THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0653

State of New Hampshire

v.

Richard Soulia

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(10-minute 3JX oral argument)

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ISSUES PRESENTED

I. Whether the trial court exceeded its discretion by denying the defendant's motions to strike, for cause, five potential jurors, three of whom sat on the jury, where the trial court was satisfied that the jurors could be impartial.

II. Whether this Court may review counseling records disclosed to the trial court for in camera review.

STATEMENT OF THE CASE

In November 2018 and April 2019, the Cheshire County grand jury returned four indictments alleging that the defendant committed aggravated felonious sexual assault. DBA A3–A6[1]; *see also* RSA 632-A:2, I(a); RSA 632-A:2, II; RSA 632-A:2, I(m); A fifth indictment alleged that he committed prostitution. DBA A7; *see also* RSA 645:2, II(a). On September 17, 2019, after a two-day trial, the jury found the defendant guilty of the AFSA indictments and not guilty of prostitution. T 245-47. On October 8, 2019, the court (*Ruoff,* J.) imposed three consecutive sentences of ten to twenty years. 10/8/19 T 19-20; *see also* DBA A33-A38. The court did not impose a sentence on one of the AFSA indictments because it was an alternative theory of conviction. 10/8/19 T 239. The third sentence was suspended for life. DBA A33-A38

This appeal followed

[1] "DB_" refers to the defendant's brief and page number.
"DBA_" refers to the appendix to the defendant's brief and page number.
"JT_" refers to the transcript of jury selection and page number.
"JS" refers to the joint stipulation filed with this Court.
"T_" refers to the trial transcript and page number.
Other transcripts are identified by the date, followed by "T" and the page number.

STATEMENT OF FACTS

A. The State's Case

1. Background

The defendant was the victim's uncle. T 106. In 2001, the victim's mother, the victim's father, the victim and her two sisters all moved to a trailer on Fenton Hill in Ashuelot Village, Winchester. T 110. The victim had just turned three years old. T 111. When the family moved into the trailer, the defendant was living in New York. T 112.

In 2007, the defendant and his wife moved into the "Fenton Hill complex." T 113. "[T]hey lived in a camper right outside" the victim's family's trailer. T 120. The children could sleep with the defendant and his wife "[w]henever they wanted to." T 123.

The trailer belonged to the mother's grandmother. T 111. The Bashaws, who were the mother's aunt and uncle, owned the land and another trailer next door. T 111. The victim's family paid rent to the Bashaws. T 114. At some point, the defendant and his wife began collecting the rent. T 114. When the Bashaws died, the defendant's wife inherited the property. T 112.

The defendant and his wife loaned the victim's family money and split the cost of the children's school clothes with the victim's parents. T 125. On two or three occasions, the defendant paid for the family to go to Canobie Lake. T 125. He made improvements to the trailer. T 126, 152.

2. The Victim's Testimony

At the time of trial, the victim was twenty years old. T 161. She lived in the Fenton Hill trailer for most of her life until August 2017 when she signed a lease for an apartment in Winchester. T 162. When she was little, the defendant would come to visit the family and, because he lived in New York, "it was a real big thing when he came to visit." T 163. He drove a tractor trailer and, when he visited, he would let the children sleep in it. T 163.

When she was five or six years old, the defendant and his wife were coming to visit and the children were excited. T 166. The defendant and his wife arrived after the children had fallen asleep and went to bed on a futon in the living room of the trailer. T 166. The victim woke first the following morning and went into the living room where the victim and his wife were sleeping. T 166. She sat down on the futon next to the defendant and, when he woke, he laid her down so the she was next to him. T 167.

The defendant started "rubbing [her] crotch area over [her] pants." T 168. He asked her if she liked it and she said "no." T 168. He then moved his hand under her clothing. T 168. Again he asked if she liked it and again she said "no." T 168. The defendant "didn't stop until the other siblings woke up shortly thereafter and they all came storming out." T 169. The defendant "whipped his hand away" and the victim went to her room. T 169. The victim did not tell anyone because she was "confused" and "didn't know what any of it meant." T 170.

On another occasion, when she was seven or eight, the victim had a "sleepover in the [defendant's] camper." T 173. The victim's sister wanted to have a sleepover and the victim did not think that the defendant would assault her again. T 174. The victim was wearing "these purple footy pajamas; they had monkeys all over them." T 176. She fell asleep and when she awoke, the defendant was unzipping the front of her pajamas. T 176. She tried squeezing her legs, but the defendant "forced his way in." T 178. He asked her if she liked it and, when she said "no," "he got more rough" with his hands on her "privates." T 178.

When he stopped, she zipped up her pajamas and ran inside to go to the bathroom. T 179. When she told the defendant that she needed to go to the bathroom, he told her that she had "better keep [her] mouth shut and come back to the camper when [she] was done." T 179-80. The victim went into the bathroom in the trailer and cried, but did not tell anyone. T 181. The victim knew that the family was dependent on the defendant. T 181. And he told her that she would "get taken away from [her] family" if she told. T 181.

When the victim was in the eighth grade, the victim was getting dressed in her room when one of the family's cats "darted near [her] door." T 186. The victim "covered up" because she thought someone was coming, but when she did not see anyone, resumed dressing. T 186-87. When she turned around, the defendant was in her doorway. T 187. The victim sat down and covered her legs because she was wearing only underpants. T 187. The defendant entered her room and removed the blanket over her legs. T 187-88. He started touching her vagina and telling her that she was beautiful. T 188. "[H]e actually managed to stick" "a small part of his

finger inside" her. T 188. She told him to stop and tried to grab his hand, but she could not prevent him. T 189. When she cried he told her that "if [she] screamed, he'd give [her] a reason to scream." T 189. He left and the victim dressed and went to school. T 189-90.

When the victim was almost 15 years old, the defendant assaulted her again. Her mother was outside doing laundry and her sister was on the computer, wearing headphones, facing away from the victim. T 190. The victim was seated on the couch watching television. T 190-91. The defendant was sitting next to her and "he rubbed [her] lap and whispered in [her] ear asking if [she would] let him do what he wanted to [her] if he gave [her] money." T 191. She whispered back that she "knew [that she] wouldn't lose [her] family and that wasn't how it worked anymore, and if he touched [her] again, [she] would tell [her] father and he would go to jail." T 191. After that, the molestation stopped. T 191-92.

3. Other Witnesses' Testimony

At the time of trial, the victim's youngest sister was 18 years old. T 144. She recalled that she and the victim slept in the defendant's camper "quite often." T 148. They sometimes slept in a bed above the bed used by the defendant and his wife; on other occasions one of the girls would sleep in the same bed as their aunt and uncle. T 150.

Edward Lake lived in Ashuelot Village in Winchester in an apartment that looked over the Common. T 48. Children gathered on the front steps of the library, which was near the Common, to wait for the school bus. T 48. Lake's children were in school with the victim and her siblings. T 49. In February 2009, Lake noticed that the defendant was

driving the victim and her siblings to the bus stop each morning, T 49-50. The defendant would wait with his car running, over time "pretty much the entire bus stop was getting in the [defendant's] car." T 51. Lake "reported" this. T 51.

At the time of trial, Brian Favreau was engaged to the victim. T 58. He met the victim when they were both in elementary school. T 58. In their sophomore year in high school, the victim told Favreau that the defendant had molested her "as a child from a young age, all the way up to preteens." T 69-70.

On August 29, 2018, Winchester Police Detective Michael Carrier interviewed the victim. T 77. She told the detective that the defendant had molested her from the time that she was seven or eight years old. T 79. The victim agreed to make an authorized "one party" call to the defendant. T 80-81. On November 13, 2018, she made the call. T 83. The defendant told her that he wanted to record the conversation. T 81. The court admitted a CD of the recorded conversation as a full exhibit and the State played it for the jury. T 83. The defendant did not admit to the abuse during the call. T 99.

At the time of trial, Heather Dubriske worked for Child Protective Services. T 104. On August 20, 2018, she received "an anonymous report of concern" involving the victim's family. T 104. On August 21, 2019, she and the Winchester Chief of Police went to the victim's family's home on Fenton Hill in Ashuelot. T 105.

B. Jury Selection

When jury selection began, the trial court told the panel:

> [I]t's alleged that during a time frame back in 2000 - roughly between 2004 and 2009, that he engaged in sexual acts with a young girl, okay? So that's enough for right now, a general description of the charges, and he's pled not guilty and denies that charges.

JT 4. The court then asked a series of questions, which included the following: "Do you believe that you or any member of your family or anyone close to you have ever been a victim of sexual abuse, sexual assault, or attempted sexual assault?" JT 10-11. The court continued:

> Do you, or any member of your family, or anyone close to you, work to provide support and/or services to victims of sexual abuse?
>
> Is there anything in your history, your family history, or your day-to-day experience that prevents you from being fair and impartial towards an individual who has been accused of committed or attempting to commit a sexual assault?
>
> Is there anything in your history, your family history, or your day-to-day experience that prevents you from being fair and impartial towards an individual who has been accused of sexually assaulting a child?
>
> Lastly, do you know of any reason whatsoever why you cannot sit and hear the evidence in this case and render a true and honest verdict under your oath as a juror according to the facts as you find them to be in accordance with the law as the Court will give it to you?

JT 11. If these questions produced any "yes," answers, jurors were instructed to provide those answers at the bench. JT 7.

D.B., the first prospective juror, approached the bench, said that he had been sexually assaulted, suffered flashbacks, and could not serve. JT 12. D.B. was excused. JT12. The next prospective juror, A.N., knew the victim and her sister and was excused. JT 13.

J.C. followed. J.C.'s sister had been molested. JT 14. He also thought that he might know the victim's family. JT 14. After questioning, he was not sure if the person he knew was part of the same family. JT 14-15. And, after further questioning, it turned out that the sister had been molested 30 years before and J.C. did not "know the whole story" because he was young. JT 16. The defense made a motion for cause, but the court denied it. JT 19-20.

A.D. approached next. JT 21. She had a stepson with an alcohol problem and had told A.D. that he had been raped. JT 21. The court found A.D. qualified without objection. JT 25-26. The fifth juror, V.K, recounted being assaulted as a child and the court granted the defendant's motion to strike the juror for cause. JT 33-34.

P.S. had no "yes" answers and was seated. JT 34.[2]

S.L. followed. He knew Detective Carrier. JT 35. S.L. said that the detective was on the Board of Selectmen in Hinsdale and that he knew the family. JT 35. Asked if he could remain impartial if Detective Carrier testified, the juror responded, "I believe I could, yes." JT 36. The juror acknowledged that he was close friends with Detective Carrier's father-in-

[2] After J.S. was seated, defense counsel told the court that the defendant thought that he had worked with the juror. JT 43. The juror, however, said that she did not recognize the defendant and was left seated. JT 43-44.

law, that the detective's wife had taught the juror's children, and that the juror himself was on the Hinsdale School Board. JT 37.

The court asked S.L. to step back and then asked the lawyers what role Detective Carrier would play in the trial. T 38-39. Defense counsel said that the detective would be "the only witness that's going to testify from police, unless they also called [another officer]." JT 39. Defense counsel pointed out that the detective had overseen the "one party" telephone call. JT 39. The court asked if the defense was "moving for cause?" JT 39. Defense counsel responded, "Yeah. I mean, I think that because he's the only witness really from law enforcement that the State is going to put on, his impact, even though he's not an opinion witness or an eyewitness, I think that his impact is magnified in this case." JT 39.

The court asked if the detective would be testifying to "disputed facts," and defense counsel responded that, as a witness, Detective Carrier would "endorse the State's fact." JT 40. The State responded that it "didn't hear much in the relationship; they work on boards together." JT 40. The court responded:

> I'm going to deny the motion for cause. I think his answers were very honest, his demeanor - I mean, he had a professional relationship; it's a small town, there's going to be overlap. He doesn't know him, he doesn't personalize, go to his house, or anything like that. So I don't think there's a sufficient grounds for cause.

JT 41.

A.R. followed and was excused after telling the court that she had "lived physical and mental abuse all [her] life with [her] father." JT 42. The next juror, K.O., had no "yes" answers and was seated. JT 43. The next

prospective juror, M.S-G, had transportation issues and was placed on reserve. JT 46-47.

P.G. came next. JT 48. P.G. had a nephew who was sexually assaulted by his father and "it got really ugly." JT 48. Although her parents had raised the nephew, she did not "think it would be a problem for [her]." JT 48. Later on, however, P.G. expressed uncertainty about her ability to be objective, JT 53-54, and defense counsel moved to strike her for cause, JT 54-55. The State did not object and the juror was excused. JT 55.

T.W. followed. JT 55. He had a son who was in law enforcement and a second son who had pleaded guilty with "felony assault." JT 55-56. The son who was in law enforcement was "a Trump supporter and [they would] get into heated conversations about politics," but they did not discuss his cases or his work. JT 60-61. The court seated the juror. JT 61.

A.K. came to the bench next. She knew one of the witnesses, had a daughter who had been sexually assaulted, and had been diagnosed with cancer. JT 61-62. She was excused. JT 62.

The next prospective juror, C.C., had been molested from age two until the age of twelve. JT 63-64. She had also been a foster parent to children who had been molested. JT 64-65. The court excused C.C. JT 66.

B.P-S came forward next. JT 66. Her husband had been sexually assaulted. JT 67. She was a retired school nurse. JT 69. She said that she "knew of students who had been abused," but that the school had a counselor who responded to those students. JT 70-71. She said that she tended to believe children. JT 71-72.

The defense moved to strike the juror for cause. JT 72. The court responded that it would deny the request because the court did not "like it when lawyers start cross-examining the jurors." JT 73. The court stated: "I don't think there's enough to strike her for cause. If that were true, no one that works in a high school would be able to serve as a juror. No one that works [as] a nurse would be able to serve." JT 73.

Next, H.H. was excused after telling the court that she thought that the defendant was guilty. JT 74-75. J.D., who followed, was excused because his grandmother was "always talking about" the victim's family. JT 76. Both the prosecutor and defense counsel agreed that the juror's knowledge of the family was "too close" and the court excused the juror. JT 81-82. The next juror, H.L., had brother and a stepfather who were incarcerated for "sex crimes" and he had "heard a lot of horror stories." JT 83. He was excused. JT 83.

The court held A.S. "in reserve" because she had a two year old at home and a "preemie" who was still nursing. JT 84-85, 86. M.B. was the father of three small children and had a nephew who had been charged with sexual assault. JT 87-88. He wondered if his son had been a victim. JT 88. The court excused him. JT 88. The next two prospective jurors, C.F. and R.C., had no "yes" answers and were seated. JT 89-90. The court did not have a completed juror questionnaire for P.M., who returned to the panel so that the court could get a copy. JT 90-91.

L.G. came forward next. L.G. had a son and an ex-significant other who had been police officers, but she told the court that she could be "fair and impartial." JT 91-94. She had also worked in a school, was a mandatory reporter of sexual abuse, and had been involved in one case that

did not result in a conviction. JT 95-96. She felt that the child "wasn't advocated" for properly. JT 96. Defense counsel asked the court to excuse the juror, but the court declined to do so. JT 98-99.

J.L. had no "yes" answers and was seated. JT 100. K.B. had an ex-brother-in-law who was also an ex-police officer. JT 101. He was physically abusive to her sister's children. JT 102. The court seated her without objection. JT 105.

L.A. approached next. She had been sexually assaulted and had worked with sexually abused children. JT 105-06. The court asked, "Do you think this is too much for you?" and she responded, "Yeah." JT 106. She was excused. JT 106.

R.P. followed. He had a daughter who had been arrested for sexual misconduct with a minor. JT 107. "She was pregnant, her boyfriend was under 16." JT 107. He had also been a firefighter and had worked for a funeral home and had seen "a lot of things." JT 108. He thought that it was "[h]ard to say" how these experiences would affect his judgment. JT 108. The court then explained that the case would not involve much forensic evidence or photographs. JT 112. The court said that the trial would be "just people testifying" and no "pictures of, like, stab wounds, and stuff like that." JT 113. The court then asked, "Does that make you feel better about your ability to serve?" and the juror responded, "Yeah." JT 113.

Defense counsel asked the court to dismiss R.P. for cause. JT 114-15. She argued that R.P.'s work experiences had changed his "perspective" and that he lacked objectivity. JT 115. The court denied the request, noting, "[T]hat's why I gave him some more information about the cases

[sic]," and that "this is not likely [to] rekindle his work experience." JT 115.

K.P., the next prospective juror, had a brother-in-law was a retired detective who lived in California and taught law enforcement classes there. JT 116. The juror was "neutral" about the criminal justice system. JT 117. She said that she thought "pretty highly of law enforcement," and was not certain that she would be objective, however. JT 118. She agreed, however, that she would give a defendant the benefit of the doubt. JT 119-20. She took the next seat. JT 119-20.

B.G. had no "yes" answers and was seated. JT 120. The next juror, M.C., was quickly excused for reasons not provided on the record. JT 120-21. The next juror, J.A., had a 23-year-old daughter with Down Syndrome and was concerned about her schedule as an elementary school cook. JT 121-22. The defense made a motion to strike for cause and the State did not object. JT 123. J.A. was excused. JT 124.

A.L. had a mother who was molested as a child. JT 124. A.L. also had three daughters and said that the case made her feel "biased." JT 124. The court excused her. JT 125.

J.L., the next prospective juror, had an uncle who was a retired police officer. JT 125. He acknowledged that he was more likely to believe a police officer and the court excused him. JT 128-29. Potential juror R.G. was married to a recently retired SANE nurse. JT 129. He said he thought that her former occupation "might" affect his view of the case. JT 130. The court excused him. JT 133.

A.I. had no "yes" answers and was seated. JT 133. A.J., who followed, explained that she worked with developmentally disabled adults,

some of whom had been sexually abused. JT 134. She told the court: "I assume that he's guilty." JT 136. She was excused. JT 136.

A.A. came forward next. He knew a great many police officers from a wide range of towns because he worked at a village store that sold doughnuts. JT 137. He said his father had been sexually molested as a child and had committed suicide. JT 139. He felt that the testimony in the case would be too emotional for him and was excused. JT 139-40.

The next prospective juror, W.C., "haul[ed] water at night" for Niagara and thought that he would fall asleep during the trial. JT 141. He was excused. JT 141. The next juror, R.W., had a daughter and granddaughter who were molested and he felt that "the system failed [his] daughter completely." JT 141. He said that his "impartiality might be limited." JT 143. He was excused. JT 143.

W.O. then came forward. He had uncles, cousins, and a nephew in law enforcement, but was seated after he stated that he could be neutral. JT 144-46.

K.H. was questioned next. He thought that he had read the defendant's name in the newspaper, but could not remember the details. JT 146. He added that he was the father of a young daughter and, if the State could prove its case "beyond a reasonable doubt," he would gain by getting "a predator off the street." JT 146-47. He would do his best to listen to the other jurors and "stick to the facts." JT 149. Defense counsel then asked K.H. if the evidence was "50-50," how he would vote. JT 149. The juror responded, "I guess I'm having trouble considering a scenario where it would be 50-50." JT 149. The juror acknowledged that he might be

influenced by concern for his daughter. JT 150. The defense moved to strike for cause and the court denied the request. JT 150.

The final prospective juror, B.A., explained that he fidgeted, but that he could "do the job." JT 152. He took the last seat. JT 153.

After the lawyers conducted *voir dire* with the newly seated prospective jurors, the parties exercised their peremptory challenges. *See* JS 1. The defendant struck prospective jurors J.C., C.F., and R.P. The State exercised peremptory strikes on prospective jurors T.W., A.I., and K.H. JS 1.

SUMMARY OF THE ARGUMENT

The trial court acted within its discretion in declining to dismiss the five jurors for cause. The court was persuaded that each juror could be impartial. The trial court assessed each juror's demeanor in answering questions. Further, the panel *voir dire*, conducted after the individual voir dire, demonstrates that a fair and impartial jury tried and convicted the defendant.

This Court may review the DCYF counseling records submitted to the trial court to determine if additional records should have been disclosed.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S MOTIONS TO STRIKE AS ALL THREE JURORS WHO SAT ON THE JURY WERE IMPARTIAL.

At the outset, the defendant describes two different approaches toward a trial court's denial of a motion to strike. DB 17-19. The first is that, if a defendant makes a motion to strike a juror for cause, and the trial court denies the motion, the error is "cured" if the defendant then uses a peremptory challenge. DB 17. If the defendant foregoes the challenge, and an unqualified juror sits on the juror, reversal results. DB 17. The second approach is that if defense the has the opportunity to challenge a juror and, instead, allows the juror to sit without exercising a peremptory challenge, the claim is waived. DB 18.

The defendant points out that this Court has adopted the first approach, *i.e.*, if a defendant strikes a juror that the court has declined to strike for cause, he has "cured" the trial court's error. DB 17-19; *see also State v. Addison*, 165 N.H. 381, 449-52 (2013). The defendant asks this Court to "reaffirm its adherence to [this] approach." DB 20. The State does not disagree.

As a result, the relevant inquiry is to the qualifications of three jurors who sat: J.C., S.L., and B.P-S.

A. Standard

"It is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury." *State v. Goupil,* 154

N.H. 208, 218 (2006) (quotation omitted). "Generally, a juror is presumed to be impartial." *State v. Addison* (the Roy Drive case), 161 N.H. 300, 303 (2010) (citing *State v. Rideout,* 143 N.H. 363, 365 (1999)). "When a juror's impartiality is questioned, however, the trial court has a duty to determine whether the juror is indifferent." *Id.* "[I]f it appears that any juror is not indifferent, [the juror] shall be set aside on that trial." *State v. Weir,* 138 N.H. 671, 673 (1994) (quotation omitted). However, "[i]t is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Qualified jurors need not "be totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). Jurors "need not enter the box with empty heads in order to determine the facts impartially." *Skilling v. United States*, 561 U.S. 358, 398 (2010)

"[T]he manner in which *voir dire* is conducted is wholly within the sound discretion of the trial court." *State v. Wamala,* 158 N.H. 583, 594 (2009) (quotation omitted). "It is well settled that whether a prospective juror is free from prejudice is a determination to be made in the first instance by the trial court on *voir dire.*" *Addison* (Roy Drive)*,* 161 N.H. at 303 (citing *State v. Gullick,* 120 N.H. 99, 102 (1980)). This Court "will not disturb the trial court's ruling absent an unsustainable exercise of discretion or a finding that the trial judge's decision was against the weight of the evidence." *Addison* (Roy Drive), 161 N.H. at 303; *see also Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991) (trial court's findings of juror impartiality may be overturned only for "manifest error") (citation omitted). "No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*." *Skilling*, 561 U.S. at 386.

B. The Three Seated Jurors

To place jury selection in perspective, the court questioned 33 prospective jurors. The court dismissed 12 of them because they knew a witness well, had been subjects of sexual abuse or other trauma, or had stated that impartiality was an impossibility. As a result, the trial court was open to dismissing jurors and did so. *See State v. Bailey*, 127 N.H. 416, 422 (1985) (noting that the trial court had "no general reluctance to excuse for cause, for he had just done that a dozen times"). With respect to the three seated jurors, the record is clear that they were impartial.

First, S.L. knew Detective Carrier. JT 35. S.L. said that the detective was on the Board of Selectmen in Hinsdale and that he knew the detective's family. JT 35. Asked if he could remain impartial if Detective Carrier testified, S.L., "I believe I could, yes." Tr.: 36. Defense counsel argued that the detective would be "the only witness [that was] going to testify from police, unless they also called [another officer]." JT 39. Because the detective was going to be the only law enforcement officer called, defense counsel argued, his testimony would be "magnified in this case." JT 39.

The court made a credibility determination, finding that S.L.'s answers were "very honest," that he had "a professional relationship" with the detective and that it was "a small town" where there would be "overlap." JT 41. This was an appropriate credibility determination. *See, e.g., Commonwealth v. Murphy*, 797 N.E.2d 394, 402 (Mass. Ct. App. 2003) ("[T]he mere fact that a juror knows a police officer or prosecutor, or is related to them, does not disqualify a juror from service or show any

bias."); *see also State v. Sharrow*, 949 A.2d 428, 432 (Vt. 2008) ("[k]nowing a witness does not automatically require removal of a prospective juror"); *see also id.* at 436 (noting the "attenuated" relationship between the juror and police officer who would testify). His passing acquaintance with the detective was not a reason to disqualify him. Cf. *Davis v. State*, 494 S.E.2d 702, 705 (Ga. Ct. App. 1997) (fact that juror's children knew father of sexual assault victim was not basis for striking the juror for cause).

But it was also clear that the detective would not be testifying to what the court characterized as "disputed facts." JT 40. Indeed, during cross-examination at trial, defense counsel pointed out that the defendant had not confessed to the sexual assaults during the "one party" call and the detective agreed that he had not. T 99. Throughout most of his cross-examination, Detective Carrier simply agreed with defense counsel. T 87-100. If the juror gave Detective Carrier's testimony greater credibility, it would have been to the testimony of the detective as he was agreeing with defense counsel. Indeed, the detective's direct testimony drew only three objections from the defense. T 78, 82, 86.

B.P-S was a retired school nurse. JT 69. Her husband had been sexually abused, but she did not think that this would affect her consideration of the evidence. JT 68. She said that she "knew of students who had been abused," but she did not have much contact with them. JT 70. She said that she tended to believe children. T 71-72. The court rejected the defendant's motion to strike, telling defense counsel that it felt that the juror would follow the court's instructions and that she would be impartial. JT 73. The inclination to believe children, the court observed,

was "a personal position with a lot of people." JT 73. *Cf. State v. Burse*, 169 So.3d 649, 654 (La. Ct. App. 2015) (trial court did not abuse discretion in declining to strike juror who said that she believed children); *see also State v. Sainave*, 185 S.W.3d 704, 707 (Mo. 2006) (A juror's response the she believed children did not mean "that she would not treat the evidence in the case fairly or believe one side's case and not the other's.")..

The court discounted some of the statements the juror made because defense counsel was asking leading questions that suggested the answer.[3] JT 73. This was a perfectly appropriate consideration by the court. *See Murphy v. Florida*, 421 U.S. 794, 801-02 (1975) (juror's response "in light of the leading nature of counsel's questions and the juror's other testimony" did not require removal for cause). The trial court also relied on the juror's demeanor in denying the motion. JT 73. Again, this is the kind of credibility determination that is within the trial court's discretion. *Addison* (Roy Drive), 161 N.H. at 303.

Finally, L.G., had a son and an ex-significant other who had been police officers, but she told the court that she could be "fair and impartial." JT 91-94. She had also worked in a school, was a mandatory reporter of sexual abuse, and had been involved in one case that did not result in a conviction. JT 95-96. The court asked, "Do you think that experience

[3] Defense counsel asked a lot of leading questions. See, e.g., JT 17-18 (Asked of J.C. "So your sister has been talking to you about it recently as an adult?"); 119 (Asked of K.P.: "[I]f there was a class of people called criminals, what do you feel about them?"); 149 (Asked of K.H.: "But in terms of my question and if it was just you and not in conjunction with other jurors, what do you think you do in that situation? If it was 50-50, would you want to err on the side of caution?").

would affect your ability to be fair and impartial in this case?" JT 96. She answered "no," but with "a little bit of apprehension," because felt that the child "wasn't advocated" for "properly." JT 96. She added, "I would do my best here to do what's right and answer honestly to my heart." JT 96.

Questioned by defense counsel, L.G. added that the child's family did not wish to pursue a prosecution because a family member was accused. JT 97. Defense counsel asked the court to excuse the juror, arguing that L.G. "didn't express a certainty that she could be fair." JT 98. The court responded that it was "about to disallow leading questions." JT 98-99. The trial court acted within its discretion in considering the kind of question that prompted an answer that the defense then tried to use to exclude the juror. *Murphy,* 421 U.S. at 801-02; *cf. McFarland v. State*, 707 So.2d 166, 174 (Miss. 1997) (Trial courts should avoid asking "leading questions during *voir dire*, for such questions 'are the tool of advocacy, not neutrality.'").

The defendant now argues that, under *State v. Town*, 163 N.H. 790 (2012), the court should have granted the challenge for cause. DB 24. But *Town* is distinguishable. In *Town*, the juror had actually been a victim of sexual assault. *Town*, 163 N.H. at 794. She told the court that she thought that she "need[ed]" to sit on the jury. *Id.* She "repeatedly reiterated that she was 'not sure whether she could be fair and impartial." *Id.* Her statements to the trial court that she would "try" to be impartial were, in this Court's view, insufficient to assure impartiality. *Id.*

In contrast, L.G. had not been the victim of a sexual assault, although that alone would not have required her disqualification. *See United States v. Lowe*, 145 F.3d 45, 48-49 (1st Cir. 1998) (trial court

committed no error in seating two jurors who had been sexually assaulted). L.G. had done a "write up" of a single case involving a sexual assault. She was not interviewed by law enforcement. She did not "need" to sit on the jury.

Unlike the juror in Town, L.G. did not want to sit on the jury for her own personal reasons. The Town juror "needed" to sit on the jury apparently to help her, but L.G.'s responses suggested nothing of that sort. L.G. approached the *voir dire* and jury service without a personal agenda and, as a result, the court, in making its credibility assessment, determined that she was qualified.

It seems likely that L.G. had never sat on a jury. *See, e.g., State v. Noltie*, 786 P.2d 332, 335 (Wash. Ct. App. 1990) (finding that juror's "answers merely reflected honest caution based on her lack of prior jury experience"). Moreover, L.G. might have been uncertain because she had little experience with the law. *See People v. Clemens*, 401 P.3d 525, 529 (Col. 2017) ("The purpose of challenges for cause, as relevant here, is to remove jurors who have shown bias or enmity toward one of the parties, not jurors who simply enter the courtroom with a misunderstanding of the law.").

The defendant states that the panel *voir dire* after the potential panel was seated, but before the peremptory challenges were exercised, was "spirited." DB 14. It was, indeed, a thorough *voir dire*, particularly in light of the fact that the questioning lasted for 34 minutes and takes up 36 pages of transcript. JT 154-90. Of that questioning, the prosecutor asked eight pages of questions. JT 154-62. Defense counsel had the floor for the remaining 28 pages.

During that questioning, jurors[4] told defense counsel: (1) that sexual assault cases were difficult cases, JT 163-66; (2) that sexual cases involving children were particularly difficult, JT 166-67; (3) that the age of the child mattered because of the possibility of consent, JT 168; (4) that it was possible that a person would lie and the jury had "to hear the evidence" before deciding, JT 169-72; (5) that there were a number of reasons a person might lie, JT 172-74; (6) that a child might confide in a close friend, law enforcement, or a relative, JT 175-76; (7) that, if charged with a crime, a number of jurors would want to testify, but there were good reasons for a defendant to decide not to testify, JT 176-83; (8) that no juror thought that a defendant should be required to testify, JT 184; (9) that the burden of proof was on the State, JT 186; and (10) that the defendant was innocent until proven guilty, JT 186-88 (UNIDENTIFIED JUROR: "Innocent until he's proven guilty. That's why we're sitting over here." JT 188).

In short, the responses given by the potential jurors demonstrates that the penultimate panel seated by the court understood the gravity of the charges and the difficult task that lay ahead, as well as the presumption of innocence. *Cf. Sainave*, 185 S.W.3d at 708 (noting that, during the general questioning of the panel, no juror expressed doubt that he could decide the case fairly and impartially); *see also Clemens*, 401 P.3d at 531 (discussing jurors lack of disagreement with a defendant's right not to testify during panel *voir dire*). The defendant's jury was fair and impartial and the court committed no error in declining to strike the three challenged jurors who sat on it.

[4] Each juror who responded was called "unidentified juror" in the transcript.

C. The Jurors Struck by the Defense

The defendant argues that, if this Court abandons the approach taken in *Addison*, 165 N.H. at 449-52, then the trial court should have struck R.P. and J.C. DB 32. The defendant contends that, by requiring the defendant to use two of his peremptory challenges on these two jurors, it deprived him of striking the jurors he might have otherwise struck. DB 17.

As the defendant notes, this approach has been rejected by this Court, as well as by the United States Supreme Court. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) ("[A] defendant's exercise of peremptory challenges… is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause."). The defendant as not asked this Court to abandon the *Addison* analysis in favor of this one. Setting aside this legal hurdle, neither juror should have been excused for cause. The defendant had an impartial jury.

First, there was no reason to dismiss either juror for cause. Although J.C.'s sister had been molested 30 years before, J.C. did not "know the whole story" because he was young at the time. JT 16. J.C. told the court that he was "just being honest." JT 17. His sister did not "really get into the specifics." JT 17. The court was "satisfied with his answers at this time." JT 20. This is exactly the kind of credibility determination that trial court's are given the discretion to make. *Addison* (Roy Drive), 161 N.H. at 303; *see also State v. Gribble*, 165 N.H. 1, 17 (2013) ("The trial court's determination of the impartiality of the jurors selected, essentially a question of demeanor and credibility, 'is entitled to special deference.'")

(quoting *State v. Smart*, 136 N.H. 639, 653 (1993)); *State v. Thomas*, 124 S.3d 633, 636 (La. Ct. App. 2013) (court was not required to strike juror whose sister had been raped four or five years earlier).

For his part, R.P. had a daughter who became pregnant and her boyfriend was under the age of 16, clearly not the situation presented in this case. JT 107.

He was also concerned that his work as a firefighter and a funeral home director might affect his view of the evidence. JT 108. After the court explained that the case would include testimony, but would not have graphic pictures, R.P. said he felt better about sitting on the jury. JT 112-13. Rejecting the defense motion to strike the juror, the court responded that the trial was "not likely [to] rekindle his work experience." JT 115. This line of questioning was entirely appropriate. *Cf. State v. Hofacker*, 2016 WL 561363 (Ohio Ct. App. Feb. 12, 2016) (A "trial court can properly rehabilitate a juror by correcting misconceptions and verifying that the juror can put aside the juror's personal experiences and be fair and impartial.") (unpublished)).

In short, the trial court did not exceed its discretion in declining to dismiss the two jurors discussed here. Each juror impressed the court with his candor and willingness to consider the evidence fairly and impartially. The *voir dire* of the penultimate panel demonstrates that the jurors were committed to holding the State to its burden of proof and giving the defendant the benefit of any doubt. The trial court committed no error.

II. IT IS WITHIN THIS COURT'S DISCRETION TO REVIEW THE COUNSELING RECORDS.

The defendant also asks this Court to review the records from the Division of Children, Youth, and Families (DCYF) to determine if the trial court erred in withholding any records. DB 38. It is within this Court's discretion to review the DCYF records to determine "that the withheld portions of the records contain no information that would have been of assistance to the defense and that the trial court sustainably exercised its discretion in ordering the records redacted prior to disclosure." *State v. Alwardt*, 164 N.H. 52, 58 (2012).

CONCLUSION

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

The State requests a 10-minute 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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July 17, 2020

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,346 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.

July 17, 2020 /*s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

July 17, 2020 /*s/Elizabeth C. Woodcock*
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