THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0682

State of New Hampshire

v.

Steven M. Clark

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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Issue preserved by Clark's motion in limine to exclude the evidence, A 44*, the parties' arguments, H 4–16, and the court's ruling, AD 3.

2. Whether the court erred by admitting evidence that Clark showed pornographic images to his minor nephews.

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3. Whether the court erred by failing to disclose DCYF records submitted for in camera review.

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* Citations to the record are as follows:
"A" refers to the separate appendix containing documents other than the appealed decisions;
"AD" refers to the separate appendix containing the appealed decisions;
"H" refers to the transcript of the motion hearing on July 24, 2019;
"JS" refers to the transcript of jury selection on July 29, 2019;
"T1," T2," etc., refer, by volume number, to the transcript of trial on July 30 to August 5, 2019.

STATEMENT OF THE CASE

In August 2018 and April 2019, the State obtained from Strafford County grand juries seven indictments charging Steven Clark with aggravated felonious sexual assault (AFSA), one indictment charging him with attempted AFSA, and one indictment charging him with felonious sexual assault (FSA). A 4–12. My.B. and M.B. were the alleged victims of the sexual assaults. A 4–12. With the agreement of the parties, the case was transferred to the Rockingham County Superior Court. During a five-day trial from July 30 to August 5, 2019, the court (Delker, J.) dismissed two AFSA indictments for insufficient evidence, T3 500–01, and the jury found Clark guilty of the remaining seven indictments. T5 803–05. In November 2019, the court sentenced Clark to ten to twenty years on the AFSA and attempted ASFA convictions, and to three-and-a-half to seven years on the FSA convictions. A 50–63. Three of the AFSA sentences were stand committed and consecutive, with the opportunity to suspend the minimum of one upon successful completion of sex offender treatment. A 50–56. The other four sentences were suspended, concurrent with each other but consecutive to the stand-committed sentences. A 57–64.

STATEMENT OF THE FACTS

Steven Clark met his wife, Stephanie, in college, in 2004. T3 530, 618. They were engaged in 2010 and married in 2012. T1 57–58, 180, T2 320, 424, T3 438–39, 531, 536, 630, T4 726.

From 2010 until 2014, Clark and Stephanie lived with Stephanie's parents in Somersworth. T1 59, 140, 143, T2 423, 426–27, T3 466, 533, 554–55, 589, 625–26, T4 726. They slept in a bedroom in the basement. T1 59, 183, T2 426–27, T3 466, 537, T4 726.

Stephanie had two older brothers, Richard and Chris, who were each married with children. T1 56, 141, 172, 174, 179, T2 422–23, T3 438, 487–88, 558, 568, T4 663–64. Richard and his wife had two sons, Be.B. and Br.B., born in the early 2000s. T1 57, 175, T2 316–17, 423–24, T3 437, 559, T4 664. Chris and his wife, Heather, had three daughters, Ma.B., born in 2001, My.B., born in 2003, and M.B., born in 2005. T1 46–47, 51–52, 138, 172, T2 322, 421–22, T3 438, 559, 664.

Heather sometimes "butt[ed] heads" with members of Chris's family. T3 478, 489–90. Once, during a vacation, Heather got in a fight with Chris's parents. T2 280, T3 478, 489. Heather sometimes fought with Stephanie as well. T3 478. Heather thought that Stephanie didn't like her when they first met. T2 273, T3 588.

Stephanie's brothers often brought their families to the Somersworth home to visit their parents. T2 55, 57, 60–62, 140, 149, 184, T2 325, T3 439, 561, T4 665, 687. They and their wives also sometimes dropped their children off to be babysat. T1 60–64, 140, 144, 182, 188, T3 467, 561, 565–66, T4 665. In the basement, next to the Clarks' bedroom, was a playroom with toys, video games and stuffed animals. T1 62–63, T3 562–63. With the exception of Ma.B., who was older and uninterested in playing with her younger sisters at the time, the playroom was popular with the children. T1 62, 143, 145, 163, 193, T3 448–49, 562, 594–95.

In January 2014, My.B. alleged to her father that Clark sexually assaulted her and M.B. T1 109–10, 197, T3 469–70. Chris informed Heather, who notified the Division of Children Youth and Families ("DCYF") of My.B.'s allegation. T1 111–12, 197–99, T3 470, 472. Following an interview at the Child Advocacy Center ("CAC"), however, Heather did not follow up with the police because My.B. and M.B. were in therapy and "were doing okay," Heather felt emotional when she thought about the allegations, and she "didn't want to keep stirring it up." T1 202, T2 300–01. Heather didn't hear anything from authorities until prosecutors called her in August 2018, over four years later. T1 203.

At trial, My.B. testified that, beginning in 2011 or 2012, at least once a week, Clark took her and M.B. into the Clarks'

basement office, showed them pornographic videos, had them take off their clothes and touch his penis, and touched their genitals. T1 47, 65–78, 80. My.B. also testified that Clark once inserted his finger into her vagina, T1 79, and once touched her breasts, T1 80–81. My.B. testified that, once, in the Clarks' bedroom, while M.B. was present, Clark ejaculated and told My.B. to lick his penis, which she refused, and then told her to touch his ejaculate, which she did. T1 82–83, 102. My.B. testified that she decided to tell her father about the assaults because she saw a puppet show at school about sexual abuse and Clark continued to assault My.B. and M.B. T1 105–09. M.B. did not testify.

Clark testified that, when he heard about My.B.'s allegations, he felt shock and disbelief. T4 675. He testified that he never showed pornography to the girls and never sexually assaulted them. T4 676–77, 728.

My.B. testified that, on at least one occasion, Br.B. was in the basement living room while Clark sexually assaulted her and M.B. in the adjacent office. T1 85–86, 95. She testified that the door between the rooms was open and that she could see Br.B. while the sexual assault took place. T1 85. Br.B., however, testified that he never saw Clark sexually assaulting My.B. or M.B. T3 440.

My.B. testified that Clark would stop sexually assaulting her and M.B. when he heard Stephanie coming

down the stairs. T1 79–80, 84. In the time it took Stephanie to descend the stairs, My.B. testified, Clark would turn the video off and pull his pants up, and My.B. and M.B. would put their clothes back on. T1 124–25. Stephanie, however, testified that she never saw or heard anything that caused her concern that Clark was acting inappropriately with My.B. or M.B. T3 583–86.

In addition to Br.B. and Stephanie, Ma.B., Heather, Chris and Be.B. all testified that they never saw Clark acting inappropriately with My.B. or M.B. T1 164–66, T2 299, 342, T3 486–87.

In her CAC interview, My.B. told the interviewer that she had an "eidetic memory," which, she explained, meant, "I remember everything that . . . I see . . . or hear." T1 116. At trial, she admitted that she didn't know what the word "eidetic" meant[1], adding, "I just saw it on a show and I thought I would be cool by saying it." T1 130–31.

On direct examination, My.B. testified that she and M.B. touched Clark's penis at "[t]he same time." T1 70. On

[1] To the extent that "eidetic memories" exist, they are a short-term phenomenon; "eidetic images are said to persist only for a maximum of about four minutes after the visual stimulus of which they are a memory has been removed from sight." Thomas, Nigel J.T., "Mental Imagery, Other Quasi-Perceptual Phenomena," The Stanford Encyclopedia of Philosophy (Fall 2020 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2020/entries/mental-imagery/quasi-perceptual.html (last visited December 29, 2020). However, "there is no scientific consensus regarding the nature, the proper definition, or even the very existence of eidetic imagery." Id.

cross-examination, Clark's lawyer impeached My.B. with a statement she made at the CAC, in which she said that she and M.B. touched Clark's penis at "at different times." T1 126–27. On redirect examination, the State elicited My.B.'s testimony that she and M.B. touched Clark's penis "during the same incident," but not "at the exact same time." T1 133.

On direct examination, My.B. testified that, during some of the assaults, she and M.B. took off their clothes, but during other assaults, Clark touched them under their clothes. T1 80–81. In two pretrial interviews with prosecutors, however, My.B. said that her and M.B.'s clothes were "always off" and that they were "completely naked." T1 123–24, 136.

My.B. testified that Clark told her and M.B. that if they told anyone about the assaults, he would kill them. T1 105. At the CAC, however, she said only that Clark said, "Don't tell anybody." T1 129–30. When the interviewer specifically asked, "[D]id [Clark] say what would happen if you told anybody," My.B. answered, "[N]o." T1 130.

My.B. testified that Clark found the pornographic videos he displayed on his computer by searching on Google. T1 66. Following My.B.'s allegations, the police seized 27 electronic devices from the Clarks. T2 362, 398, 406–08, T3 555–57. Although the police found a commercially-produced

pornographic DVD in an unfinished area of the basement, they did not find any pornography on any of the smaller electronic devices. T2 363, 365–66, 383–84, 396, 401, 409–12, 414, 418–19, T4 717. Due initially to technical problems and later to the denial of a search-warrant application, the police were not able to access the larger electronic devices, such as external hard drives and laptop and desktop computers. T2 362–63, 365–66, 384–85, 400, 402–04.

SUMMARY OF THE ARGUMENT

1. Evidence is inadmissible if it does not alter the probability of a fact of consequence, and even relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. Here, as the parties and the court agreed, evidence that an alleged victim of sexual assault, who did not testify, began to identify as male after the alleged assaults did not alter the probability that the alleged assaults occurred. Thus, the evidence was irrelevant, regardless of whether some witnesses might have been nervous about not disclosing it during trial. Even if the evidence was relevant, the danger that the jury would misattribute the change in gender identify to childhood sexual assault substantially outweighed any probative value.

2. Evidence of a defendant's other acts is not admissible to prove the defendant's character or propensity. Here, evidence that Clark showed his nephews pornography lacked any non-propensity relevance to the allegation that he sexually assaulted his nieces, and the danger of unfair prejudice substantially outweighed any probative value.

3. Due Process guarantees a criminal defendant the right to access exculpatory evidence. Following in camera review of confidential records, a trial court must disclose any records that are material and relevant. Here, the trial court may have erred by failing to disclose DCYF records.

I. THE COURT ERRED BY ADMITTING EVIDENCE THAT M.B., AFTER SHE WAS ALLEGED TO HAVE BEEN SEXUALLY ASSAULTED, BEGAN TO IDENTIFY AS MALE AND TO TRANSITION FROM FEMALE TO MALE.

The State initially included M.B. on its list of prospective witnesses. A 32. Shortly before trial, however, it informed Clark that it did not intend to call M.B. as a witness. A 45. However, it still intended to prosecute the indictments charging that Clark sexually assaulted M.B. A 45.

Clark filed a motion to exclude irrelevant testimony. A 44. He noted that, at some point during the years after My.B. alleged that Clark sexually assaulted her and M.B., M.B. began transitioning from female to male, chose a new name, and expressed a preference to be referred to with masculine pronouns. A 45. In light of the fact that M.B. would not testify at trial, Clark argued, evidence of his gender transition was irrelevant under New Hampshire Rules of Evidence 401 and 402. A 45–46. Evidence of the gender transition, Clark argued, "does not make any fact of consequence any more or less probable that it would be without the evidence." A 46. Clark also argued that the danger of unfair prejudice substantially outweighed the probative value of the evidence, under Rule 403, because the evidence "could have a great emotional impact on the jury," "appeal to a juror's sense of resentment or outrage," or "confuse the jury as to the issues before it." A 46.

At a hearing on the motion, the State told the court that at the time of the alleged sexual assaults, M.B. was referred to by her birth name and "identif[ied] as female." H 5–6. The court asked the State why the witnesses couldn't refer to M.B. as female, "because that is the state of events as they existed at the time of the allegations in this case." H 5. The State responded:

> Because it's not the state of events that exist for them. [I]t's so disrespectful to ask a family to wipe away a human's identity. They're respecting [M.B.] to refer to him as [M.B.'s chosen name] and to refer to him as male. And to ask them to pretend that a fact doesn't exist is completely disrespectful. It's dehumanizing, and I think it's going to be impossible —.

H 5–6. The prosecutor added, "I don't feel that I can ask his parents and his sister to force themselves to use female pronouns and to use [M.B.'s birth name] when that's not how they identify." H 6. The State did not argue that the change in M.B.'s gender identity made it any more or less probable that M.B. was sexually assaulted.

Regarding the State's "dehumanizing" argument, Clark noted that the State admitted that M.B.'s parents and sisters "slide back and forth" with the names and pronouns they use to refer to him, and that the police officers who would testify would use his birth name and feminine pronouns. H 4–7.

"[A]pparently," Clark observed, "[the State doesn't] have an issue with the officers dehumanizing [M.B.] or wiping away his identity." H 7.

Regarding the danger of unfair prejudice, Clark argued that "there is a possibility that the jury will think that [M.B.] is transitioning because of trauma in his childhood, because of sexual trauma in his childhood, [even though] the State is not going to have any evidence or experts to say that." H 8. "[T]here is a possibility," he added, "that [jurors] will think . . . that someone [who] is transitioning would only transition because of sexual trauma in their past." H 8.

The court suggested that the issue could be addressed through voir dire of the jury panel. H 8. Clark, in response, noted that "there's no probative value to this information." H 8.

The court then stated:

> [A]ll witnesses talk about who they are, who their family members are . . . who they live with. That's part of who the witness is. And it's part of what a jury is allowed to consider in deciding the full package of the witness, like who is this person that I'm asked to judge the credibility on, what is their life experience, and in this case, it is an event. It is an experience in these people's lives. And so to the extent that the witnesses refer to [M.B.] as [M.B.'s chosen name] and refer to him in the

> masculine pronoun or even do it interchangeably, that seems to be relevant to their life experience and a jury's ability to assess their testimony.

H 9. Clark responded, "[I]f [M.B.] were testifying, we would be in that spot, Your Honor. But [M.B.] is not testifying. He is not a witness in this case." H 9.

The court reiterated:

> [W]itnesses are asked all the time, ["]who are your siblings, who you live with, how old are they[?"] I mean, that's sort of a typical line of questioning in cases that allow juries to understand someone's life experience, generally, just I mean, sort of regardless of whether the siblings are testifying and where they are at in their life. That's sort of basic foundation about who the witness is that the jury's asked to judge.

H 9–10.

Clark responded:

> And we're not saying that they can't testify. I mean certainly, [My.B.], according to the State, is going to testify about [M.B.] and is going to testify about what she alleged that she perceived happening to [M.B.].
>
> The question is not whether she can testify about having a sister or a brother. We're not objecting to the existence of this individual. We're just asking that the Court instruct the

> witnesses to refer to him as [M.B.'s birth name], because at the time of these events, that was his name. And there is a risk of undue prejudice, which, yes, we could try to deal with it in voir dire, but there's no purpose in creating that risk. It's an undue risk when there is no probative value.

H 10. He reiterated, "The fact that [M.B.] now goes by [his chosen name] and he identifies as masculine doesn't corroborate any of the allegations in this case and is not alleged to be causally linked by Mr. Clark. And so there is no relevant purpose in this case." H 11. "[W]hy run the risk," Clark asked, "of having a juror think that because he's now transitioning, because he now identifies as a male, that there's some sort of trauma in his past?" H 13.

The State argued that M.B.'s gender transition was "a biographical fact," "not a piece of evidence that the State is seeking to introduce." H 11. It then argued that, "although [M.B.] may not be testifying, he's still a party in this case." H 13. It then repeated, "[M.B.] is very much a party to this case, although he's not going to be . . . walking [in]to this courtroom." H 13. It argued that Clark was "asking [the State's] witnesses to lie and force themselves to undo a truth and a reality in their heads." H 13.

The prosecutor stated, "I can almost guarantee you there will be a slip. And that makes it look worse, because

now we have to address it midtrial." H 13. The court asked Clark about the possibility that a witness may, "out of habit," refer to M.B. as a male or by his chosen name. H 14. "And now we're midtrial with that occurring and no opportunity to question the jurors about how they view that evidence. I mean, isn't it safer to head the issue off during voir dire and just deal with it head on?" H 14.

Clark responded by noting that M.B.'s chosen name can be either a female or a male name. Thus, the witnesses could simply refer to M.B. by his chosen name and refrain from using gendered pronouns. H 14.

The court stated that "the issue goes both ways," explaining that, "whatever my order is," witnesses were likely to make an unintentional mistake. H 15. Clark noted again that M.B.'s chosen name was unisex, so that if witnesses were instructed to refer to M.B. by one name, but a witness inadvertently used the other name, it would not suggest that M.B. now identifies as male. H 15–16.

The State reiterated its view that it would be "[r]eally unfair to ask . . . anybody in that family" to refer to M.B. as female, even when describing events that occurred when M.B. identified as female. H 16.

In its order on Clark's motion, the court began by claiming that its ruling would be unreviewable. AD 4. It asserted that the issue "embodies the very essence of the

need for judicial discretion," and thus, "[t]here is no right or wrong answer." AD 4. It stated that "the central role of the jurors is to judge the credibility of witnesses." AD 5. "Forcing [M.B.'s] family to refer to [M.B.] by an identity which is no longer their present reality," the court ruled, "introduces a level of artificiality to their testimony." AD 5. "It is likely," the court found, "that jurors will sense this discomfort or dissonance and incorrectly (or perhaps correctly) infer that the witnesses are hiding something." AD 5. "In this respect," the court concluded, "[M.B.'s] gender transformation is relevant to the juror's assessment of witness credibility, even if there is no evidence it has anything to do with the alleged sexual assaults." AD 5. The court also asserted that "excluding evidence of [M.B.'s] gender identity" would create "the risk of accidentally introducing potentially prejudicial evidence mid-trial." AD 5.

The court also refused to exclude the evidence under Rule 403. AD 4, 6. It found that "[Clark's] fear that jurors will [infer that M.B.'s gender transition has a connection with the accusations against Clark] can be mitigated through proper trial procedures such as voir dire and jury instructions." AD 6–7. The court ruled that it would pose two supplemental voir dire questions to the jury panel, and that it would grant the parties additional time during panel voir dire to question

potential jurors about their opinions about the issue of gender transition. AD 7.

At jury selection, the court posed the following questions to the jury panel:

> In this case, you will also likely hear evidence that one of the alleged victims identified as a female at the time of the alleged act, but now identifies as a male. Do you have any prejudices or strong feelings on the issue of gender identity which would affect your ability to be a fair and impartial juror if you're chosen as a juror on this case, based on this fact alone?
>
> [Y]ou will not hear any evidence in this case that the gender transition was caused by the Defendant's alleged conduct or otherwise had any connection to the allegations of the Defendant in this case. So if you're chosen as a juror in this case, the Court will instruct you that you are not allowed to use the gender transition as evidence against the Defendant, nor are you allowed to infer, assume, or conclude that that individual's gender transition was connected in any way to the accusations against the Defendant. Do you have any strong, moral, religious, or personal opinions that would prevent you from following these instructions that the Court would give to you if you were chosen as a juror in this case?

JS 48–49.

On individual voir dire, one potential juror told the court that "people have been using [their transgender status] recently for all kinds of excuses. It's like the greatest thing." JS 103. The court excused the potential juror sua sponte. JS 104. Another potential juror told the court that her sister was sexually assaulted and subsequently transitioned from female to male. JS 130–31. The court excused her as well. JS 131.

On panel voir dire, one potential juror, a teacher, stated that she had a student who "became transgender" when "he ha[d] trauma," then "went back to her original gender when the trauma left her life." JS 182. She added, "[S]o I think for some people that is . . . a reason. . . [F]or other people, that's not a reason." JS 182. That potential juror was selected for the jury and was among the twelve jurors who returned the guilty verdicts against Clark. See JS 195 (potential juror not among those struck peremptorily); T4 798 (potential juror not designated an alternate); T5 806 (jury poll). Prior to opening statements, Clark told the court that he did not want her on the jury, but he ran out of peremptory challenges after expending two peremptory challenges on other potential jurors whom he had unsuccessfully moved to strike for cause. T1 3–4; see also State v. Addison, 165 N.H. 381, 449–52 (2013) (a criminal defendant cannot obtain appellate review of

the denial of a motion to strike a potential juror for cause if the defendant later exercised a peremptory strike on the potential juror, even if the effect was to reduce the number of peremptory challenges otherwise available to the defendant).

The prosecutor did not begin her opening statement by giving the jury background information about individuals involved, such as M.B.'s transgender status. T1 28–29. Instead, she began by telling the jury that Clark sexually assaulted My.B. and M.B., whom she referred to as a "girl" and as My.B.'s "sister." T1 28–29. Only after telling the jury that Clark sexually assaulted M.B. did she inform the jury that "[M.B.] now identifies as a male, [M.B.'s chosen name]." T1 29. Clark later noted that this juxtaposition suggested a causal connection between the alleged assault and the gender transition. T1 45, T4 732. The court responded by telling the prosecutors to "be careful" in closing. T4 732.

During trial, My.B. testified that M.B. was "trans." T1 50. She referred to M.B. by M.B.'s chosen name and as her "brother," and used masculine pronouns. T1 50. Ma.B. referred to M.B. as her "sister," but used M.B.'s chosen name. T1 138. Heather and Chris referred to M.B. by her chosen name. T1 172, 193, T2 262–63, T3 469–70. Be.B. referred to M.B. by her birth name. T2 322. A police officer referred to M.B. by her birth name and, on one occasion, used a feminine pronoun. T2 348, 377. With the exception of My.B.

and the police officer, no other State's witness had occasion to use gendered pronouns to refer to M.B.

By denying Clark's motion to exclude evidence of M.B.'s transgender status, the court erred.

The proponent of evidence has the burden of demonstrating its admissibility. Moscicki v. Leno, 173 N.H. 121, 125 (2020). If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. State v. Munroe, ___ N.H. ___ (Aug. 4, 2020). Under that standard of review, the question is whether the ruling was clearly untenable or unreasonable to the prejudice of the appellant's case. Id. The trial court's interpretation of the rules of evidence, however, is not afforded deference. Id. ("[W]e review the trial court's interpretation of court rules de novo, as with any other issue of law."); State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary."); see also Koon v. United States, 518 U.S. 81, 100 (1996) (abuse-of-discretion "label" "does not mean a mistake of law is beyond appellate correction," because "[a] district court by definition abuses its discretion when it makes an error of law.").

New Hampshire Rule of Evidence 401 defines relevant evidence as that which "has any tendency to make a fact [of

consequence in determining the action] more or less probable that it would be without the evidence." Rule 402 provides that irrelevant evidence is not admissible.

The fact that M.B.'s gender identity changed in the years after My.B. alleged that Clark sexually assaulted her had no tendency to make it more or less probable that Clark sexually assaulted her. Thus, the evidence was irrelevant.

Clark acknowledges the current controversy regarding transgender rights, and the importance of the language used to address and refer to transgender persons. In fact, Clark agrees with the notion that individuals should be entitled to determine their own gender and to live their lives as fully-recognized members of that gender. See Chan Tov McNamarah, Misgendering As Misconduct, 68 UCLA L. Rev. Discourse 40 (2020) (arguing that "misgendering in court documents should be disallowed as an offensive ad hominem attack"); but see United States v. Varner, 948 F.3d 250, 254–58 (5th Cir. 2020) (denying transgender woman's motion to refer to her with feminine pronouns). Here, for instance, Clark agrees that, had M.B. testified, he would have been fully entitled to testify as a male, and to be addressed as such.

To say that individuals are entitled to determine their own gender is one thing; to say that they are entitled to rewrite history is quite another. Here, M.B. did not testify. At

all times relevant to this case, M.B. identified as female, presented as female, and was known to her family as a girl. In light of these circumstances, the fact that, subsequent to the time period in which the State alleges that she was assaulted, M.B. began to identify and present as male was irrelevant.

The court's finding that excluding the evidence would "introduce[] a level of artificiality to [some witnesses'] testimony" did not justify admitting the evidence. Whenever a court excludes evidence, the witnesses must refrain from testifying to that evidence. Indeed, as the court observed, the risk that a witness might be "nervous[]" about "saying 'the wrong thing'" is always present when a court excludes evidence. AD 6.

Courts, for instance, routinely exclude evidence that, after the events at issue, an individual involved in those events died, when the death has no tendency to alter the probability of any fact of consequence. See, e.g., State v. Collier, 9 Wash. App. 2d 1021, at *7–8 (2019) (unpublished); State v. Buxton, 2019 WL 2359602, at *3 (Vt. June 3, 2019) (unpublished). The language that people use to describe an individual — verb tense in particular — tends to change once the individual dies, and witnesses may very well be nervous about their ability to refer to such an individual in a way that not disclose that the individual has died. But that

nervousness does not justify the admission of irrelevant and prejudicial evidence.

No rule of evidence or other authority permits a court to admit evidence that does not satisfy Rule 401's definition of relevance merely because a witness might be nervous about their ability to refrain from disclosing it. By finding that the change in M.B.'s gender identity and presentation was admissible, despite failing to satisfy Rule 401's definition of relevance, the court committed legal error, and its ruling should not be afforded deference.

The court also erred by failing to exclude the evidence under Rule 403. Even if relevant, evidence is excludable under that rule "if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice, confusing the issues, [or] misleading the jury." "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Colbath, 171 N.H. 626, 636 (2019) (quotation and brackets omitted).

The danger of unfair prejudice here was palpable. Although there has been growing awareness of transgender issues in recent years, much of the general public remains

uncomfortable with the idea that an individual may identify as a gender other than the one with which they were born. Individuals who believe that being transgender is unnatural may be inclined to attribute it to a traumatic event, such as childhood sexual assault.[2] Here, any juror who believed that childhood sexual assault causes victims to become transgender would view evidence of M.B.'s transgender status as evidence corroborating My.B.'s testimony that Clark sexually assaulted her and M.B.

State v. Woodard, 146 N.H. 221 (2001) is analogous. There, the defendant, a woman, was charged with sexually assaulting a young girl. Id. at 222–25. At trial, the court, over the defendant's objection, admitted evidence that, almost two years after the last alleged sexual assault, the defendant had a sexual relationship with the girl's mother. Id. at 223–24. On appeal, the State argued that the relationship "was relevant because it explained the mother's failure to report her suspicions about the assaults to the police." Id. at 224.

This Court reversed. Id. at 225. "[T]he potential for the jury to be unfairly influenced by whatever bias they might

[2] Among those who are uncomfortable with society's increasing affirmance of gender transition, the notion that childhood sexual abuse causes victims to become transgender is particularly popular. See, e.g., https://www.parentsofrogdkids.com/other-causes-for-gender-dysphoria (listing childhood sexual assault as a cause for gender dysphoria) (last visited December 29, 2020); https://www.thepublicdiscourse.com/2018/03/21178 ("Many sexual abuse victims . . . get swept up by LGBT therapists who suggest that the proper treatment is to start on powerful sex hormones followed by gender 'affirming' surgery.") (last visited December 29, 2020).

have concerning homosexual conduct," this Court held, "created the danger of prejudice." Id. at 225. "Disclosure to the jury that the defendant had engaged in a homosexual relationship could have caused the jury to conclude that she was more likely to have committed the alleged assaults." Id. Even assuming that the relationship was relevant, this Court held, "its probative value was substantially outweighed by the danger of unfair prejudice." Id. at 224.

Just as jurors, in the late 1990s, may have believed that homosexual conduct was linked to child sexual assault, the jurors here may have believed that being transgender is linked to child sexual assault. Here, as in Woodard, "[t]he inferential leaps that the jury might have been tempted to make with this evidence are simply too significant to ignore." Id. at 225.

The Court here ruled that "[Clark's] fear that jurors will make that impermissible inferential leap can be mitigated through proper trial procedures such as voir dire and jury instructions." AD 6–7. At the conclusion of trial, the court instructed the jury:

> [Y]ou heard evidence in this case that one of the alleged victims identified [a]s a female at the time of the alleged act, but now identifies as a male. So there's absolutely no evidence in this case that this gender transition was caused by the Defendant's alleged conduct, or

> otherwise has any connection to the allegations against the Defendant. So you are not allowed to use the gender transition as evidence against the Defendant, nor are you allowed to infer, assume, or conclude that the gender transition of the alleged victim was connected in any way to the accusations against the Defendant.

T4 783–84.

"There are some cases in which a limiting instruction cannot erase from the jury's mind the taint of prejudice." State v. Giddens, 155 N.H. 175, 181 (2007). Sometimes, "the bell is simply too loud to be successfully dampened." Border Brook Terrace Condo. Ass'n v. Gladstone, 137 N.H. 11, 18 (1993). In Woodard, for instance, this Court rejected the argument that a limiting instruction could adequately mitigate the risk that the jury would use the evidence to infer the defendant's guilt. "[A] limiting instruction," this Court held, "would not have cured the prejudicial effect of the testimony, but rather would have emphasized the prejudice." Woodard, 146 N.H. at 225.

Like views on politics and religion, individuals' views on gender and sexuality are deeply held. It is unrealistic to presume that jurors will abandon those views, even temporarily, simply because a judge tells them to. There is no reason to believe that the court's limiting instruction here was any more effective than it would have been in Woodard.

II. THE COURT ERRED BY ADMITTING EVIDENCE THAT CLARK SHOWED PORNOGRAPHIC IMAGES TO HIS MINOR NEPHEWS.

In its opening statement, the prosecutor told the jury that Clark told My.B. that he tried to show Br.B. pornography, but that that "[Br.B.], being just a kid, freaked out." T1 33. The prosecutor then told the jury that Be.B. recalled Clark showing him and Br.B. a pornographic image on Clark's tablet, and that Br.B. was very upset. T1 34.

During My.B.'s testimony, Clark objected to testimony that Clark told My.B. that he tried to show Br.B. a pornographic image and that Br.B., "flipped out." T1 86–88. Clark argued that the evidence was prohibited by Rule 404(b). T1 88.

The State argued that the evidence did not fall under Rule 404(b) because it did not involve "sexual touching." T1 88. It also argued that the evidence was admissible because it consisted of "[Clark's] own statements to [My.B.]" T1 88. It asserted that Clark made the statement to intimidate My.B. T1 88.

Clark noted that, even though the evidence did not involve sexual touching, it did involve sexual misconduct, and thus, fell within Rule 404(b). T1 89. He argued that the State's "intimidation" rationale made little sense because, according to My.B., the abuse had already "been going on for some time," and because, to the extent the statement sent a

"message," the message was "you just freak out and I'll stop doing it, too." T1 90.

The State responded by asserting that "[']intimidate[']" is maybe not the best word to describe it." T1 90. It then argued that Clark's statement was form of "grooming." T1 90. It added, "it sort of goes towards his whole method of . . . normalizing this type of exposure to sort of, I guess, even ease [My.B.'s] thoughts about whether what's happening is okay or not." T1 90.

The court overruled Clark's objection on two grounds. T1 92. First, it ruled that evidence that Clark showed pornography to Br.B. "puts into context what that interaction was, and [Clark], I mean, had an encounter with [Br.B.]" T1 92. Second, the court noted that Clark's lawyer observed, in opening statement, that "a pebble thrown into a pond makes a ripple," and asserted, "We should see some ripples, some effects, but we don't because [My.B.] is not telling the truth." T1 39. The court ruled that Clark showing pornography to Br.B. was "one of the ripples, perhaps, in the pebbles in the pond that . . . the jury can consider in deciding whether to believe this witness's testimony." T1 92.

Following the court's ruling, the State elicited My.B.'s testimony that Clark told her that he tried to show Br.B. pornography, but Br.B. "freaked out." T1 94–95. It later elicited Be.B.'s testimony that Clark showed him and Br.B.

photographs of naked women on his tablet. T2 328–33. Be.B. added that Br.B., who was nine years old at the time, was surprised, that they did not want to view the photos, and that when they told their mother about the incident, Br.B. cried. T2 334–38. Finally, the State elicited Br.B.'s testimony that Clark obtained the images by conducting a Google search. T2 338–39.

Clark called Br.B. as a witness but did not question him about the incident. T3 436. On cross-examination, Br.B. testified that he did not recall Clark showing him pornography. T3 448.

Clark testified on cross-examination that, although he had pornographic photographs on his tablet, he did not purposely show them to Be.B. or Br.B. T4 718–21. He testified that he unlocked the device so that they could play games, and that they inadvertently viewed the photographs on their own. T4 718–20. Clark testified that, when he realized that they saw the photographs, he told Stephanie and the boys' parents. T4 719–20.

By admitting testimony that Clark showed pornography to his nephews, the court erred.

New Hampshire Rule of Evidence 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity

> therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b)(2) provides:

> Evidence of other crimes, wrongs or acts is admissible under this subsection only if: (A) it is relevant for a purpose other than proving the person's character or disposition; (B) there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and (C) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

To satisfy the relevance prong of the Rule 404(b) analysis, "the other bad act evidence must have some direct bearing on an issue actually in dispute and have a clear connection to the evidentiary purpose for which it is offered." Colbath, 171 N.H. at 633 (quotation omitted). "[T]he State is required to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the proffered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." State v. Thomas, 168 N.H. 589, 599 (2016). "[The trial court] must articulate

for the record the theory upon which the evidence is admitted, without invoking propensity, and explain precisely how the evidence relates to the disputed issue." Id.

The trial court ruled that the evidence here was admissible because it "puts into context what that interaction was, and [Clark], I mean, had an encounter with [Br.B.]" T1 92. This was not a valid basis for admitting the evidence. Clark was charged with sexually assaulting My.B. and M.B., not Be.B. or Br.B. Thus, there was no need to demonstrate the "context" of Clark's relationship with Be.B. or Br.B. "Context, in this instance, [was] merely a synonym for propensity." State v. Davidson, 163 N.H. 462, 471 (2012).

The court also ruled the evidence was admissible because it was, following Clark's analogy, "one of the ripples . . . in the pond that . . . the jury can consider in deciding whether to believe [My.B.'s] testimony." T1 92. This too, was not a valid basis for admitting the evidence.

The doctrine of specific contradiction applies when "a party introduces admissible evidence that creates a misleading advantage for that party, and the opposing party is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage." State v. DePaula, 170 N.H. 139, 146 (2017). "The initial evidence must have reasonably created a

misimpression or misled the fact-finder in some way." State v. Morrill, 154 N.H. 547, 550 (2006).

Here, in her opening statement, Clark's lawyer told the jury, "If [My.B.] is telling the truth, then we should see some evidence that corroborates her story. We should see some ripples, some effects, but we don't because [My.B.] is not telling the truth." As she expressly stated, the word "ripple" meant an "effect" of the sexual assaults that My.B. claimed had occurred.

Assuming that Clark sexually assaulted his nieces, showing pornography to his nephews was not an "effect" of those assaults. There is no evidence that any sexual assault of his nieces somehow caused Clark, on a separate occasion, to show adult pornography to his nephews. The most that one can reasonably claim is that the two acts are both an "effect" of the same cause: Clark's predisposition to engage in sexual misconduct with children. But that is precisely the inference that Rule 404(b) prohibits.

State v. McGlew, 139 N.H. 505 (1995) is analogous. There, the defendant was charged with attempting to sexually assault a nine-year-old girl. Id. at 506. The trial court admitted evidence that, six years prior to the alleged attempt, the defendant sexually assaulted a four-and-a-half-year-old boy. Id. at 506–07. On appeal, the State argued that the evidence was relevant to show the defendant's intent. Id.

This Court reversed. Id. at 508. It "h[e]ld that this evidence d[id] not meet the requirement that prior bad acts evidence be in some significant way connected to material events constituting the crime charged and not so remote in time as to eliminate the nexus." Id. at 507. Thus, this Court held, the trial court unsustainably exercised its discretion by admitting the evidence. Id. at 508.

Here, as in McGlew, evidence that Clark engaged in sexual misconduct with young boys was not relevant to the charge of sexually assaulting young girls, and the court erred in admitting that evidence.

Even if the court did not err by finding the evidence relevant for a non-propensity purpose, it erred by finding that the evidence satisfied the third prong of the Rule 404(b) analysis: that the danger of unfair prejudice does not substantially outweigh its probative value.

This requirement merely reiterates the balancing test set forth in Rule 403. Rule 403 operates as "an exclusionary rule that cuts across the rules of evidence." State v. Milton, 169 N.H. 431, 435 (2016). Thus, the rule applies to evidence intended to rebut a misleading inference. See DePaula, 170 N.H. at 146 ("[T]he fact that the 'door has been opened' does not permit all evidence to 'pass through' because the doctrine is intended to prevent prejudice and is not to be subverted into a vehicle for the introduction of prejudice.") It

also applies to a defendant's statements. See State v. Papillon, 173 N.H. 13, 27, (2020) ("An out of court statement is not admissible merely because it is not hearsay under Rule 801(d)(2)(A) — it must also pass muster under the other rules of evidence.").

"Unfair prejudice is inherent in evidence of other similar crimes." State v. Dow, 168 N.H. 492, 501 (2016). "[T]here is a risk that the jury will find the defendant had a propensity to commit the charged crime merely because the defendant committed a similar crime or wrong in the past." State v. Belonga, 163 N.H. 343, 360 (2012).

Here, the evidence clearly presented the risk that the jury would conclude that, because Clark was the type of person who would show pornography to young boys, he was the type of the person who would sexually assault young girls. That risk substantially outweighed any marginal probative value the evidence may have had.

Once the court admitted evidence that Clark showed pornography to his nephews, the temptation to draw inferences about Clark's propensity to engage in sexual misconduct with children would have been too great for the jurors to resist. Thus, "cautionary or limiting instructions would not have been able to erase the taint of the prejudicial evidence." State v. Marti, 140 N.H. 692, 695 (1996).

Although the court attempted to give a limiting instruction, that instruction made little sense. In its instruction, the court combined evidence that Clark showed his nephews pornography with evidence that the police found a pornographic DVD:

> You also heard evidence that Be.B. and Br.B. . . . saw photographs of naked women on a tablet. And you also heard evidence about a DVD with pornography that was found by the police. So it's up to you to decide the facts of this case, and to decide whether those events occurred or did not occur in this case. But if you find that these things happened, you may only consider this evidence for a limited purpose. This evidence is only relevant for the purpose of evaluating the credibility of [My.B.'s] testimony. You are not allowed to consider this evidence as reflecting on the Defendant's character.
>
> So you're not allowed to consider this evidence of the Defendant's propensity to engage in bad acts. In other words, if you find that the Defendant had photographs of naked women on the tablet, or a pornographic DVD, you are not allowed to conclude that he must have committed the acts alleged against him for the indictments in this case.

T4 785.

Although the court told the jury that it was "not allowed to consider this evidence as reflecting on [Clark's] character," the court failed to explain what relevance the evidence had to "evaluating the credibility of [My.B.'s] testimony," other than by demonstrating that Clark had a propensity to engage in sexual misconduct with children.

As this brief suggests, Clark fails to perceive any valid, non-propensity purpose for admitting evidence that he showed his nephews pornography. To the extent that the trial court believed that such a valid purpose existed, it was incumbent on the court to identify such a purpose for the parties and, most importantly, the jury, and to limit the jury's consideration of the evidence to that clearly-defined purpose. Because it failed to do so, this Court must reverse.

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

Prior to trial, Clark filed a motion asking the court to conduct an in camera review of DCYF records. A 13. He cited his right to access exculpatory evidence under the Due Process clauses of Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. A 17. The State assented, A 30, and the court (Wageling, J.) granted the motion, A 42. The parties later agreed to submit police reports to aid the court in determining whether to disclose records to the parties. A 33, 43.

Following the in camera review, the court disclosed some, but not all, of the DCYF records. AD 9, 10. By withholding some records, the court may have erred. Thus, Clark respectfully requests that this Court review the records provided to the court for in camera review, and to determine whether the court erred in failing to disclose any material. The court's decision is reviewed for an unsustainable exercise of discretion. State v. Girard, ___ N.H. ___ (Oct. 16, 2020).

"A criminal defendant's interest in obtaining disclosure of material helpful to his defense is rooted in the constitutional right to due process." Id. Following in camera review of confidential records, a trial court must disclose records that are, "in fact," "material and relevant." Id.

Relevance is defined by Rule 401. Id. Records can be relevant based on their tendency to impeach a witness, even if they only affect the witness's general credibility. Id.

Records are material "if there is a reasonable probability that [their] disclosure . . . will produce a different result in the proceeding." Id. (quotation omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.

This Court should review the DCYF records in this case for any information that would have been material and relevant. If this Court determines that the trial court erred in failing to disclose any records, it should disclose those records to the parties. It should then address whether the court's error was "harmless beyond a reasonable doubt." Id.

CONCLUSION

WHEREFORE, Steven M. Clark respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decision on two issues are in writing and are set forth in a separate appendix containing no other documents. The appealed decision on the remaining issue was not in writing.

This brief complies with the applicable word limitation and contains 8,122 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

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