THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0628

State of New Hampshire

v.

Roger Dana

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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I. Whether the trial court erred in admitting the redirect testimony of Sergeant Nathan Zipf, a police officer, over the defendant's hearsay objection when: (1) the testimony was limited to Sergeant Zipf's first-hand knowledge of the police investigation, and (2) the defendant opened the door to this testimony by challenging the adequacy of the police investigation during Sergeant Zipf's cross-examination.

II. Whether the trial court erred in admitting witness Debra Johnson's testimony about a conversation she had with the victim's grandmother pursuant to the excited utterance exception when: (1) the grandmother was crying and upset during the conversation, (2) the statements concerned the grandmother's belief that the defendant had murdered her two-and-a-half-year-old granddaughter, and (3) the grandmother made the statements less than twenty-four hours after her granddaughter was murdered.

III. Whether the trial court erred in giving a "false exculpatory statement" jury instruction concerning the defendant only, rather than all individuals associated with the murder investigation, when: (1) the defendant repeatedly made false exculpatory statements, (2) the defendant presented scant evidence that others made false exculpatory statements, (3) the defendant had ample opportunity to present his theory of the case, and (4) the trial court provided comprehensive jury instructions about evaluating witness credibility.

IV. If the trial court erroneously admitted hearsay evidence and failed to provide an adequate false exculpatory statement jury instruction, whether these errors were harmless because the defendant's guilt was overwhelming and the alleged errors were inconsequential.

STATEMENT OF THE CASE AND FACTS

A. The murder of M.D.

In November 2016, the defendant resided at 109 York Street, Berlin, New Hampshire with M.D., his two-and-a-half-year-old daughter, and Ashley Bourque, his longtime girlfriend and M.D.'s mother ("Mother"). TT[1]171-72; SE50-53.

About two weeks before Thanksgiving, the defendant spoke to Deborah Bourque, Mother's older sister and M.D.'s maternal aunt ("Aunt"), in his bedroom at 109 York Street. TT215, 234-35; *see also* SE58 (scene diagram). The defendant complained that Mother "was getting on his nerves and stuff lately." TT234. According to Aunt, the defendant said his life was like "jail," and that "he might as well just go do something to go to jail if he's going to be treated like he's in jail." TT234. The defendant also remarked that M.D. was "going to drive him to the point where he's just going to snap." TT234.

On Friday, November 25, 2016, Alex Bourque, Mother's father and M.D.'s grandfather ("Grandfather"), and Debra Johnson, Grandfather's fiancée, visited 109 York Street for a belated Thanksgiving celebration.

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[1] Citations to the record are as follows:
"DB__" refers to the defendant's brief and page number.
"DD__" refers the defendant's addendum and page number.
"DA__" refers to the defendant's appendix and page number.
"NOA__" refers to the defendant's notice of appeal and page number.
"TT__" refers to the trial transcript from September 17-19, 2019 and September 23-26, 2019 and page number.
"ST__" refers to the sentencing hearing transcript from September 27, 2019 and page number.
"SE__" refers to the State's trial exhibit and exhibit number.

TT58-59, 176. Grandfather and Ms. Johnson stayed overnight. TT58-59, 176.

The next day, Saturday, November 26, 2016, the family set up a Christmas tree. *See* TT176. According to Mother and Ms. Johnson, M.D. was happy, alert, and did not have any bruises on her body. TT58-59, 177-78.

The next morning, Sunday, November 27, 2016, Mother made coffee, fed M.D. breakfast, and changed M.D.'s diaper. TT178; *see also* TT63. According to Mother, M.D. appeared normal. TT179-80; *see also* TT62-63, 73-74. At around 7:45 AM, Mother left 109 York Street to go to work at a nearby deli. TT178-81; *see also* TT63. Before leaving, Mother told the defendant that she would return at 4:00 PM. TT180.

Around 9:00 AM, Grandfather and Ms. Johnson left the apartment, leaving M.D. alone with the defendant. TT63-65. According to Ms. Johnson, M.D. looked healthy when they departed. TT65.

At approximately 10:30 AM, Floyd Riff Jr., Aunt's boyfriend, visited 109 York Street. TT82-83, 615-17. Mr. Riff saw M.D. when he arrived. TT83-84. According to Mr. Riff, M.D. looked tired but otherwise appeared to be fine. TT83-84.

The defendant asked Mr. Riff to buy him beer. TT84-85. Mr. Riff took money from the defendant and left the apartment. TT85. Mr. Riff and Andrew Rivard, Mr. Riff's acquaintance, walked to a nearby variety store and purchased beer. TT85.

Mr. Riff and Mr. Rivard returned to 109 York Street. TT86. Mr. Riff told Mr. Rivard to wait outside. TT618-19. Mr. Riff reentered the

defendant's apartment and gave the defendant his beer. TT85-86. According to Mr. Riff, M.D. continued to look normal. TT86-87.

Mr. Riff and Mr. Rivard left 109 York Street. TT86-87. After briefly stopping to smoke with Mr. Rivard, TT619, Mr. Riff returned to his apartment and watched football with Aunt, his two children, and others, TT87, 216.

Around 12:25 PM, Mother called the defendant. TT183. Mother heard M.D. in the background playing and, at one point, talked to M.D. on the phone. TT183-84. According to Mother, M.D. was "[h]aving fun, having a blast." TT184. Mother did not hear anyone else in the background during the phone call. TT184. Mother asked the defendant if Paulette Walker, her mother and M.D.'s grandmother ("Grandmother"), had stopped by the apartment with tobacco. TT185. The defendant replied that she had not. TT185.

Sometime between 12:30 PM and 1:00 PM, Pastor Robert Haynes saw the defendant outside pushing M.D. in a stroller. *See* TT137-40; SE57. Pastor Haynes waved at the defendant and the defendant waved back. TT143. According to Pastor Haynes, M.D. looked normal and healthy. TT139-40, 142.

At 2:35 PM, Shane Whitehouse, the defendant's neighbor, recorded the defendant yelling and other loud noises coming from the defendant's apartment. *See* TT561-62, 580-83, 587-89.

At 3:12 PM, the defendant called Grandmother and told her that M.D. was dead after she "fell off the bunk bed." TT149-50. According to Grandmother, the defendant "sounded like he[was] drunk." TT151.

Grandmother called Mother and relayed what the defendant had told her. TT150, 186. Mother "dropped the phone from work . . . [and] ran to [her] apartment." TT186.

Grandmother, who lived a couple blocks away, TT147, rushed over to 109 York Street, TT151. After entering the apartment, Grandmother saw the defendant sitting on the bed in his bedroom holding M.D.[2] TT151-52. According to Grandmother, M.D. was "all banged up and black and blue." TT152. The defendant was crying, appeared drunk, and was doing nothing to address M.D.'s injuries. TT152-53; *see also* TT187. The defendant again told Grandmother that M.D. had fallen off the top bunk of her bunk bed. TT153.

Mother arrived at the apartment seconds later. TT152, 186. Grandmother took M.D. away from the defendant and gave her to Mother. TT151, 186. Grandmother called 911. TT151, 187. According to Mother, M.D. "was just lifeless. Her arms were just limp. . . . Her eyes were glazed over. She had cuts and bruises all over herself." TT186.

The defendant told Mother that he had given M.D. a bath, put her on the top bunk of her bunk bed, and, while he was looking for M.D.'s clothes, she fell onto the floor below. TT187-88. The defendant did not claim that anyone else was in the apartment when M.D. fell. TT188.

At around 3:20 PM, the defendant called Aunt, who was in her apartment with Mr. Riff and her roommate. TT88, 126, 220. Aunt put the defendant on speakerphone. TT88, 126. The defendant told Aunt that they

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[2] Grandmother recalled that only the defendant and M.D. were in the apartment when she arrived. TT156.

had "been good friends for a long time." TT88, 126-27, 220. According to Mr. Riff, the defendant "sounded like he was three sheets to the wind, slurring his words, could barely understand him." TT88; *see also* TT220.

At 3:27 PM, Officer Geoffrey Bardeen of the Berlin Police Department responded to 109 York Street. TT20-23. When Officer Bardeen arrived, he saw Grandmother standing outside the residence. TT23-24, 101, 146. Grandmother was "screaming and yelling"[3] and "punching and kicking [a] railing." TT23-25. Officer Bardeen also saw Mother holding M.D. in the doorway of the home. TT24. Mother "was screaming and crying[,] asking [him] to help her baby." TT24.

Mother handed M.D. to Officer Bardeen. TT24. Officer Bardeen carried M.D. inside the apartment, placed M.D. on the floor, and performed CPR on her. TT24. M.D., however, was "completely lifeless, just completely limp." TT25-26. Officer Bardeen observed that M.D. had bruising on her face and abdomen, no pulse, and cold skin. TT26-28. According to Officer Bardeen, M.D. "looked like she had been beaten severely." TT27.

Moments later, paramedics arrived and placed M.D. in an ambulance. TT28. Mother told the defendant that she was going to the hospital to be with M.D. TT189. Mother recalled that the defendant said, "[W]hatever," and walked back into his bedroom. TT188-89.

Police transported Mother and Grandmother to the hospital. TT188. Aunt, despite being confined to a wheelchair and pregnant with Mr. Riff's

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[3] At 3:31 PM, Mr. Whitehouse made another audio recording that captured some of Grandmother's yelling. *See* TT589, 596-97.

child, met Mother and Grandmother at the hospital. TT216, 222, 238-39. The defendant remained at the 109 York Street apartment. *See* TT188-89.

Medical staff rushed M.D. to the hospital's emergency room. TT38. The treating physician, Dr. Faith Monique Pinkerton, observed that M.D. was "pale" and "felt cold." TT38. M.D.'s temperature was only 85.2 degrees Fahrenheit—more than thirteen degrees below normal. TT39.

Dr. Pinkerton recalled that M.D. had bruises "everywhere" on her body, including "her face, her ears, her chest, her back, her abdomen, her pelvic area." TT40; SE1-20, 48-49. M.D.'s eyes were "fixed and dilated," which, according to Dr. Pinkerton, was typical of a brain injury. *See* TT39. The back of M.D.'s head was so severely injured that it "felt like mush." TT40; SE1-20, 48-49. Dr. Pinkerton also observed a blood and mucous discharge from M.D.'s vagina and rectum. TT40-41 (Dr. Pinkerton stating that the injuries to M.D.'s vagina and rectum were "quite evident"); SE1-20, 48-49.

According to Dr. Pinkerton, M.D.'s injuries were "[a]bsolutely not" consistent with a fall from a bunk bed. TT41. Based on Dr. Pinkerton's experience, if children are awake when falling off a bunk bed, they will have injuries to "their hands, their arms, their extremities," and if not awake, "they'll hit on their . . . head, it's the heaviest part of their body, one side, not both sides, not both sides of the body, not the way that [M.D.] presented with bruises everywhere." TT41.

For approximately two hours, Dr. Pinkerton and her team of ten-to-fifteen medical professionals attempted to resuscitate M.D. TT41-44. They were unsuccessful, however—M.D. had all but perished before she arrived at the hospital. TT41-44. M.D. was pronounced dead at 5:40 PM. TT43.

The next day, Monday, November 28, 2016, Mother met the defendant at a Dunkin' Donuts. TT190, 205. There, the defendant provided a different account of the incident. TT190. The defendant told Mother that he laid M.D. down for a nap on the bottom bunk in her bedroom, went back into his bedroom, and heard a "thud." TT190. When he reentered M.D.'s room to investigate the noise, he saw M.D. lying on the floor. *See* TT190. As before, however, the defendant maintained that only he and M.D. were in the apartment at the time of the alleged fall. TT191.

B. The police investigation

1. Interviews with the defendant

Sergeant Nathan Zipf of the State's Major Crimes Unit was assigned to investigate M.D.'s death. TT382-83. Sergeant Zipf considered M.D.'s death suspicious because "the amount of [M.D.'s] injuries [did] not match[] up with falling off a bunk bed." TT383, 387, 389-90.

On November 28, 2016, Sergeant Zipf conducted a recorded, voluntary interview with the defendant. TT391. During the interview, the defendant provided statements that conflicted with his prior accounts. TT396. First, the defendant claimed that he was "homeless," and that "he had slept under a bridge" the night before M.D.'s death. TT396. Second, the defendant told Sergeant Zipf that M.D. had fallen off the bottom bunk instead of the top bunk. TT397-99. Consistent with his prior statements, however, the defendant asserted that only he and M.D. were in the apartment at the time of the alleged fall. TT399-400, 459-60.

The following day, November 29, 2016, Sergeant Zipf interviewed the defendant again. TT406-07. In this interview, the defendant gave differing versions of how M.D. died—one in which M.D. fell from her bunk bed once, and another in which she fell from her bunk bed twice. TT409-14.

2. Forensic investigation

On November 28, 2016, Dr. Jennie Duval, an expert in forensic pathology, performed an autopsy on M.D. TT465-66. M.D., who weighed only twenty-four pounds, had sustained "[d]ozens of injuries" externally and internally. *See* TT467; SE1-20, 48-49; *see also* TT468-505 (describing M.D.'s injuries in detail). Notably, Dr. Duval found that M.D. sustained injuries to her rectum and vagina resulting from "[f]orced penetration." TT500-05; *see also* TT807-11. Based on her training and experience, Dr. Duval believed that M.D.'s injuries were not consistent with falling from a bunk bed:

> [T]here's way too many injuries on all surfaces of her body, all surfaces of her head. A simple fall from off a bunk bed or fall from standing on it, even, can certainly cause some bruising. It can cause some abrasions. It might cause some swelling, but it's going to be in the area of impact, not the front of the body and the back of the body and every surface on the head.

TT500. Dr. Duval concluded that M.D.s cause of death was "blunt-impact injuries of head and abdomen." TT505.

On November 28, 2016, Detective Sergeant Steven Sloper of the Major Crimes Unit and other police officers executed a search warrant for 109 York Street. TT266-67; SE58 (scene diagram). During their search, the

police found what appeared to blood on many surfaces and items throughout the apartment, including:

(1) the kitchen floor, TT274-77; SE64-65, 67-69;

(2) baby wipes in the kitchen trash, TT277-81; SE88-89, 111-12, 114;

(3) the kitchen wall,[4] TT294-97; SE75-78;

(4) a pillow in the living room, TT282; SE91-92;

(5) the hallway wall, *see* TT346;

(6) a child's pajamas and a towel in the bathroom, TT299-301; SE117-18, 122;

(7) the shower wall in the bathroom, TT301-04; SE79-81;

(8) the adult bed and adult clothes in the defendant's bedroom, TT306-08; SE83, 90, 102, 119;

(9) baby wipes in the defendant's bedroom, TT308-09; SE87, 108;

(10) a child's pajama top hidden near the head of the bed in the defendant's bedroom, TT312-15; SE98-100;

(11) a Green Bay Packers football jersey in the defendant's bedroom, TT311; SE65, 116;

(12) baby wipes in M.D.'s bedroom, TT292-93; SE94-96; and

(13) the bed and floor in M.D.'s bedroom, TT286-92; SE70-72, 94-97, 109.[5]

Kevin McMahon, a criminalist specializing in serology, tested numerous samples collected by the police. TT333-37, 350. Of these, several came back positive for blood, including: (1) the sample from the

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[4] In this location, the substance had been partially wiped off. TT297; SE75-78.

[5] Despite the defendant's claim that M.D. had fallen on top of a pile of toys in her bedroom, *see, e.g.*, TT397, no blood was found on the toys, TT291-93, 793-94; DB12.

defendant's Green Bay Packers jersey, TT342-44; (2) the samples from the baby wipes found in M.D.'s bedroom and the kitchen trash, TT344-45; (3) the sample from the hallway wall, TT346; (4) the sample from the shower wall, TT347; and (5) the sample from the child's pajama top hidden near the defendant's bed, TT348-49.

Mr. McMahon sent the blood samples to Katie Swango, a criminalist, for DNA testing. DA8-9; TT349, 361, 370. Ms. Swango found the defendant's DNA on (1) the sample from the defendant's Green Bay Packers jersey. DA16; TT721; DB12. Additionally, Ms. Swango found M.D.'s DNA on (2) the samples from the baby wipes found in M.D.'s bedroom and the kitchen trash, DA16; TT722-23, 780; DB13; (3) the sample from the hallway wall, DA17; TT718-19, 780; DB13; (4) the sample from the shower wall, DA16-17, 22; TT780, 782-83; DB13; and (5) the sample from the child's pajama top hidden near the defendant's bed, DA20; TT780-81; DB13.

C. The arrest, trial, and sentencing

On December 2, 2016, the police arrested the defendant for killing M.D. TT431. A grand jury charged the defendant with one count of first degree murder and one count of second degree murder. *See* TT3-5; NOA9; RSA 630:1-a, I(b)(1); RSA 630:1-b, I.

On September 17, 2019, the Superior Court (*Bornstein*, J.) held a jury trial. TT1. The trial lasted six days. *See generally* TT. During the proceedings, the State and the defense called numerous lay and expert witnesses. *See generally* TT. The defendant, however, did not testify. TT646, 673-74.

On September 25, 2019, after deliberating for less than two hours, *see* TT815, the jury found the defendant guilty of first degree murder and second degree murder, TT816-22.

On September 27, 2019, the trial court held a sentencing hearing. ST1. Several of M.D.'s family members provided victim impact statements. *See* ST4-12. Before sentencing the defendant to life without parole for his first degree murder conviction,[6] *see* RSA 630:1-a, III, the trial court made the following remarks:

> I've been doing this job for a long time. I've heard and seen a considerable amount of evidence regarding various serious crimes, including aggravated felonious sexual assaults of adults and minors, and homicides. But at least in my experience, the nature and extent of the depravity and inhumanity, the criminal conduct events, is unprecedented. You've committed a violent and brutal killing with your own hands and a felonious sexual assault of a child, of a two-and-a-half-year-old child, of your own two-and-a-half-year-old child. And sentencing hearings in which the defendant's been convicted of serious crimes against persons, the judge or the prosecutor often uses words like, or sometimes uses words like, heinous, or appalling, or horrific, to try to describe the [d]efendant's criminal conduct, but frankly, I'm at a bit of a loss to find one or more adjectives, at least in the English language, that adequately captures and conveys the nature of your criminal acts which, frankly, are beyond heinous, or beyond appalling, or beyond barbaric, or beyond malignant.
>
> If I was in a position to exercise discretion as to the sentence to be imposed on you, and I'm not because it's a mandatory sentence of life without parole, but if I was in a position to exercise discretion, I'd nevertheless find that the sentence of life without parole that's mandated by the legislature in this

[6] The prosecution sought a sentence for the first degree murder conviction only. *See* ST3.

case, would likewise be required based on all the facts and circumstances of this case.

ST14-15.

This appeal followed.

SUMMARY OF THE ARGUMENT

The defendant alleges that the trial court violated the rule against hearsay when it admitted: (1) Sergeant Zipf's testimony that certain people were interviewed regarding the whereabouts of Mr. Riff, Grandfather, Ms. Johnson, and Grandmother, DB14-16, 18-20; and (2) Ms. Johnson's testimony about a telephone conversation she had with Grandmother the day after M.D.'s death, DB14, 16-17, 20-22. The defendant also claims that the trial court erred by giving a false exculpatory statement jury instruction that encompassed the defendant's statements only, rather than the statements of all individuals associated with the murder investigation.[7] *See* DB14, 24-31; DD35-45.

The defendant's arguments are without merit. First, the trial court acted within its discretion by admitting Sergeant Zipf's and Ms. Johnson's testimony over the defendant's hearsay objections. Sergeant Zipf's testimony on redirect examination did not constitute hearsay and, even if it did, the defense opened the door to the introduction of this testimony during its cross-examination of Sergeant Zipf. The trial court also did not err by admitting Ms. Johnson's testimony about her conversation with Grandmother the day after M.D.'s murder because it fell under the excited utterance exception to the hearsay rule: Grandmother was "crying" and "very upset" during her conversation with Ms. Johnson; the subject matter of the conversation—the murder of her granddaughter—was inherently

[7] The defendant raises additional legal issues in his notice of appeal. *See* NOA3. Because the defendant did not brief these issues, they are waived. *See Halifax-Am. Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 575 (2018).

distressing; and Grandmother was continuing to suffer from the severe emotional trauma associated with M.D.'s murder.

Second, the trial court did not err by limiting the false exculpatory statement jury instruction to the defendant's statements. Pursuant to *State v. Evans*, 150 N.H. 416 (2003), the trial court was not required to broaden the scope of this jury instruction because: (1) the defendant's assertion that another person, such as Grandmother or Mr. Riff, was the true killer was not a theory of defense upon which he was entitled to an instruction; (2) by contrast to the substantial evidence concerning the defendant's false exculpatory statements, there was scant evidence that others made false exculpatory statements; (3) the defendant had ample opportunity to present his theory of the case; and (4) the trial court instructed the jury about evaluating witness credibility.

Finally, even if the trial court erred by admitting hearsay evidence and by providing inadequate jury instructions, which it did not, any such errors were harmless. At trial, the State presented prodigious and persuasive evidence that the defendant committed first degree murder. Further, the alleged errors did not meaningfully prejudice the defendant or affect the outcome of trial.

ARGUMENT

I. THE TRIAL COURT DID NOT ERRONEOUSLY ADMIT HEARSAY EVIDENCE.

The defendant argues that the trial court erred when it ruled that (1) Sergeant Zipf's testimony on redirect examination that certain people were interviewed regarding the whereabouts of Mr. Riff, Grandfather, Ms. Johnson, and Grandmother was non-hearsay, DB14-16, 18-20; *N.H. R. Ev.* 801; and (2) Ms. Johnson's testimony about a telephone conversation she had with Grandmother fell under the excited utterance exception to the hearsay rule, DB14, 16-17, 20-22; *N.H. R. Ev.* 803(2).

This Court reviews a trial court's decision to admit evidence under the unsustainable exercise of discretion standard.[8] *State v. Pepin*, 156 N.H. 269, 274 (2007). This Court's task "is not to determine whether [it] would have found differently." *In re Adam M.*, 148 N.H. 83, 84 (2002). Instead, its "only function on review is to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." *State v. Field*, 132 N.H. 760, 767 (1990) (brackets and quotation omitted). To show an unsustainable exercise of discretion, "the defendant must demonstrate that the trial court's ruling was clearly

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[8] In his brief, the defendant invites this Court to adopt a "bifurcated standard of review for hearsay issues" employed in certain other jurisdictions. DB17-18. This Court should reject this suggestion because (1) the defendant does not develop this argument on appeal, *see Halifax-Am. Energy Co.*, 170 N.H. at 574; (2) the defendant does not advance why it is necessary to adopt this new standard for this appeal; and (3) the Court's current standard is appropriate to evaluate all evidentiary issues, including those involving hearsay.

Even if this Court adopts this new standard, however, it does not alter the conclusion that the trial court sustainably exercised its discretion by admitting the testimony of Sergeant Zipf and Ms. Johnson.

untenable or unreasonable to the prejudice of his case." *Pepin*, 156 N.H. at 274.

A. The trial court did not err by admitting Sergeant Zipf's redirect testimony because the testimony did not constitute hearsay, and even if it did, the defendant opened the door to this testimony during cross-examination.

"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." *N.H. R. Ev.* 801(c); *see also State v. Delgado*, 137 N.H. 380, 382 (1993) ("Hearsay statements are those out-of-court statements that are offered to prove the truth of the matter asserted.").

On redirect examination of Sergeant Zipf, the prosecutor sought to elicit testimony that the police interviewed certain witnesses during the investigation into M.D.'s death. The discussion of this issue was, in relevant part, as follows:

The prosecutor:	Defense counsel asked you about [Mr.] Riff, [Grandmother], [Ms.] Johnson, and [Grandfather]. Remember that?
Sergeant Zipf:	Yes.
The prosecutor:	Were the people they were with on November 27th interviewed?
Sergeant Zipf:	Yes, they were.
The prosecutor:	To account for their whereabouts?
Sergeant Zipf:	Yes.
	. . . .
Defense counsel:	Objection.

. . . .

Object and move to strike because that was hearsay information. Whatever [Grandmother] or any of those other people said about who they were with on the day in question is hearsay. There's no nonhearsay purpose for that. And so I would ask you to instruct the jury that they should disregard that last answer.

The prosecutor: I'm not asking him what they said. I'm asking . . . were these people interviewed to verify their whereabouts. That's the only question.

That isn't hearsay at all . . . .

. . . .

It's not for the truth of the matter asserted at all. It's simply to show that [the police], in fact, did do some follow-up work without saying what it revealed. Basically, what the [d]efense is saying, [the police] were sloppy; [they] weren't careful. This shows that did, in fact, go out and do additional follow up . . . .

. . . .

. . . [W]hat [defense counsel] said was, did you swab those four people I just listed; did you swab them; did you take their clothes. So clearly, the implication is, [the police are] doing sloppy work . . . . So [this testimony is] simply to rebut that [and to show] not the content of any of those interviews at all, but just to show that [the police] did follow up and talk to these . . . people[.]

. . . .

> *The trial court*: [Sergeant Zipf] hasn't testified as to what the people said or the content what they told the police. The hearsay objection is overruled.
>
> . . . .
>
> [The prosecutor] asked if [the police] accounted for their whereabouts; that's all that . . . was asked.
>
> . . . .
>
> [T]here's no sort of substantive statement that's being elicited and made by any person outside of this court. I simply find it isn't hearsay.

TT455-58.

The trial court was correct that Sergeant Zipf's testimony did not constitute hearsay. First, Sergeant Zipf did not reference the existence or content of any "statement" made by Mr. Riff, Grandmother, Ms. Johnson, Grandfather, or someone else. *N.H. R. Ev.* 801(c); TT455-58. Rather, Sergeant Zipf provided only his first-hand knowledge about the police investigation into M.D.'s death. TT455-58. Such testimony is not hearsay.

Additionally, Sergeant Zipf's testimony was not offered to prove the truth that Mr. Riff, Grandmother, Ms. Johnson, and Grandfather were not at the scene of the crime during the incident. *See* DB19; *N.H. R. Ev.* 801(c). The purpose of Sergeant Zipf's testimony was to establish that, by looking into the whereabouts of Mr. Riff, Grandmother, Ms. Johnson, and Grandfather, he did, in fact, conduct a thorough investigation. *See* TT456 (the prosecutor stating that his questions for Sergeant Zipf were "just to show that [Sergeant Zipf] did follow up and talk to these . . . people").

On appeal, the defendant argues that "the only reasonable inference" from Sergeant Zipf's testimony was that Mr. Riff, Grandmother, Ms. Johnson, and Grandfather "each provided the police with alibi witnesses." *See* DB19. This is incorrect. Sergeant Zipf's testimony established only that he looked into the whereabouts of these four people during his investigation. *See* TT458 (the trial court observing that the prosecutor "asked if [the police] accounted for their whereabouts; that's all that . . . was asked"). Sergeant Zipf's testimony left open the possibility that one or more of Mr. Riff, Grandmother, Ms. Johnson, and Grandfather was at 109 York Street during the incident, or that the whereabouts of one or more of these individuals during that timeframe could not be verified.[9]

Moreover, even if Sergeant Zipf's testimony contained hearsay, which it did not, it was nonetheless permissible rebuttal testimony. *See* DB19-20; *State v. White*, 155 N.H. 119, 124 (2007); *see also State v. White*, 159 N.H. 76, 80 (2009) (explaining that consistent out-of-court statements may be used to dispel an inference created by the defense on cross-examination). In a criminal trial, "both the defendant and the prosecutor . . . have the opportunity to meet fairly the evidence and arguments of one another." *State v. Laurent*, 144 N.H. 517, 520-21 (1999) (per curiam) (quotation omitted). When the defendant raises certain arguments during trial, he risks "open[ing] the door" to the State's rebuttal. *See id.*; *State v. Gaudet*, 166 N.H. 390, 401-02 (2014); *State v. Ainsworth*, 151 N.H. 691, 698 (2005).

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[9] Notably, Sergeant Zipf interviewed the defendant, *see, e.g.*, TT436, who could have claimed that one or more of these individuals was with him during the incident. The defendant, however, did not make such a claim. *See* TT 459-60.

On cross-examination of Sergeant Zipf, the defense created an inference that the police investigation was deficient. *See* TT435-55; DB15; *White*, 155 N.H. at 124; *White*, 159 N.H. at 80. Defense counsel repeatedly emphasized that Sergeant Zipf was the "lead investigator in this case," and asked calculated questions about (1) why he did not swab Grandmother's hands; (2) why he did not search Grandmother's home; (3) whether he retained items from the trash found outside the defendant's apartment; (4) whether he personally searched Mr. Riff, Grandfather, and Ms. Johnson; and (5) why he did not examine certain forensic evidence more closely. TT447-55. Asking Sergeant Zipf on redirect whether certain people were interviewed to "account for [the] whereabouts" of Mr. Riff, Grandmother, Ms. Johnson, and Grandfather was "a permissible rebuttal" to the defense's cross-examination—it squarely refuted the inference created by the defense that the police investigation was inadequate. *See* TT455-56; *Laurent*, 144 N.H. at 519-20; *White*, 155 N.H. at 124; *White*, 159 N.H. at 80.

Sergeant Zipf's testimony did not constitute hearsay, and even if it did, it was admissible to rebut the defense's suggestions that the police investigation was flawed. The trial court, therefore, did not unsustainably exercise its discretion.

B. The trial court did not err by admitting Ms. Johnson's statements about her conversation with Grandmother pursuant to the excited utterance exception.

The excited utterance exception to the hearsay rule permits the admission of hearsay statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

N.H. R. Ev. 803(2); *State v. Gordon*, 148 N.H. 710, 720 (2002) (quotation omitted). Although the time between the startling event and the statements is a factor to be considered in determining admissibility, "it is by no means controlling, and such things as the nature of the event, the [declarant's] state of mind, and all other circumstances are important considerations." *Simpson v. Wal-Mart Stores*, 144 N.H. 571, 575 (1999) (quotations omitted); *State v. Woods*, 130 N.H. 721, 727 (1988). "The precise amount of time that may elapse before a statement loses its spontaneity as an excited utterance evoked by a startling event and becomes a mere narrative cannot be established by any absolute rule of law and accordingly, much must be left to the discretion of the trial court in admitting or rejecting such testimony." *State v. Pennock*, 168 N.H. 294, 302-03 (2015), *as modified on denial of reconsideration* (Dec. 3, 2015) (quotation omitted).

On recross-examination, the State sought to elicit testimony about Ms. Johnson's phone call with Grandmother the day after M.D.'s death.[10] TT609-13. The discussion regarding this issue was, in relevant part, as follows:

The prosecutor:	. . . . [W]hen [Grandmother] called on the 28th she was crying, right?
Ms. Johnson:	Yes.
The prosecutor:	Okay. She told you—
Defense counsel:	Objection.
	. . . .

[10] For clarity, Grandmother's statements were roughly a day after she arrived at 109 York Street and first saw M.D.'s injuries, and were approximately twenty-two hours after medical personnel pronounced M.D. dead. *See* TT609-13; *supra* Statement of the Case and Facts.

The objection is hearsay . . . . The State is about to elicit statements [Grandmother] made on November 28th. . . .

The prosecutor: . . . . [W]hat [Grandmother] said is an excited utterance. She said she was upset and crying, so I may elicit her excited statements . . . .

. . . .

. . . . [Ms. Johnson] said that when [Grandmother] called she was screaming at her, and she was yelling. . . . And she was talking about [M.D.], and her condition and what happened. So it was clearly an excited utterance. . . .

. . . .

Defense counsel: This is 24 [hours] after the fact, and it's also after [Grandmother] has given a statement to the police. So I think the length of time is too far to be an excited utterance.

The prosecutor: There's case law that allows excited utterances for many days after the fact. The question is whether the party is still under the stress of the startling event. [Grandmother is] talking about [M.D.'s] injuries, and she's upset and crying. And she says, "[The defendant] murdered her, beat her," so clearly that goes directly to the issue which is the startling event.

. . . .

The trial court: . . . . I thought the State has laid the requisite foundation for the excited-utterance exception, and has established that [Grandmother] was still under the stress of the excitement resulting from the

death of [M.D.] [a]nd therefore the [d]efendant's objection is overruled.

. . . .

The prosecutor: So again, during this phone call when you told the police about it, you told them that [Grandmother] was upset and crying; do you remember that?

Ms. Johnson: Um-hum. Yes, she was.

The prosecutor: She talked about the bruises [M.D.] had on her body, right?

Ms. Johnson: Yes.

The prosecutor: She said [the defendant] murdered her, beat her, right?

Ms. Johnson: Yes.

The prosecutor: She was very upset when she said that?

Ms. Johnson: Yeah.

TT609-13.

The trial court correctly ruled that Grandmother's statements fell under the excited utterance exception to the hearsay rule. Ms. Johnson testified that, at the time of Grandmother's call, Grandmother was "crying" and "very upset." TT609, 613; *see also* DB22 (acknowledging that Grandmother had an "emotional presentation during the call"). Such a reaction would be expected from Grandmother, who, approximately a day before, held her unresponsive and severely beaten two-and-a-half-year-old granddaughter. Grandmother then accompanied M.D. and Mother at the hospital, where she endured more stress and trauma as medical personnel attempted—unsuccessfully—to revive M.D. *See* TT154. Grandmother's actions evidenced her emotional pain; she was "screaming and yelling"

when the responding officer arrived at the scene, and she twice punched walls in anguish, causing her knuckles to swell. *See* TT23-25, 155, 164. Coping with anger, sadness, and despair from M.D.'s death, and exhausted from staying up the previous night talking to police about the incident, TT164, Grandmother remained overcome with emotion when she told Ms. Johnson that she believed the defendant had murdered her granddaughter,[11] *see* TT613.

The defendant contends that Grandmother's statements could not qualify as excited utterances because they were made approximately one day after M.D.'s death and after Grandmother interviewed with the police. DB14, 16-17, 20-22. In support of this argument, the defendant relies on three cases: *State v. Thompson*, 161 N.H. 507 (2011); *State v. Woods*, 130 N.H. 721 (1988); and *State v. Fischer*, 165 N.H. 706 (2013). DB21. Each of these cases, however, is materially distinguishable.

First, in *Thompson*, this Court rejected the State's argument that a witness's statements were excited utterances because they were made *five days* after the startling event.[12] 161 N.H. at 532. By contrast, Grandmother's statements were made fewer than twenty-four hours after M.D.'s death.

Next, in *Woods*, this Court rejected applying the excited utterance exception to a victim's statements made one day after a startling event. 130 N.H. at 727. This Court, however, found that the statements in question

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[11] Grandmother's anguish may have been exacerbated by watching a news report about M.D.'s death on television. *See* TT610-12.

[12] Additionally, in *Thompson*, unlike in this appeal, the State did not invoke the excited utterance exception at trial. *Thompson*, 161 N.H. at 531.

failed to qualify as excited utterances not because of the time elapsed since the startling event, *see id.* (holding that timing is but one "factor to be considered," and suggesting that the victim's "continuing excitement" could have persisted into the following day), but because the record was "barren of any evidence establishing or suggestions that the child's statements . . . were made while under the continuing stress of nervous excitement that would insure spontaneity," *id.* Unlike the victim in *Woods*, Grandmother was "under the continuing stress of nervous excitement" of her granddaughter's murder, *see id.*—she was "crying" and "very upset" when she spoke with Ms. Johnson, TT609, 613.

Finally, in *Fischer*, this Court held that certain statements the victim made to a witness did not constitute excited utterances because the trial court ruled that statements the victim made shortly before to a different witness were not excited utterances. 165 N.H. at 711 ("In light of the trial court's finding that these intervening events precluded admission of [a witness's] testimony as an excited utterance, it erred in admitting [a different witness's] testimony concerning the victim's subsequent statements to her.").[13] The trial court in this matter, by contrast, made no such ruling prior to admitting Grandmother's statements pursuant to the excited utterance exception.

When considering "all . . . circumstances," including "such things as the nature of the event [and] the [declarant's] state of mind," *see Simpson*, 144 N.H. at 575 (quotations omitted), Grandmother's statements

[13] This Court, however, affirmed the defendant's convictions because the admission of this evidence was harmless. *Fischer*, 165 N.H. at 711-12.

constituted excited utterances: (1) Grandmother was "crying" and "very upset" during her conversation with Ms. Johnson; (2) the subject matter of the conversation—the murder of her granddaughter—was inherently distressing; and (3) Grandmother was continuing to suffer from the severe emotional trauma associated with the defendant brutally beating her two-and-a-half-year-old granddaughter to death the day before. *See* TT609-13. Concluding that Grandmother's statements constituted excited utterances is not only well-grounded in fact, but is also consistent with decisional law from New Hampshire and other jurisdictions. *See, e.g.*, *Pepin*, 156 N.H. at 274-75 (finding that the victim's statements made over six hours after a startling event qualified as excited utterances because the victim was "still clearly upset"); *State v. Plummer*, 117 N.H. 320, 325 (1977) (holding that a statement constituted an excited utterance when made more than three hours after the startling event); *State v. Underwood*, 337 P.3d 969, 971-73 (Or. Ct. App. 2014) (finding that statements made a day after the startling event qualified as excited utterances and noting that "there are cases in which statements made more than five days after the triggering event were found to fit within the exception"); *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, 1235, at ¶¶ 56-58 (determining statements made approximately two days after startling event constituted excited utterances and noting that, at least for children, "courts have upheld the application of the excited-utterance exception even where several days or weeks have elapsed since the startling event"); *see also Wright v. State*, 249 S.W.3d 133, 139 (Ark. 2007) (observing that "the trend has been toward expansion of [the] time interval" between the startling event and the statements).

The trial court, therefore, did not unsustainably exercise its discretion when it admitted Ms. Johnson's statements about her conversation with Grandmother pursuant to the excited utterance exception.

II. THE TRIAL COURT DID NOT ERR BY LIMITING THE FALSE EXCULPATORY STATEMENT JURY INSTRUCTION TO THE DEFENDANT'S STATEMENTS.

The defendant contends that the trial court erred by giving a false exculpatory statement jury instruction that encompassed the defendant's statements only, rather than the statements of additional individuals associated with the police investigation. *See* DB24-31; DD35-45; TT626-30, 647-49. This claim is without merit because this Court considered and rejected a nearly identical argument in *State v. Evans*, 150 N.H. 416 (2003).

"The scope and wording of jury instructions is generally within the sound discretion of the trial court." *Id.* at 420. This Court "will not reverse unless the jury charge fails to cover fairly the legal issues in the case." *Id.* This Court reviews the challenged instructions "in the context of the entire charge and all of the evidence to determine whether the trial court adequately stated the relevant law." *Id.* The defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *State v. Parry*, 174 N.H. 50 (2021).

At trial, the prosecution asked the trial court to provide a false exculpatory statement jury instruction for the defendant's statements. *See* TT626-30. The defense countered that the instruction should encompass the statements of additional individuals—namely, Grandmother and Mr. Riff. *See* TT626-30.

Considering the written filings and oral arguments of both parties, *see* TT626-30, 647-49; DD35-45, the trial court rejected the defense's requested instruction, TT648-49. After the trial court "shorten[ed] the

[prosecution's proposed] instruction considerably," TT649, it instructed the jury as follows:

> . . . [I]f you find that the [d]efendant intentionally made a statement or statements tending to demonstrate his innocence, and the statement or statements were later discovered to be false, then you may consider whether the statements show a consciousness of guilt and determine what significance, if any, to give to such evidence. It is your decision as jurors as to whether false exculpatory statements, if made, constituted or indicate consciousness of guilt or nothing at all.

TT677-78.

Contrary to the defendant's contentions, this instruction was not improper. In *Evans*, this Court considered two issues regarding a similar false exculpatory statement instruction: (1) whether such an instruction was categorically impermissible,[14] and (2) even if such an instruction were permissible, whether the trial court should have broadened it to include false exculpatory statements made by another individual. *See Evans*, 150 N.H. at 419-20.

Regarding the first issue, this Court determined that false exculpatory statement jury instructions are permissible. This Court reasoned that a false exculpatory statement "may constitute circumstantial evidence of consciousness of guilt" because "an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his or her innocence." *Id.* at 420 (brackets and quotation omitted).

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[14] The defendant does not contend that false exculpatory statement instructions are categorically impermissible. *See* DB 24-31.

Regarding the second issue, this Court held the trial court did not err by refusing to expand the false exculpatory statement instruction to include a person whom the defendant claimed was the true murderer. *Id.* at 422. This Court provided four reasons in support of this decision. First, the defendant's assertion that another person was the true killer was "not a theory of defense upon which he was entitled to an instruction, but was a theory of the case." *Id.*; *State v. Bruneau*, 131 N.H. 104, 117 (1988) (explaining that a theory of defense is "akin to a civil plea of confession and avoidance, by which the defendant admits the substance of the allegation but points to facts that excuse, exonerate or justify his actions such that he thereby escapes liability," whereas a theory of the case "is simply the defendant's position on how the evidence should be evaluated and interpreted" (quotations and citations omitted)). Second, "[i]n contrast to the evidence concerning the defendant's false exculpatory statements, there was scant evidence that [the other suspect's statements] . . . demonstrate[d] [the defendant's] innocence." *Evans*, 150 N.H. at 422-23. Third, the defendant had "ample opportunity to present his theory and the jury was free to consider it." *Id.* at 423-24 (quotation omitted). Finally, the trial court's jury instructions "included extensive information to help the jury evaluate witness credibility." *Id.* at 424.

As in *Evans*, each of the four reasons for rejecting the defendant's proposed broadening of the false exculpatory statement instruction is present. First, as the defendant appears to concede, *see* DB28-29, the defendant's claim that a different person murdered M.D. was "not a theory of defense upon which he was entitled to an instruction, but was a theory of the case," *Evans*, 150 N.H. at 422; *Bruneau*, 131 N.H. at 117.

Second, the evidence that Grandmother or Mr. Riff made false exculpatory statements was thin. *See Evans*, 150 N.H. at 422-23. Mr. Whitehouse, the defendant's neighbor, testified on direct examination that he may have heard Grandmother in the defendant's apartment around the time of the incident. *See* TT561. On cross-examination, however, Mr. Whitehouse testified that he only recorded Grandmother's voice at 3:31 PM—which is around the time Grandmother remembered arriving at the defendant's apartment. *See* TT151, 582-84, 587-89, 596-97. As to Mr. Riff, Mr. Rivard testified that he did not know where Mr. Riff went after dropping off beer at the defendant's apartment. *See* TT620. The defense also argued that Mr. Riff's account differed with Mr. Rivard's, and that Mr. Riff's timeline of events was "not possible." TT699. Yet, the defense never established that Mr. Riff returned to 109 York Street around the time of the incident, or, if he did go back, that he assaulted M.D. *See generally* TT. In short, the defense's theory that Mr. Riff killed M.D., or that he made false exculpatory statements about M.D.'s murder, was pure conjecture.[15]

Even assuming the defense established that Mr. Riff and Grandmother made false exculpatory statements regarding M.D.'s death, which it did not, those statements were dwarfed by the defendant's false exculpatory statements. *See Evans*, 150 N.H. at 418-19, 422-23 (finding that the evidence of the defendant's false exculpatory statements outweighed the evidence of the other suspected killer's false exculpatory statements). Following the incident, the defendant repeatedly stated that

[15] A more plausible explanation for the inconsistencies between Mr. Rivard's and Mr. Riff's accounts was that Mr. Riff did not want to admit that he and Mr. Rivard "smoked a couple of joints" that day. *See* TT116, 619.

M.D. perished after falling from her bunk bed. M.D.'s injuries, however, were inconsistent with the defendant's account; they were far more severe and were located on parts of her body—including her vagina and rectum—that could not have been injured from the fall alone. *See infra* section III. The defendant also provided conflicting versions of the incident to Mother and Sergeant Zipf, further supporting the conclusion that the defendant fabricated his account of the incident. *See Evans*, 150 N.H. at 420-23.

Third, the defendant had "ample opportunity to present his theory [of the case] and the jury was free to consider it." *Id.* at 423-24 (quotation omitted). As in *Evans*, defense counsel argued extensively in opening and closing statements that another individual—e.g., Grandmother or Mr. Riff—murdered M.D. *See* TT11-20 ("[Grandmother], [Grandfather], [Ms.] Johnson, and [Mr.] Riff, who were in the house that day, . . . lied about their contact with [M.D.]"); TT690-731. And throughout trial, defense counsel questioned Grandmother, Mr. Riff, and others in an attempt to blame M.D.'s murder on someone other than the defendant. *See generally* TT.

Fourth, the trial court cured any potential harm by providing extensive jury instructions for evaluating witness credibility. *See Evans*, 150 N.H. at 424. Before closing statements, the trial court gave the jury, among other instructions, the following guidance for assessing witness testimony:

> In deciding which witnesses to believe, you should use your common sense and judgment. I suggest that you consider a number of factors, whether the witness appeared to be candid, whether the witness appeared worthy of belief, the appearance and the demeanor of the witness, whether the witness had an

> interest in the outcome of the trial, whether the witness had any reason for not telling the truth, whether what the witness said seemed unreasonable or inconsistent with the other evidence in the case, or with prior statements by the witness, and whether the witness had any friendship or animosity towards other people in the case.

TT679-681. Despite the defendant's claims to the contrary, *see* DB29-30,[16] these instructions were as comprehensive, if not more so, than this Court determined in *Evans* were sufficient for the jury to "evaluat[e] the defendant's theory of the case absent a false exculpatory statement instruction that pertained to [others]." 150 N.H. at 424.

The trial court did not unsustainably exercise its discretion by giving a false exculpatory statement jury instruction for the defendant's statements only.

[16] The defendant also claims that the trial court failed to give a jury instruction about disregarding perceived expressions of the judge's opinion. DB29-30; *Evans*, 150 N.H. at 421. The trial court, however, provided such an instruction. *See* TT675 ("If you believe that I have expressed or suggested an opinion as to the facts in my rulings, you should ignore such an opinion.").

III. EVEN IF THE TRIAL COURT ERRONEOUSLY ADMITTED HEARSAY EVIDENCE AND FAILED TO PROVIDE AN ADEQUATE FALSE EXCULPATORY STATEMENT JURY INSTRUCTION, WHICH IT DID NOT, SUCH ERRORS WERE HARMLESS BECAUSE (1) THE DEFENDANT'S GUILT WAS OVERWHELMING, AND (2) THESE ERRORS DID NOT AFFECT THE OUTCOME OF TRIAL.

"To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict." *State v. Peters*, 162 N.H. 30, 36 (2011). An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of "an overwhelming nature, quantity, or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id.* In making this determination, this Court considers the other evidence presented at trial as well as the character of the erroneously admitted or excluded evidence itself. *Id.*

A. The State presented overwhelming evidence of the defendant's guilt.

The State presented evidence at trial that established beyond a reasonable doubt that the defendant committed first degree murder. *See id.*

First, prior to M.D.'s murder, the defendant harbored troubling thoughts about his life generally and about M.D. in particular. Aunt testified that, a couple weeks before M.D.'s death, the defendant told her his life was like "jail," and that "he might as well just go do something to go to jail if he's going to be treated like he's in jail." TT234. The defendant also told Aunt that M.D. was "going to drive him to the point where he's just going to snap." TT234.

Second, the defendant was the only person with M.D. at the time of the incident. Mother, Ms. Johnson, Mr. Riff, and Pastor Haynes testified that, on November 27, 2016, M.D. appeared to be healthy and normal through approximately 1:00 PM. Between 1:00 PM and 3:00 PM, when M.D. was alone with the defendant in the 109 York Street apartment, M.D. sustained severe injuries. Moreover, during the ensuing police investigation, the defendant never claimed that another person was in the apartment with him when M.D. was injured.

Third, the defendant was indifferent to M.D. following the incident. Grandmother testified that, when she first arrived at 109 York Street, the defendant was drunk and was doing nothing to help M.D.—such as, for example, calling 911. Mother testified that when she told the defendant that she was going to the hospital to be with M.D., the defendant said, "[W]hatever," and walked back into his bedroom. TT188-89. The defendant remained at the apartment while medical personnel attempted to save M.D.'s life at the hospital.

Fourth, the defendant gave conflicting accounts of what caused M.D.'s injuries. Initially, the defendant claimed that M.D. fell from the top bunk of her bunk bed. Mother testified, however, that when she met with the defendant the day after the incident, he provided a markedly different version of what happened to M.D. Similarly, Sergeant Zipf testified that the defendant provided inconsistent and implausible explanations for M.D.'s injuries.

Fifth, M.D.'s injuries strongly suggest that she was brutally beaten and sexually assaulted. Grandmother testified that, when she first arrived at 109 York Street, M.D. was "all banged up and black and blue." TT151-52.

Mother recalled that M.D. "was just lifeless. Her arms were just limp . . . . Her eyes were glazed over. She had cuts and bruises all over herself." TT186. Officer Bardeen stated that, when he arrived at the scene, M.D. was "completely lifeless, just completely limp" and "looked like she had been beaten severely." TT25-27.

Dr. Pinkerton testified that, when M.D. was admitted to the emergency room, M.D. had bruises on "her face, her ears, her chest, her back, her abdomen, her pelvic area," and that the back of M.D.'s head was so severely injured that it "felt like mush." TT40; *see also* SE1-20, 48-49. Dr. Duval similarly testified that M.D. had sustained "[d]ozens of injuries." TT467; *see also* TT468-505 (describing M.D.'s injuries in detail). Both doctors described that, in addition to external injuries, M.D. had sustained wounds to her vagina and rectum. TT40, 500-05. Dr. Pinkerton and Dr. Duval each determined that M.D.'s injuries were inconsistent with falling off a bunk bed. TT41, 500.

Finally, the forensic evidence supported the conclusion that the defendant murdered M.D. and subsequently lied about it. Mr. McMahon and Ms. Swango testified that M.D.'s blood was present not only in her bedroom, but also on (1) the hallway wall, (2) the shower wall, and (3) a child's pajama top hidden near the defendant's bed. If the defendant's story were true, M.D.'s blood should not have been located on these surfaces. And, perhaps most damningly, although blood was discovered underneath the toys scattered at the foot M.D.'s bed, blood was *not* found on top of the toys. This suggests that the defendant not only lied about M.D.'s fall, but also rearranged her bedroom to make his story seem more plausible.

Even though the trial lasted six days, the defendant's guilt was so overwhelming that it took the jury less than two hours to convict. Based on the evidence presented at trial, there is no doubt that the defendant murdered M.D.

B. Even if the trial court erroneously admitted hearsay evidence and failed to provide an adequate false exculpatory statement jury instruction, which it did not, these errors were inconsequential when compared to the strength of the State's evidence of guilt.

First, Sergeant Zipf's and Ms. Johnson's alleged hearsay testimony did not unduly prejudice the defendant or alter the verdict. *See Peters*, 162 N.H. at 36. Despite the defendant's contentions, a plain reading of Sergeant Zipf's testimony did not imply that Mr. Riff, Grandmother, Ms. Johnson, or Grandfather had "alibi witnesses." *See supra* section I.A. And even if Sergeant Zipf had suggested this, the defendant never placed any of those four individuals at 109 York Street during the incident. To the contrary, the defendant repeatedly stated during the police investigation that he alone was with M.D. when she sustained her injuries. Moreover, Sergeant Zipf's testimony was cumulative because Mr. Riff, Grandmother, and Ms. Johnson each testified at trial that he or she was not at 109 York Street during the incident, and Ms. Johnson testified that Grandfather also was not there at that time. *See* TT63, 72, 87-88, 149-51.

Ms. Johnson's testimony that Grandmother's phone call was similarly immaterial. Ms. Johnson's statements did not establish that Grandmother saw the defendant assault M.D. or that Grandmother had any other special knowledge regarding M.D.'s death. *See* DB23

(acknowledging that Grandmother's statements were "not based on [her] personal knowledge"). And to the extent that her statements implied as much, the trial court's jury instructions negated any harm to the defendant. *See, e.g.*, TT679 (the trial court instructing the jury: "Simply because a witness has taken an oath to tell the truth does not mean that you must accept the testimony as true.").

The trial court's denial of the defendant's requested false exculpatory statement jury instruction also did not unduly prejudice the defendant or overcome the strength of the State's evidence of guilt. Even assuming that the trial court should have adopted the defendant's requested false exculpatory statement instruction, *see* DB24, the defendant had "ample opportunity" to present his theory of the case and the trial court's comprehensive jury instructions minimized any potential harm to the defendant, *see Evans*, 150 N.H. at 423-24; *supra* section II.

Even if, for the sake of argument, the trial court should have excluded the challenged testimony of Sergeant Zipf and Ms. Johnson, and should have expanded the false exculpatory statement jury instruction to include others, this Court should affirm because any such errors were harmless when compared to the strength of the evidence of the defendant's guilt. *See Fischer*, 165 N.H. at 712.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court deny the defendant's claims and affirm his conviction.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF COMPLIANCE

I, Weston R. Sager, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,497 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 12, 2021 */s/ Weston R. Sager*
Weston R. Sager

CERTIFICATE OF SERVICE

I, Weston R. Sager, hereby certify that a copy of the State's brief shall be served on Stephanie Hausman, Deputy Chief Appellate Defender and counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 12, 2021 */s/ Weston R. Sager*
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