weighed the advantages and disadvantages of calling [Heather], and ultimately determined that it would not help the defense, but instead, may hurt the defense by introducing the shoveling comment." *Id*.

Accordingly, the court was "unpersuaded that the defendant ha[d] rebutted the strong presumption that trial counsel's decision here [was] sound trial strategy." *Id*. The court denied the defendant's motion for a new trial. DA at 49. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court did not err in denying the defendant's motion *in limine* to exclude evidence of Facebook messages that the defendant sent to the victim. "The bar for authentication of evidence is not particularly high." *State v. Brown*, __ N.H. __, slip. op. at 3 (decided March 30, 2022) (quoting *State v. Palermo*, 168 N.H. 387, 392 (2015)). Evidence can be authenticated in several different ways, including through testimony of a witness with personal knowledge and distinctive characteristics. *N.H. R. Ev.* 901(b)(1), (4). At the pretrial motions hearing, the State proffered testimony from two witnesses who would confirm the authenticity of the screenshot of Facebook messages through personal knowledge and a distinct characteristic — the defendant's Facebook profile picture. That evidence is enough to make a *prima facie* case that the evidence is what it claims to be, and that is all that is required for admissibility. *Brown*, __ N.H. __, slip. op. at 3. "Once the evidence is admitted, the rest is up to the jury." *Id*.

The "best evidence" argument that the defendant presents for the first time on appeal should be rejected because it was not preserved for appellate review. The defendant's motion *in limine* makes passing reference to the best evidence rule but does not flesh that argument out or even cite to *N.H. R. Ev.* 1001-1004. Moreover, the defendant did not make a best evidence argument during the motion hearing. Understandably, then, the trial court did not make a ruling relating to a best evidence argument. Accordingly, the defendant's argument on appeal, complete with citations

to *N.H. R. Ev.* 1001-1004 and lines of argument that were never made to the trial court, should not be considered by this Court in the first instance.

The defendant's doctrine of completeness argument should also be rejected. Fairness did not require the entire conversation to be admitted to provide context to the Facebook messages the State sought to admit. If the defendant felt otherwise, the State offered to provide the defendant whatever time was needed to conduct a forensic analysis and the defendant chose not to pursue that option.

The trial court also did not err in denying the defendant's motion for a new trial based on ineffective assistance of counsel. The defendant observes, and the State agrees, that "the decision of whether to call a particular witness belongs to the lawyer, not the client." DB at 42. It is clear from the record that defense counsel carefully weighed the pros and cons of calling Heather to testify at trial and strategically concluded that her testimony had significant potential to do more harm than good to the defense. Further, defense counsel consulted the defendant and Heather concerning whether Heather would testify, and both expressed their desire that Heather not testify unless it was necessary for her to do so. Accordingly, there is no basis to conclude that trial counsel's decision not to call Heather to testify brought counsel's representation below an objective standard of reasonableness.

Finally, this Court should remand this case to the trial court to reconduct an *in camera* review of confidential records because the trial court did not have the benefit of this Court's decision in *State v. Girard*, 173 N.H. 619 (2020), when it ruled upon the defendant's motions for *in camera* review. *See State v. Clark*, 174 N.H. 586, 594-95 (2021).

However, the State respectfully request this Court to clarify the remand instructions issued in *Girard* and *Clark* to make expressly clear for trial courts whether they are required to make the materiality and harmless error determinations on their own in a vacuum, or if trial courts have discretion to request pleadings and arguments from the parties to assist the court in making its final ruling on those issues.

ARGUMENT

I. THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO EXCLUDE EVIDENCE.

The decision to admit or exclude evidence is within the discretion of the trial court. *Brown*, __ N.H. __, slip op. at 3. In determining whether a ruling is a proper exercise of judicial discretion, this Court considers whether the record establishes an objective basis sufficient to sustain the discretionary decision made. *Id*. To show 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*. Because this case calls upon this Court to review the trial court's pretrial rulings, this Court limits its review to the proffers presented to the court at the pretrial motion hearing. *Id*.

The State notes that the defendant asks this Court to review the trial court's evidentiary ruling under a *de novo* standard of review. DB at 29. The defendant argues that the proper standard is *de novo* because "the trial court's ruling was based solely on its interpretation of the rules of evidence and not on any factual determination." *Id*. However, the defendant never identifies any language from the rules of evidence that the trial court interpreted or how it might have erred in doing so. Tellingly, the defendant grounds his evidentiary arguments entirely in the facts of this case. *See* DB at 29-38. Accordingly, the proper standard of review is the unsustainable exercise of discretion standard.

A. Authentication.

Rule 901(a) provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." N.H. R. Ev. 901(a). "The bar for authentication of evidence is not particularly high." *Brown*, __ N.H. __, slip. op. at 3 (quoting *Palermo*, 168 N.H. at 392). "The proponent need not rule out all possibilities inconsistent with authenticity, or prove beyond any doubt that the evidence is what it purports to be." *Id.* "The State need only demonstrate a rational basis from which to conclude that the person from whom a statement originated is, in fact, the defendant." *Id.* "The contested evidence, if otherwise relevant, should be admitted once a prima facie case has been made on the issue of authentication." *Id.* "Once the evidence is admitted, the rest is up to the jury." *Id.*

This Court has stated that the established rules governing authentication are sufficient to address authentication of Facebook messages and other electronic communications. *See Palermo*, 168 N.H. at 391 (Facebook messages); *State v. Ruggiero*, 163 N.H. 129, 135-36 (2011) (e-mail). Rule 901 does not establish specific requirements as to the nature or quantum of evidence sufficient for authentication. *Palermo*, 168 N.H. at 392. Rule 901(b) provides a list of "examples only--not a complete list--of evidence that satisfies the requirement." *N.H. R. Ev.* 901(b). Relevant to this case are subsections (1) and (4):

> (1) *Testimony of Witness with Knowledge*. Testimony that an item is what it is claimed to be.

. . . .

(4) *Distinctive Characteristics and the Like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

N.H. R. Ev. 901(b)(1), (4).

State's Exhibit 1 is a picture of Laramie's cell phone propped up on a desk. DA2 at 53. The screen of the cell phone depicts the screenshot of the message thread between the defendant and the victim that the victim sent to Laramie. *Id*. At the pretrial hearing, the State explained that the victim would testify that she was the recipient of the messages, that she communicated with the defendant frequently over Facebook, that he had sent her many messages like the ones depicted, and that she took the screenshot and sent it to Laramie. *See* H1 at 22-23. The State informed the court that Laramie would also testify to receiving the screenshot from the victim, that State's Exhibit 1 was a picture of his cell phone with the screenshot displayed on his cell phone screen, and that he still had the screenshot saved on his phone. *Id*. Moreover, both the victim and Laramie would testify to the avatar next to the defendant's messages being his Facebook profile picture, which was a picture of the defendant, the victim, and Heather at a Halloween party, which both the victim and Laramie attended. *Id*.

Accordingly, the State proffered an abundance of testimony from witnesses with direct knowledge that the evidence is what it is claimed to be. *See N.H. R. Ev.* 901(b)(1). Additionally, though likely insufficient on its own, the testimony explaining that the avatar next to the defendant's

messages was his profile picture provided a distinctive characteristic to help authenticate the messages. *See N.H. R. Ev.* 901(b)(4). The defendant's argument that "multiple accounts can use the same profile picture" carries little weight when the profile picture in question is the defendant, Heather, and the victim at a Halloween party.

The defendant argues that "the evidence did not establish that the messages were sent from [the defendant's] account — only that they were sent from an account using the same profile picture." DB at 32. However, the victim's testimony, coupled with the defendant's profile picture, establishes a *prima facie* case that the messages did come from the defendant's account, and only a *prima facie* case is required for authentication. *Brown*, __ N.H. __, slip op. at 3. While it is possible that someone else sent the messages from the defendant's account, or someone framed the defendant by making a fake account, "the ease with which someone could have posed as the defendant does not preclude authentication based upon the State's authentication evidence." *Id*., slip op. at 5 (quotation and brackets omitted). "The State need not rule out all possibilities inconsistent with authenticity." *Id*.

B. Best Evidence and Completeness.

This Court should decline to address the defendant's "best evidence" argument on appeal because the argument was not preserved for appellate review. Generally, this Court does not consider issues raised on appeal that were not presented to the trial court. *State v. Batista-Silva*, 171 N.H. 818, 822 (2019). The preservation requirement, expressed in this Courts case law and Supreme Court Rule 16(3)(b), reflects the general policy that trial

forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court. *Id*. Defendant, as the appealing party, has the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court. *Id*.

A motion *in limine* is sufficient to preserve an issue for appeal without an objection at trial if the trial court definitively rules on the issue prior to appeal. *State v. Hoag*, 145 N.H. 47, 52 (2000). A ruling on a motion *in limine* is definitive when the court is sufficiently alerted to the issue and the court's written order demonstrates that it considered the issue and ruled on it. *Id*. Passing reference to an issue that is otherwise ignored does not preserve the issue for appellate review. *See Boston and Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 518 (2004).

The defendant's motion *in limine* made two passing references to "best evidence" in sentences that also referred to hearsay, relevance, Rule 403, and authenticity. *See* DA2 at 43, 44. However, the defendant's motion did not contain a single citation to *N.H. R. Ev.* 1001-1004. Indeed, the words "best evidence" were not uttered at the pretrial motion hearing and no argument relying primarily on the concepts of that rule was made. Further, the trial court's written order characterized the four arguments it understood the defendant to be making, and a "best evidence" argument was not one of them. DA at 18-19.

Nevertheless, relying on *N.H. R. Ev.* 1001-1004, the defendant argues that the trial court "erred by finding that" the State's evidence "satisfied the best evidence rule." DB at 32-33. The defendant makes arguments relating to the attenuation between State's Exhibit 1 and the origins of the messages on Facebook and implicates technical differences

between screenshots and pictures. DB at 34-36. However, the defendant never made these arguments to the trial court. The trial court did not understand the defendant to be making a "best evidence" argument and therefore never ruled on any such argument. The defendant's cursory mention of "best evidence" in his motion before articulating what is clearly an authentication argument was not sufficient to preserve the argument the defendant now presents for the first time on appeal. Accordingly, this Court should decline to address the argument because the trial court did not have the opportunity to do so.

Within his "best evidence" argument, the defendant makes an argument rooted in the doctrine of completeness, which was preserved in the trial court. DB at 37; DA at 19 n. 1; DA2 at 47. *N.H. R. Ev.* 106 codifies New Hampshire's common law doctrine of completeness, which provides that a party "has the right to introduce the remainder of a writing, statement, correspondence, former testimony or conversation that his or her opponent introduced so far as it relates to the same subject matter and hence tends to explain or shed light on the meaning of the part already received." *State v. Boulton*, 174 N.H. 470, 475 (2021).

In a footnote, the trial court stated that it was unpersuaded that the doctrine of completeness barred the admission of State's Exhibit 1. DA at 19 n. 1. Implicit in that finding is that fairness did not require the entire message to be admitted for the State's evidence to be admissible. *See N.H. R. Ev.* 106(a) (stating that an "adverse party may require the introduction" of any other part of a statement "that in fairness ought to be considered at the same time"); *In re Aube*, 158 N.H. 459, 466 (2009) (This Court "must

assume that the trial court made subsidiary findings necessary to support its general ruling.").

On appeal, the defendant argues only that the "evidence offered by the State constituted merely a fragment" of the conversation, and that the "context may very well have been exculpatory" if the entire message were admitted because "it could have indicated that [the defendant] believed he was sending the message to Heather, not [the victim.]" DB at 37-38.

Considering the victim's proffered testimony that she received messages like this routinely from the defendant, fairness did not require the entire conversation to be admitted for proper context. Nevertheless, if the defendant "believed that other messages were necessary to make the conversation fully understood, it was his obligation to offer them." *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79, 88 (2019). At the pre-trial hearing, the State expressed its willingness to give the defense all the time it needed to conduct any forensic analysis it desired. H1 at 21. However, when defense counsel asked the defendant if they should conduct a forensic analysis of his devices, "[the defendant] unequivocally said [he didn't] think it would be a good idea, or words to that nature." H2 at 47.

Introducing only the messages contained in State's Exhibit 1 was not unfair to the defendant because the victim's testimony supplied context for the messages. If the defendant believed differently, he had ample opportunity to seek out the remainder of the messages or articulate some basis for believing that additional context would make the messages exculpatory. The defendant did neither. Accordingly, under these circumstances, it was not unfair to offer only the messages the State sought

to introduce and the defendant's appeal to the doctrine of completeness should be rejected.

C. Harmless Error.

Even if the trial court erred in its evidentiary ruling, the error was harmless beyond a reasonable doubt. *See State v. Racette*, ___ N.H. ___, slip op. at 4 (decided April 26, 2022). To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict. *Id*. This standard applies to both erroneous admission and exclusion of evidence. *Id*. An error may be harmless beyond a reasonable doubt if: (1) the other evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight; or (2) the evidence that was improperly admitted or excluded is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. *Id*. This Court reviews these factors to determine whether an error affected a verdict. *Id*. Either factor can be a basis for supporting a finding of harmless error beyond a reasonable doubt. *Id*.

This case, like many sexual assault cases, rose and fell on the credibility of the victim's testimony. The victim testified at length and in detail to the sexual assault she suffered at the hands of the defendant. While the Facebook messages may have corroborated her assertion that the defendant sent her inappropriate messages, they did not establish any element of the crimes charged — those were established entirely through the victim's testimony. Direct testimony of a sexual assault victim, if found credible, is evidence of an overwhelming nature and is likely to receive significant weight. Here, the jury clearly found the victim's testimony

detailing the years-long sexual abuse she suffered credible, and exclusion of the Facebook messages would not have changed that. Accordingly, any error the trial court may have committed in admitting the messages was harmless beyond a reasonable doubt.

II. THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL.

In his motion for a new trial, the defendant argued that his trial counsel was ineffective for not calling Heather to testify as a witness. DA at 93. 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. *State v. Fitzgerald*, 173 N.H. 564, 573 (2020). A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. *Id*.

To satisfy the first prong, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id*. To meet this prong, the defendant must show that counsel made such egregious errors that he failed to function as the counsel that the State Constitution guarantees. *Id*. This Court judges 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*. This Court affords a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make. *Id*. The defendant must overcome the presumption that trial counsel reasonably adopted his trial

strategy. *Id*. Accordingly, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id*. at 573-74.

To satisfy the second prong, 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. *Id*. at 574. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id*.

In this case, trial counsel carefully balanced the pros and cons of calling Heather to testify and discussed the option with the defendant and considered the defendant's view of the matter. *See* DA at 32, 48; H2 at 39. Counsel testified that the defendant and Heather both expressed a preference for Heather not to testify unless her testimony was necessary. H2 at 41; DA at 34. Additionally, counsel observed Heather to be emotional and frail, understandably so considering the circumstances. DA at 34. Accordingly, it was reasonable for defense counsel to be concerned and uncertain as to what might happen if Heather took the stand.

Defense counsel also had a more specific concern about Heather taking the stand — opening the door to the inappropriate comment the defendant made to the victim about shoveling the driveway. Counsel testified that it "would have been horrible for the jury to hear [that comment] given what the defendant was accused of" regardless of the "veneer" that was put on the comment. DA at 34. Thus, when the State did not bring the comment up in its case-in-chief, counsel sought to capitalize

and keep the comment from ever reaching the jury. Counsel stated "that he was on the fence about calling [Heather] at trial, but when the State failed to bring up the [shoveling] incident, the scales were tipped in favor of not calling" her. DA at 35; H2 at 42. Counsel made a reasonable tactical decision that, on balance, the good Heather might be able to do in undermining the victim's credibility was outweighed by the damage she could do if the State brought up the shoveling incident or if her emotions got the better of her on the witness stand.

The ability Heather's testimony had to undermine the victim's credibility was not lost on defense counsel, but counsel "felt that [they] had extensive material to erode [the victim's] credibility just on her cross." H2 at 58. Indeed, counsel vigorously attacked the victim's credibility on cross. "Knowing when to quit is often a hallmark of commendable courtroom advocacy. Thus, having proved his point through the prosecution's witness, defense counsel can scarcely be faulted for deciding to leave well enough alone." *U.S. v. McGill*, 11 F.3d 223, 228 (1st Cir. 1993).

The defendant observes, and the State agrees, that "the decision of whether to call a particular witness belongs to the lawyer, not the client." DB at 42. Here, defense counsel consulted with the defendant and Heather, both of whom told counsel that they would prefer Heather not testify unless it was necessary that she do so. Assessing the circumstances of the case as it developed, counsel reasonably concluded that not only was it unnecessary for Heather to testify, but her testimony might hurt the defense. Accordingly, defense counsel's decision not to call Heather at trial did not fall below an objective standard of reasonableness and the trial court did not err in denying the defendant's motion for a new trial.

III. THIS COURT SHOULD CLARIFY THE REMAND INSTRUCTIONS IT HAS ISSUED IN PRIOR CASES UNDER NEARLY IDENTICAL CIRCUMSTANCES.

As the defendant observes, the trial court did not have the benefit of this Court's opinion in *State v. Girard*, 173 N.H. 619 (2020) when it ruled upon the defendant's motions for *in camera* review of the victim's counseling records, additional mental health records, a police report, and recordings of two interviews conducted by DCYF. DB at 47. At the end of *Girard*, this Court remanded the case to the trial court with instructions to conduct a further *in camera* review of the privileged records under the standard this Court clarified in that case. *Girard*, 173 N.H. at 630. The Court explained that "[i]f the court discovers records that are material and relevant to the defendant's defense at trial, it should order a new trial . . . unless the court finds that the error was harmless beyond a reasonable doubt." *Id*.

One year after *Girard*, this Court confronted the circumstances present in this case — the trial court had conducted an *in camera* review of confidential records and determined which records should be disclosed without the benefit of this Court's decision in *Girard*. *See State v. Clark*, 174 N.H. 586, 594-95 (2021). Accordingly, in *Clark*, this Court remanded the case to the trial court with instructions to "order a new trial" if the court determined "that it would have disclosed any of the records that it withheld had it applied the standard set forth in *Girard*" unless the court determined "that its failure to disclose such records was harmless beyond a reasonable doubt." *Id*. at 595.

It is unclear from the Court's remand instructions in *Girard* and *Clark* whether the trial court is required, or even permitted, to afford the parties an opportunity to submit pleadings or present arguments. The strictest reading of this Court's language in *Girard* and *Clark* could lead one to conclude that the trial court must make both determinations — materiality and harmless error — in a vacuum without the benefit of receiving argument from the parties. A more flexible reading of the language implies that the court may request briefing and argument from the parties to assist in determining whether any error was made in withholding documents and, if so, whether any such error was harmless beyond a reasonable doubt.

Initially, of course, the trial court on remand must conduct an *in camera* review to determine whether any documents that were not released would have been released if the court had the benefit of this Court's opinion in *Girard*, without any input from the parties. After that, however, the trial court should release any such documents to the parties under an appropriate protective order and permit the parties to submit pleadings and present arguments as to whether the newly released documents are indeed material and whether nondisclosure of any material documents was harmless beyond a reasonable doubt.

In a case such as this one, in which the original trial judge has retired, the benefit of zealous advocacy from the parties will be particularly helpful because the judge on remand will not be familiar with the facts of the case, the legal issues raised in the case, the parties' theories of the case, or arguments that were made at trial. Even if the judge on remand were the original trial judge, advocacy from the parties would save the trial court

from having to conduct an unaided assessment of the merits of the defendant's case and solitarily determine if and how the defendant could have used any erroneously withheld documents in an effective way, and to what extent withholding those documents prejudiced the defendant. Moreover, should further appellate review become necessary, providing the parties an opportunity to submit pleadings and present arguments would further develop the factual and legal record.

The State is aware of no legal principle that would require the trial court to complete its task on remand without input from the parties and there is certainly no practical benefit to such a rule. Thus, it seems unlikely that this Court intended for the trial court to make these determinations on remand without the benefit of receiving pleadings and hearing arguments from the parties to assist the court in making its final ruling. Nevertheless, the most literal interpretation of the language comprising the remand instructions in *Girard* and *Clark* permit such a conclusion.

Accordingly, the State respectfully asks this Court to clarify whether, after conducting its *in camera* review, the trial court may release to the parties, under an appropriate protective order, any documents it concludes may have been erroneously withheld under *Girard* and subsequently receive pleadings and hear arguments from the parties to assist the trial court in making its ultimate ruling.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the trial court's denial of the defendant's motion *in limine* and motion for a new trial, and remand this case to the trial court

with clarified instructions for the process it should follow in determining whether any documents that were not disclosed after *in camera* review were erroneously withheld under *Girard* and whether nondisclosure of any such documents was harmless error beyond a reasonable doubt.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

August 4, 2022

/s/ Sam M. Gonyea
Sam M. Gonyea, Bar No. 273264
Attorney
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,247 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 4, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Esq., counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 4, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea