THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0682

State of New Hampshire

v.

Steven M. Clark

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By its Attorneys,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

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(Fifteen-Minute Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

I. Whether the trial court sustainably exercised its discretion when it utilized *voir dire* and jury instructions to address possible jury bias related to a victim's gender transition.

II. Whether the trial court sustainably exercised its discretion when it admitted evidence that the defendant showed pornographic images to his minor nephews.

III. Whether the trial court sustainably exercised its discretion when it declined to release additional records to the defendant following *in camera* review.

STATEMENT OF THE CASE

In August 2018 and April 2019, Strafford County Grand Juries indicted Steven M. Clark ("the defendant") on seven counts of aggravated felonious sexual assault ("AFSA") (RSA 632-A:2), one count of attempted AFSA (RSA 632-A:2; 629:1; 651:6), and one count of felonious sexual assault ("FSA") (RSA 632-A:3) against the defendant's niece and nephew My.B. and M.B. DA[1] 4-12. Upon agreement of the parties, the case was transferred to the Rockingham County Superior Court for trial. The court (*Delker, J.*) held a five-day trial from July 30 to August 5, 2019. Following the State's case-in-chief, the court dismissed two of the AFSA charges. T500-01. Following the defendant's case, the remaining seven charges were submitted to the jury. The jury returned guilty verdicts on those seven charges. T803-05.

In November 2019, the court sentenced the defendant to ten to twenty years on the AFSA and attempted AFSA convictions, and to three-and-a-half to seven years on the FSA convictions. DA50-63. Three of the AFSA convictions are stand committed and consecutive. DA50-56. The remaining four sentences are suspended, concurrent with each other and consecutive to the stand-committed sentences. DA57-64.

This appeal followed.

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[1] Citations to the record are as follows:
"DA__" refers to the defendants appendix;
"DAD__" refers to the defendant's appendix containing the appealed decision;
"DB__" refers to the defendant's brief;
"JS__" refers to the transcript of jury selection on July 29, 2020;
"PH__" refers to the transcript of the pre-trial hearing on pending motions on July 24, 2019;
"T __" refers to the transcript of the defendant's five-day jury trial from July 30-August 5, 2020.

STATEMENT OF THE FACTS

A. The State's Case at Trial

As young children, siblings Ma.B., My.B., and M.B. often visited their grandparents' home in Somerswoth. T55, 57, 60-62, 140, 149, 325, 439, 561, 665, 687. The family regularly stopped by to visit, spent holidays at their grandparents' home, and their grandparents babysat them often. T60-64, 140, 144, 149, 182, 188, 325, 439, 467, 561, 565-66, 665, 687. At trial, the family, including the defendant and his wife, agreed that they had a good relationship before the children disclosed the assaults to their parents. T141, 176, 178, 180, 181, 272-73, 425, 466, 569, 570, 603-04, 671. They celebrated holidays together, spent time at the family's camp, and went on vacations together. T55, 181, 279.

In addition to the children's grandparents, their aunt and her husband, the defendant, also lived in the Somersworth home. T59, 140, 143, 423, 426-27, 466, 533, 554-55, 589, 625-26, 726. The couple lived in a bedroom in the home's finished basement. T59, 183, 426-27, 466, 537, 726. The bedroom was adjacent to a playroom that contained toys and games for the children. T62-63, 562-63. Ma.B., the eldest sibling, preferred to stay upstairs during visits, but her younger siblings often played in the basement playroom. T62, 143, 145, 163, 193, 448-49, 562, 594-95.

In January 2014, My.B., and M.B. told their father that the defendant had repeatedly sexually assaulted them during their visits to the Somersworth home. T109-10, 197, 469-70. Their father immediately called their mother, who left work and came home to talk with My.B and M.B.

T471. The next morning, the children's mother called the Division of Children Youth and Families ("DCYF"). T111-12, 197-99, 470, 472.

The children's parents subsequently brought Ma.B., My.B., and M.B. for forensic interviews at the Child Advocacy Center ("CAC"). T112, 199, 472. The children also began attending therapy. T202. Following the CAC interviews, the family did not hear from the police for several years. T202. The children's mother testified at trial that she did not follow up with the police because the children "were dealing with it in their own ways" and she did not want to "keep stirring it up." T202.

Detective Eric Chandler of the Somersworth Police Department testified that, following M.B. and My.B.'s allegations, police obtained a warrant and seized numerous electronic devices from the defendant's home. T362, 398, 406-08, 555-57. The police examined a few of the devices that they were able to access, but did not find any incriminating evidence on those devices. T363. The investigators encountered initial technical difficulties in accessing many of the other devices such as laptops and external hard drives. T362-65.

These larger electronics were not analyzed for several years following the search. T365. Det. Chandler acknowledged that this was not the proper way to handle this case and the devices should have been analyzed in the course of the investigation. T365. When the devices were later analyzed, the police were unable to access a number of the larger devices. T366. Det. Chandler testified to a second search warrant application in 2018 that was denied. T362-63, 365-66, 384-85, 400, 402-04.

At trial, the State's primary witness was My.B. By the time of trial, My.B. was fifteen. T46. She testified that beginning in 2011 or 2012 when

she was approximately ten years old and M.B. was eight years old, the defendant took her and M.B. into the basement office, which the family referred to as the "train room," more than once a week and showed them pornographic videos on the internet. T46-47, 51, 65-66, 77. My.B. further testified that while playing the videos, the defendant would tell the children to take off their clothes. T66. According to My.B., this happened many times. T67.

According to My.B.'s testimony, after the children had removed their clothes, the defendant would pull his pants down and instruct them to touch his penis. T70. When they did this, he would become erect. T71. My.B. also testified that while she stood next to him or sat in his lap, the defendant would sit in his chair at the computer touch her vagina. T73.

My.B. also testified that the defendant would touch M.B.'s vagina as well. T75-76. My.B. testified to at least one instance in which the defendant penetrated her vagina. T79. My.B. also recounted that the defendant had touched her breasts. T81. My.B. further testified that on at least one occasion, she and M.B. were in the defendant's bedroom and saw "white stuff come out of his penis." My.B. testified that the defendant told her to lick the ejaculate and she refused. T82-83. He also told her to touch it. T83. She touched it and then went to the bathroom to wash her hands. T83.

My.B. further testified that the assaults would stop when the defendant would hear somebody open the door at the top of the staircase to come downstairs. T79. The children would put their clothes back on and the defendant would pull up his pants. T80. The other family members testified that they did not see the defendant sexually assault the children. T164-66, 299, 342, 486-87, 583-86.

My.B. testified that the defendant threatened to kill her and M.B. if they told anyone about the assaults. T105. She also testified that she decided to tell her parents about the assaults after she saw a puppet show at school about good touch/bad touch. T105-06.

She further testified that, on at least one occasion, the children's cousin, Br.B., was in the living room adjacent to the train room while the defendant was assaulting them. T85-86, 95. She testified that the door between the rooms was open and she could see Br.B. T85. She further testified that she could not remember if Br.B. ever came into the room or saw the assault happening. T86. Br.B. testified that he never saw the defendant sexually assault My.B and M.B. T440

Br.B's brother, Be.B, testified that, on one occasion, the defendant showed him and Br.B. pornographic images on the internet using a Nook or Kindle. T328-38. Be.B. testified that the defendant had done an internet browser search and shown the image results to the boys. T338. Be.B. testified that neither he, nor his brother, had wanted to see the images and that his brother reacted strongly and was crying. T335-36. The boys later told their mother and grandmother about the incident. T337.

B. The Defendant's Case at Trial

The defendant emphasized inconsistent details between My.B's CAC interview and trial testimony. T80-81, 123-24, 126-27, 136. The defendant also focused on the regular foot traffic from the family coming and going from the basement. T124-25, 155, 163-64, 540-48, 611-12, 662-63, 672-74.

The defendant testified that M.B., My.B., and Ma.B. visited the Somersworth home once or twice a week. T665-66. He characterized his relationship with the children as good. T671. But he testified that he only babysat My.B. and M.B. alone on one occasion. T666.

He testified that he never showed the children pornography and never sexually assaulted them. T676-77, 728. When he was asked about showing pornography to his minor nephews, the defendant testified that he had unlocked a tablet or e-reader for the boys to play a video game on it. T679. He had "some photos of naked women in a folder in there," and his nephews found them. T679.

C. Motion *in limine* regarding M.B.'s gender transition

Relevant to this appeal, M.B. was born with female genitals and was assigned female at birth. In the years after the children disclosed the assaults, but prior to trial, M.B. began to transition. PH6; T50. M.B. now identifies as male, uses masculine he/him pronouns, and has chosen a new affirmed name. T50. Neither the State, nor anyone else, contends that this gender transition is causally connected to the assaults.

In a pre-trial motion *in limine*, the defendant moved "to exclude any mention that [M.B.] is transitioning and has changed his name to [M.B.'s affirmed name] because such testimony is not relevant and prejudicial." This motion also sought "to preclude the Government's witnesses from referring to [M.B.] as [M.B.'s affirmed name] during their testimony" and to "exclude this information from opening or closing statements." DA45.

The trial court heard arguments on this during a pre-trial motions' hearing. PH4-16. In support of his motion, the defendant argued that a jury

might make an improper inferential leap that a gender transition is evidence of sexual trauma in M.B.'s childhood. From that, the jury could conclude, based on this improper consideration of M.B.'s transition, that the defendant was guilty of the alleged assaults.

The State objected and argued that M.B.'s family now refers to him by his affirmed name and using male pronouns. The State reasoned that to force M.B's family to revert back to using M.B.'s given name and pronouns does not reflect present reality, would be unfair to M.B. and his family, and any attempt to censor witnesses in this way would likely fail in practice PH4-6. The State also argued that this information constitutes a biographical fact about M.B., which, while not causally connected to the allegations against the defendant, is nevertheless relevant background information about one of the victims. PH11-12.

On July 25, 2019, the court issued an order denying the defendant's motion *in limine*. DAD3-6. The court began by observing that this issue "embodies the very essence of the need for judicial discretion. There is no right or wrong answer to the defense's present motion. Rather, resolution of the motion involves the balancing of competing interests guided by reasoned principles and informed by judicial experience regarding the potential impact of the competing choices on the trial process." DAD2-3.

The court further observed that "[f]orcing [M.B.]'s family to refer to their sibling and child by an identity which is no longer their present reality introduces a level of artificiality to their testimony." DAD5. Jurors, the court reasoned, may notice this in the witnesses' body language, tone of voice, or other indicators of demeanor and credibility. These jurors could conclude that the witnesses are hiding something or otherwise being

untruthful. DAD5. Because of this, the court found that M.B.'s transition was relevant to the jury's assessment of witness credibility. The court found this particularly relevant in this case, because, like many sexual assault cases, the trial involves a "contest of credibility." Because of this, "the probative value of witness credibility is high."

The court then considered the risk of prejudice if this information were accidentally introduced mid-trial. The court credited the State's proffer that "the force of habit may result in [M.B.]'s family members inadvertently referring to him as [M.B.'s affirmed name] or using the male pronoun." DAD5. The court noted that this would likely cause unnecessary jury confusion and prejudice. DAD6.

The court then contrasted this scenario with ones in which witnesses are instructed not to discuss isolated prior bad act evidence. DAD6. In that context, the court observed that witnesses who are instructed in this way often exhibit nervousness or confusion over fears of saying "the wrong thing." But the prejudicial impact of these events, "coupled with the ability to navigate around isolated or discreet events make a ruling barring such evidence unavoidable in the Rule 404(b) context. DAD6.

The court observed that, unlike the discreet nature of a past bad act, it was "not reasonable to expect the witnesses to abide by an order to refer to [M.B. by his given name] and as "she" when such a fundamental shift has occurred in their situation." DAD6. It observed that it would be "fundamentally unfair" to risk a mistrial if one of the witnesses made a mistake and referred to M.B. in a manner contrary to the court's order. DAD6. The court concluded that *voir dire* and jury instructions were the best tools to mitigate the defendant's concerns. DAD6-7.

SUMMARY OF THE ARGUMENT

I. The trial court sustainably exercised its discretion when it addressed M.B.'s transition, and possible prejudice to the defendant arising from this fact, through *voir dire* questions and jury instructions. To the extent that this Court reviews this question under a relevancy framework, this basic biographical information about one of the victims was a logically relevant aid to understanding. The trial court mitigated any risk of undue prejudice through *voir dire* questions and jury instructions.

II. The trial court sustainably exercised its discretion when it admitted evidence that the defendant used one of his electronic devices to show pornographic images to his minor nephews. The trial court admitted the evidence for relevant, non-propensity purposes. Specifically, the evidence rebutted the defendant's claims that the defendant was rarely alone with his nieces and nephews and lacked the opportunity to commit the charged assaults. The court mitigated the risk of unfair prejudice through a jury instruction.

In addition, the defendant opened the door to this evidence when, in his opening statement, he repeatedly told the jury that this case lacked "ripples" or evidence corroborating My.B.'s testimony.

Finally, if the trial court erred, the error was harmless beyond a reasonable doubt.

III. This Court may order additional review the documents reviewed by the trial court *in camera* because the trial court did not have

the benefit of this Court's recent decision in *State v. Girard*[2], when it conducted its original *in camera* review. If the trial court determines that it would not have released any further documents under the *Girard* standard, this Court should determine whether that decision represents a sustainable exercise of discretion. If the trial court's exercise of discretion was unsustainable, this Court should determine whether the error was harmless beyond a reasonable doubt.

[2] *State v. Girard*, ___ N.H. ___ (Oct. 16, 2020).

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADDRESSED THE FACT OF M.B.'S GENDER TRANSITION THROUGH VOIR DIRE AND JURY INSTRUCTION.

The defendant argues that M.B.'s transition and present gender identity are irrelevant evidence and, thus, these facts were inadmissible under *N.H. R. Ev.* 401 and 402. He also argues that the danger of unfair prejudice substantially outweighed the probative value of the evidence under Rule 403. The State maintains that basic biographical information about a victim, such as name, gender, and applicable pronouns, is logically relevant to the case as an aid to understanding.

Furthermore, it is very likely that even if the court had attempted to conceal this information, it would have inadvertently come out during the trial. The court correctly concluded that this disclosure, mid-trial, would greatly risk prejudicing the defendant and confusing the jury. Therefore, the trial court correctly decided to address this issue from the outset and mitigate the risk of undue prejudice through its *voir dire* questions and subsequent jury instructions.

A. Standard of Review

To the extent that this issue implicates the admissibility of evidence, "[t]he admissibility of evidence is a matter left to the sound discretion of the trial court. Because the trial court is in the best position to gauge the prejudicial impact of particular testimony, [this Court] will not upset its ruling absent an unsustainable exercise of discretion. To sustain his burden,

the defendant must show that the trial court's decision was unreasonable to the prejudice of his case." *State v. White*, 155 N.H. 119, 123 (2007) (internal citations omitted). "If the record establishes that a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it, the appellate court will uphold the trial court's decision." *State v. Barr*, No. 2018-0464, 2019 WL 6255853 (N.H. Nov. 22, 2019).

Furthermore, *voir dire* of a venire is a fact-specific inquiry that falls "wholly within the sound discretion of the trial court." *State v. Bedell*, 169 N.H. 62, 65 (2016). This Court has held that it will not disturb a trial court's determination of the impartiality of jurors "absent an unsustainable exercise of discretion or a finding that the trial judge's decision was against the weight of the evidence" *State v. Tabaldi*, 165 N.H. 306, 313 (2013) (quoting *State v. Town*, 163 N.H. 790, 794 (2012)). Therefore, to prevail, "[t]he defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Perri*, 164 N.H. 400, 408 (2012). Additionally, this Court has found that "[t]he trial court's determination of the impartiality of the jurors selected is essentially a question of demeanor and credibility and, thus, is entitled to special deference." *Tabaldi*, 165 N.H. at 312-13.

B. The victim's basic biographical information was logically relevant as an aid to understanding.

The defendant argues that M.B.'s transition is not relevant as evidence that the defendant committed the assaults. DB15. He argues that "[t]he fact that M.B.'s gender identity changed in the years after My.B.

alleged that Clark sexually assaulted her (*sic*) had no tendency to make it more or less probable that Clark sexually assaulted her (*sic*)." But this characterization of relevance is overly narrow and mischaracterizes the basis on which the trial court admitted the evidence.

Rule 401 does not require that every fact elicited at trial must be directed at an issue in dispute to be relevant. "Relevant evidence is not confined to that which directly establishes an element of the crime." *United States v. Gonzalez,* 110 F.3d 936, 941 (2d Cir. 1997). "[T]he trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment." *Id*. (quoting *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir.1991).

As the Reporter's Notes to *N.H. R. Ev*. 401 explain:

> [E]vidence is relevant if it has any tendency to make a fact of consequence more or less probable. There are so many qualifiers in the language of the Rule that nearly anything can be considered 'relevant' if the trial court wants to admit it. Read in context with Rules 102, 104 and 402, the trial court is given tremendous discretion in admitting any evidence that is not otherwise specifically inadmissible.

N.H. R. Ev. 401 Reporter's Notes.

The commentary to F. R. Evid. 401 – which is identical to New Hampshire's Rule 401 – likewise acknowledges, "[e]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding." Under the prevailing theory of logical relevancy, these pieces of background information are 'bricks in the wall;' "each item of

evidence under this theory need not have independent legal significance." *N.H. R. Ev*. 401 Reporter's Notes. Instead, each piece need only contribute to the whole.

M.B.'s gender identity, affirmed name, and pronouns fall within this category of background information which, although not directed at disputed matter, form relevant pieces of the whole. The identity of a victim in an AFSA or FSA charge is intrinsically linked to the prosecution of those crimes. The fact of M.B.'s transition is relevant because it explains why the victim's identifiers are not consistent across various times and witnesses. It clarifies an otherwise confusing situation for the jury and prevents the jury from questioning the credibility of witnesses who, from the jury's perspective, might otherwise appear not to know the name of the victim about whom they are testifying.

Moreover, as the trial court correctly noted, M.B.'s female genitals are a relevant topic of testimony in this sexual assault case. The unavoidable references to M.B.'s genitals make it logically necessary to explain M.B.'s transition in order to explain why someone who many witnesses identify as male would have female genitals. While the fact of M.B.'s transition does not directly implicate the defendant, it is, nevertheless an unavoidable topic given the nature of this case.

The defendant emphasizes that M.B. did not testify in this case. DB10, 15, 26. He argues that if M.B. had testified then his gender identity could have been relevant. Absent his trial testimony, however, the defendant argues that it is not relevant. But victims often do not, and sometimes, cannot, testify at trial. In a murder trial, for example, the victim

cannot testify. That does not make the identity of that victim any less relevant to the case.

Nor is M.B.'s identity any less relevant to this case. M.B.'s sister, My.B., offered evidence of the defendant's assaults against M.B., because she witnessed them firsthand while the defendant was assaulting both children simultaneously. M.B. is an identified victim and the charges against the defendant relate directly to his conduct against M.B. M.B.'s identity, including his affirmed name and pronouns are, therefore, intrinsically tied to this case.

C. The trial court properly mitigated the risks undue prejudice through *voir dire* and jury instructions.

The defendant next argues that, even if it is relevant, the trial court should have excluded the fact of M.B.'s transition under Rule 403 because of the risk of undue prejudice. DB28. According to the defendant, jurors could construe information related to M.B.'s transition as evidence of past trauma at the hands of the defendant. PH8; DB29.

Generally, "[t]he power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is absolutely necessary for a court to function effectively and do its job of administering justice." *State v. LaFrance*, 124 N.H. 171, 179-80 (1983). Thus, "the trial court enjoys broad discretion in regulating the proceedings before it." *State v. Letendre*, 161 N.H. 370, 376 (2011). The need for flexibility in such an unusual factual situation exemplifies the purpose underlying this judicial discretion.

More specific to the Rule 403 context, "[t]he trial court is in the best position to gauge the prejudicial impact of particular testimony, and what steps, if any, are necessary to remedy that prejudice. Thus, [this Court] give[s] the trial court broad latitude when ruling on the admissibility of potentially unfairly prejudicial evidence." *Tabaldi*, 165 N.H. at 323 (internal citations and quotations omitted).

The defendant's specific argument invokes concerns about jurors' preconceived notions and prejudices towards transgender individuals and the stimuli that lead individuals to transition. The trial court is best equipped with the tools to identify and filter out such juror prejudices. "*Voir dire* is the appropriate method for inquiry into possible prejudice or bias on the part of jurors, and ... the procedure used must provide a reasonable assurance for the discovery of prejudice." *United States v. Tiangco*, 225 F. Supp. 3d 274, 289 (D.N.J. 2016) (citing *Waldorf v. Shuta*, 3 F.3d 705, 709 (3d Cir. 1993)).

While the defendant insists that it is unreasonable to expect jurors to set aside their preconceived views on contentious issues such as gender, politics, and religion (DB31) and focus only on the facts before them, that is precisely what courts ask of every jury they empanel. A juror is regularly asked to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *State v. Addison*, 160 N.H. 493, 499 (2010).

The trial court took careful and deliberate measures to prevent prejudice about transgender persons from influencing the outcome of this trial. To start, the court correctly determined that *voir dire* was the proper vehicle for weeding out prejudice. In addition to granting each side more

than double the normally allotted time for panel *voir dire* (T4), the trial court also crafted two of its own thorough *voir dire* questions addressing this issue:

> 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?

JS48-49. Following this question, several prospective jurors voiced concerns about their ability to be impartial and the court dismissed them. JS103-04, 130-31. The defendant takes issue with one juror who stated that she had a student who "became transgender" due to trauma and "went back to her original gender when the trauma left her life." JS182. The juror added, "[S]o I think for some people that is . . . a reason. . . [F]or other people, that's not a reason." JS182. This juror was seated.

But far from evidencing a clear bias or opinion that transitioning is necessarily a result of trauma, the juror's comment demonstrated the ability to look at the facts on a case-by-case basis. Although she described a

willingness to believe that childhood trauma could cause an individual to transition, she was not adamant that this is always true.

The court's subsequent instruction that the jury was not permitted to use M.B.'s transition as evidence of childhood trauma neutralized the possibility that this juror would use that information in this way. That instruction read:

> [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 31 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.***

T783-84 (emphasis added). "The jury is presumed to follow the instructions given by the trial court." *State v. Smith*, 149 N.H. 693, 697 (2003).

Moreover, a juror's own statements and assurances are not the only factors that a court considers. "While [it] may have based [its] decisions in seating jurors in part upon the jurors' assurances, the trial [court] was also able to observe each juror's demeanor and make [its] own determination regarding his or her credibility." *Addison*, 160 N.H. at 500. "The trial court's determination of the impartiality of the jurors selected, essentially a question of demeanor and credibility, is entitled to special deference." *State v. Weir*, 138 N.H. 671, 673-74 (1994) (quotations and ellipsis omitted).

The *Tiangco* Court dealt with a similar issue of attitudes towards transgender persons. *Tiangco*, 225 F. Supp. 3d at 289-90. In that case, the

defendant sought a specific *voir dire* question related to juror biases regarding transgender persons. Specifically, the defendant sought to include a question regarding prospective jurors' opinions about a celebrity who had transitioned. Instead, that court asked the following:

> One or more of the individuals in this case may identify with a gender other than that with which he or she was born. Would this affect your ability to be fair and impartial?

Id. at 289. That court found that the inquiry was sufficient to identify bias regarding transgender issues, particularly where there was "no specific indication that anything about the jurors' attitudes toward [a witness] might affect their judgment as to [the defendant]." *Id*. at 290. Confronted with similar circumstances, this trial court was significantly more thorough in its *voir dire* and buttressed those questions with proper jury instructions.

The defendant argues that "[t]here are some cases in which a limiting instruction cannot erase from the jury's mind the taint of prejudice," and that this is such a case. *State v. Giddens*, 155 N.H. 175, 181 (2007). But the defendant's reliance on this Court's decision in *Giddens* is misplaced. The *Giddens* Court specified that a limiting instruction is effective unless the proffered evidence constitutes an "unambiguous conveyance of [a defendant's] prior criminal conduct." *Id*. By way of example, the *Giddens* Court referenced *State v. Woodbury*, 124 N.H. 218, 221 (1983), in which the court granted a mistrial after a police officer testified that the defendant had been previously charged with a crime that was identical to the one for which he stood trial.

M.B.'s transition is not evidence of any prior criminal charges or other bad acts on the part of the defendant. As such, it is not the type of

evidence that the *Giddens* Court contemplated as undermining the effectiveness of a jury instruction. Accordingly, *Giddens* is inapplicable and this Court should presume that the jury followed the trial court's instructions. This includes its instruction that the jury should not use evidence of M.B.'s transition to find that the defendant committed the assaults.

D. The defendant's recommended solution carried significant risk of confusing the jury and prejudicing the defendant and would have been fundamentally unfair to the M.B. and his family.

The defendant's recommendation that the trial court order witnesses to misgender M.B. and use his given name and feminine pronouns (PH10) was not a viable solution. It carried a substantial risk of confusing the jury and generating prejudice against the defendant. PH7-15; DB27. Both the State and the trial court recognized before trial that information about M.B.'s transition was likely to come out mid-trial, despite attempts to censor it. DAD5.

For one, M.B.'s genitals are an unavoidable topic of this sexual assault case. And, unlike the death of a witness, to which the defendant analogizes (DB27), gender identity is not a discreet event that witnesses can compartmentalize and avoid discussing. As the record demonstrates, individuals struggle with misgendering and deadnaming, even when they are trying to be respectful.

The State explained that while M.B.'s family is working to accept M.B.'s transition and use his correct name and pronouns, they sometimes make mistakes. PH4. Other witnesses in the case are not as familiar with

the situation and would likely refer to M.B. incorrectly. Specifically, the State noted that the officers who investigated this case only ever knew M.B. prior to his transition and would likely refer to him by feminine pronouns and with his given name. PH7. The defendant and his witnesses were also likely to refer to M.B. by his given name and use feminine pronouns.

The trial record reinforces this likelihood of a mistake. My.B. referred to M.B. by his affirmed name and used masculine pronouns. T50. Ma.B. referred to M.B. by his affirmed name, but called him her "sister." T138-39, 141. The children's mother referred to M.B. by his affirmed name. The children's father initially referred to M.B. by his given name, before quickly correcting himself. T421. When the State asked Be.B., "So are your cousins [Ma.B.], [M.B.'s affirmed name], and [My.B.]?" Be.B. corrected the State with M.B.'s given name. T322. When asked about her brother's children, the defendant's wife replied, "They have three girls," and identified M.B. by his given name. T559. The defendant likewise identified M.B. by his given name. T664. One of the police officers involved also referred to M.B. by his given name. T348.

This left the trial court with a difficult choice. If it wanted to try to avoid this fact entirely, it would need to either order M.B.'s family to misgender him, or order the other witnesses to refer to M.B. in the masculine and by his affirmed name. Realistically, one or more of the witnesses would likely have made a mistake regardless of the court's order. These mistakes or inconsistencies would have confused the jury and injected prejudice into the proceedings.

Moreover, with no opportunity to probe the jury's biases beforehand, the gravity of the prejudice would have been manifestly greater than the

risk of addressing it before trial. Absent the court's *voir dire* on this issue, it is entirely possible that one or more of the prospective jurors who expressed particularly strong feelings about transgender individuals would have been seated on the jury. With no ability to probe these prejudices after the fact, the defendant likely would have requested, and perhaps been entitled to, a mistrial.

In addition to the risk of prejudice and jury confusion, the dehumanizing effect of misgendering M.B. would have been substantial. The defendant criticizes the State and the defendant's family for trying to "rewrite history" by referring to M.B. by his affirmed name and pronouns. DB26. But transgender individuals are routinely misgendered by the public, particularly when referring to their pasts. In the transgender community, this is referred to as "deadnaming" and many transgender individuals suffer significantly from it.[3] Requiring M.B.'s family to intentionally misgender and deadname him in open court would not only have created a substantial risk of confusing the jury and prejudicing the case, it also would have been dehumanizing and offensive to this young man and his family.

Therefore, instead of trying to "re-write history" one way or the other, the trial court acknowledged and balanced all the parties' interests in preventing the injection of prejudice or jury confusion mid-trial. It also considered the right of a victim to be recognized as part of his identified gender. DAD5-7. The court correctly decided to sustainably exercise its

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[3] For more information, see, e.g.: Clements, KC, *Deadnaming: What Is It and Why Is It Harmful*, (September 18, 2018). Available at: https://www.healthline.com/health/transgender/misgendering. (Last accessed March 22, 2021).

discretion, address the issue directly, and mitigate the risk of undue prejudice using the proper tools of *voir dire* and jury instructions.

II. THE COURT PROPERLY ADMITTED TESTIMONY THAT THE DEFENDANT SHOWED PORNOGRAPHIC IMAGES TO HIS MINOR NEPHEWS.

A. Standard of Review

This Court has outlined the standard and test for 'other bad acts' evidence as follows:

> Before evidence of other bad acts may be admitted at trial, the State must demonstrate that: (1) such evidence is relevant for a purpose other than proving the defendant's character or disposition; (2) clear proof establishes that the defendant committed the other bad acts; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. The trial court's evidentiary decision under this three-prong test lies within its sound discretion, and we will disturb its judgment only if the defendant shows that the decision was clearly untenable or unreasonable to the prejudice of his case.

State v. Colbath, 171 N.H. 626, 633 (2019) (internal quotation omitted). The defendant argues that the State failed to meet its burden on the first and third prongs of the Rule 404(b) analysis. The State maintains that trial court sustainably exercised its discretion when it admitted evidence that the defendant showed pornographic images to his minor nephews.

B. The State offered the evidence for relevant, non-propensity purposes and the probative value outweighed the risk of undue prejudice.

1. The proffered evidence was relevant.

"To satisfy the first 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. "In determining whether a ruling is a proper exercise of judicial discretion, [this Court] consider[s] whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *State v. Pennock*, 168 N.H. 294, 302 (2015). The trial court noted the relevance of the evidence as follows:

> Okay. So well, I think it's admissible for a couple of reasons. One, I mean, part of the defense argument in this case was that no one saw what was going on and [My.B.] just testified that the door was open. So it kind of puts into context what that interaction was, and the Defendant, I mean, had an encounter with [Br. B]. But I think also it's -- to paraphrase the defense's opening, it's one of the ripples, perhaps, in the pebbles in the pond that either the jury can consider in deciding whether to believe this witness' testimony. So I'm going to allow it.

T92.

Throughout the trial, the defendant emphasized evidence that no one else in the home witnessed the assaults. The small size of the home and the regularity with which other family members came into the basement, argued the defendant, meant the defendant did not have the opportunity to commit these crimes without anyone finding out about them. If he had committed these crimes, there would have been "ripples."

The defendant reinforced this theme in its questioning. Defense counsel asked each of the witnesses, other than My.B., whether they had seen the defendant or the children naked, or seen the defendant assaulting the children. T165, 299, 342, 440, 486-87, 584-85. He elicited testimony from multiple witnesses about the distance from the stairs to the train room, the number of stairs, the open layout of the basement, whether the doors were open or shut while the assaults were happening, who frequented the

basement, and the speed at which the defendant would have had to turn off the porn and the children put on their clothes to hide the assaults T124-25, 155, 163-64, 540-48, 611-12, 662-63, 672-74. The defendant also claimed he only babysat alone once T666-67. And defense counsel highlighted that testimony in its closing argument. T755.

The purpose of all this testimony was to argue that the defendant lacked the opportunity to assault the children without another member of the household walking into the train room and witnessing it, in direct contradiction of My.B.'s testimony. Accordingly, the trial court's reference to "context" refers not to the defendant's propensity to commit these acts, but rather that the evidence corroborates My.B.'s testimony in the face of the defendant's attack on her account of the assaults and her credibility.

Evidence that the defendant had the opportunity to be alone with his nephews, and that during that time he showed them pornography, "allowed the jury to fairly weigh the credibility of a claim. . . by putting the claim in the context of past events that showed noteworthy coincidences." *Govt. of V.I. v. Prince*, 486 F. App'x 989, 994 (3d Cir. 2012). This context allowed the State to rebut the defendant's argument that he lacked the opportunity to show pornography to, and assault, M.B. and My.B.

The evidence demonstrated that, contrary to the defendant's suggestion, the other adults in the home were not aware of everything that occurred in the basement. They only became aware of the incident with Br.B. and Be.B when the boys told their mother and grandmother about it. T336-37. Moreover, the fact that the defendant showed pornography to his nephews in the same manner that My.B. alleged he showed it to her and M.B. corroborates her testimony on that point. Finally, the fact that the

defendant seemingly experienced no negative consequences, despite the fact the boys told their mother and grandmother about the incident, made it more likely that the defendant would feel emboldened to take advantage of further opportunities to commit the charged acts against the other children.

Colbath is analogous. In *Colbath*, the defendant was convicted on seventeen charges of AFSA. On appeal, he argued that the trial court erred in admitting evidence of the defendant's uncharged bad acts toward the victim, including touching her breasts and engaging in oral sex with her, during her early adolescence. This Court affirmed, finding that proof of the uncharged conduct was relevant evidence that the defendant acted knowingly and in awareness of his guilt. *Colbath,* 171 N.H. at 635.

The Court also held that "the fact that the [uncharged] incidents occurred and that the victim did not report them to others made it more likely that the defendant would feel that it was "safe" to commit the charged acts, which in turn tended to show that he knew what he was doing when he acted." *Id*. That Court also reasoned that the uncharged incidents were "closely connected by logically significant factors." *Id*. In particular, both the charged and uncharged conduct was directed at the same victim and occurred in a similar context. *Id*.

While the victims in this instance were multiple different children, they were all cousins of similar ages, all shared the same uncle-niece/nephew relationship with the defendant, and both the charged and uncharged conduct occurred in the same time-period, same location, and involved exposing the victims to pornography. Accordingly, the events share a logical nexus of time and context that makes them relevant to rebut

the defendant's claims that he lacked access and opportunity and to corroborate My.B.'s testimony on the defendant's mode of operating.

2. The probative value outweighed the risk of unfair prejudice

Turning to the prejudice prong of Rule 404(b), this Court has held that "[u]nfair prejudice is not ... mere detriment to a defendant from the tendency of the evidence to prove guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged" *Colbath*, 171 N.H. at 636 (internal citations omitted).

The factors this Court considers in weighing the risk of unfair prejudice are: "(1) whether the evidence would have a great emotional impact upon a jury; (2) its potential for appealing to a juror's sense of resentment or outrage; and (3) the extent to which the issue upon which it is offered is established by other evidence, stipulation, or inference." *Id*. "The trial court is in the best position to gauge the potential prejudicial impact of particular testimony, and to determine what steps, if any, are necessary to" diminish or eliminate "the potential prejudice." Thus, [this Court] afford[s] considerable deference to the trial court's balancing of prejudicial impact and probative worth." *Id*. (internal citations and quotations omitted).

These three factors weighed in favor of admitting this evidence. First, the evidence would not have a great emotional impact upon the jury. In this regard, *State v. Howe*, 159 N.H. 366, 378 (2009) is comparable. In *Howe*, the defendant was charged with six counts of possession of child

pornography. The trial court admitted evidence of more than thirty additional pages of pornographic images from the defendant's computer. *Id*. This Court affirmed the admission. After finding that the images were relevant as evidence of the defendant's knowledge, the Court concluded that the risk of unfair prejudice did not outweigh its probative value. That determination rested, in part, on the conclusion that the images from the computer were "not likely to have any greater emotional impact upon the jury than the charged images." *Id* at 378.

Similar to *Howe*, the fact that this defendant had pornographic images on his tablet and showed them to his nephews is not likely to have had any greater emotional impact on the jury than the sexual assault allegations against the defendant. Moreover, testimony about the pornography the defendant showed his nephews was relatively brief and the State did not show actual images to the jury. Therefore, their capacity to invoke an emotional response, or otherwise stir resentment or outrage in the jury was, at best, limited.

Nor did the State have other avenues through which to admit this evidence. Because the State's second warrant application to search the defendant's devices was denied, evidence of the defendant's use of such images could only come in through testimony. My.B. provided this testimony and Be.B's testimony corroborated her testimony on this point.

While any evidence offered against a defendant is prejudicial, "[a] trial court can diminish or eliminate the danger of *unfair* prejudice by issuing a limiting instruction to the jury." *Colbath*, 171 N.H. at 636 (emphasis added). The trial court took this step and issued an extensive jury instruction on this point:

> 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.

T785.

The defendant argues that the limiting instruction on this evidence "made little sense." DB40. But the defendant's main strategy was to argue that he could not have committed these assaults without getting caught by the rest of the household and that My.B. was lying when she testified to the contrary. During closing arguments, defense counsel insisted, "The whole story shows the lies. The whole story shows there aren't ripples." T767.

This established a typical credibility contest between victim and defendant. Therefore, all evidence that corroborated part of My.B.'s testimony, including evidence that the defendant did have opportunity to commit these crimes and the manner in which he committed them, contributed to the jury's ability to resolve this credibility contest. Be.B's testimony that the defendant had opportunity to show him and Br.B pornography, without someone else interrupting him, corroborated My.B.'s

testimony and helped the jury resolve the credibility contest in My.B.'s favor. Evidence that tends to support My.B about that fact increases the likelihood that her testimony about the assaults was also truthful.

The trial court correctly concluded that the probative value of evidence of pornography outweighed risk of unfair prejudice. It wisely issued an appropriate limiting instruction that the evidence only to be used to rebut the defendant's attack on My.B.'s credibility and this Court should not overturn this sustainable exercise of discretion.

C. The defendant opened the door to evidence that he used his electronic devices to search for pornography on the internet.

Even if evidence that the defendant showed his nephews pornography would have been otherwise inadmissible, the defendant opened the door to this evidence. Specific contradiction, one of two subsidiary doctrines of the "opening the door" doctrine, applies broadly to "situations in which 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). This Court has previously held that "remarks in opening statements can create a misleading advantage and, thus, trigger the specific contradiction doctrine." *State v. Nightingale*, 160 N.H. 569, 579 (2010).

The defendant's case rested in large part on a lack of corroborating evidence for My.B.'s testimony and the argument that he lacked the

opportunity to commit these crimes without another member of the household noticing. His opening statement reflected this:

> Even a pebble thrown into a pond makes a ripple. Every cause has an effect. 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. She has made false accusations against Steve Clark and now the State is asking you to convict an innocent man.

T39.

The defendants repeated this theme numerous times:

> Where are the ripples? Even the circumstances around [My.B.'s] disclosure in this case doesn't corroborate what she says happened.

T41.

> From 2014 to 2017, nothing happened with this case. That's a long time. When [My.B's mother] was asked, why not? Why? Why didn't you call the police? Why didn't you follow up? She said that they had seemed to get over it. Where are the ripples?
>
> Let's talk about the physical evidence in this case. There must be physical evidence, right? Are you going to see evidence from a computer or a laptop, or a NOOK, or a tablet? No.

T42.

> A person who if she was telling the truth there would be ripples of that truth throughout this case. There would be something, but there isn't. Because [My.B.] is not telling the truth. She has made these accusations against Steven Clark and they're (*sic*) not true.

T43.

The defendant also reemphasized this point in his closing argument:

> At the beginning of this case Attorney Forciniti talked to you about rippled (*sic*), about how a pebble, when thrown into a body of water leaves ripples or marks. But if this happened the way that [My.B.] alleges, we wouldn't be talking about just a pebble. It would be a 100-pound boulder being thrown into the water.
>
> Two years of abuse, two years where she's going to her grandparents' house five days a week, sometimes more, maybe something -- it's not happening every time, but it's happening very often according to her, and it's always the same, often with the computer room or office room -- door open, people home. There would be something. And the reality is, there's not.
>
> Before we get into specifics I want to go through the evidence we don't have. We don't have any physical evidence to support these allegations. Nothing of evidentiary value was found on those 27 electronic devices that were seized. Some of them have not been searchable, some wouldn't have stored information anyways, like a router. But they did the best they could on the searches, and they didn't find anything, not on the computers, not on the NOOK, not on any of those devices.

T745-46.

The defendant repeatedly urged the jury to infer that the lack of corroborating evidence and evidence of pornography on the defendant's electronic devices were missing "ripples" that proved My.B. was lying.

While it is true that the State did not recover physical evidence from the defendant's devices, the defendant's characterization of the evidence created a misleading advantage. The State was not required to corroborate My.B.'s testimony with either witness testimony or physical evidence. RSA 632-A:6. The defendant's statements created a misleading impression that such corroboration was missing necessary evidence.

In analyzing the admissibility of Be.B's testimony, the trial court observed: "to paraphrase the defense's opening, it's one of the ripples, perhaps, in the pebbles in the pond that either the jury can consider in deciding whether to believe this witness' testimony. So I'm going to allow it." T92

This testimony corroborated My.B.'s account regarding both the defendant's opportunity and his mode of operating during the assaults she described. Contrary to his argument, the defendant had the opportunity to be alone with his nieces and nephews without interruption. While alone with them, he used at least one of his devices to show the children pornographic images. The trial court rightly concluded that the defendant's misleading "ripples" argument opened the door to Be.B.'s corroboration and sustainably exercised its discretion by admitting it.

D. If the trial court erred, the error was harmless beyond a reasonable doubt.

If the trial court erred by admitting evidence that the defendant showed pornographic images to his minor nephews, the error was harmless beyond a reasonable doubt. "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *State v. Enderson*, 148 N.H. 252, 255 (2002).

Evidence that the defendant showed his nephews pornography was relevant to corroborate My.B.'s testimony, but her testimony did not need corroboration. RSA 632-A:6. My.B. testified at length and in detail about

the defendant's assaults. Although the defendant drew attention to minor differences between her trial testimony and her CAC interview five years prior (DB10-11), her two accounts were otherwise very consistent. Ultimately, Be.B's testimony was cumulative of My.B.'s testimony, so any error in admitting that evidence was harmless beyond a reasonable doubt.

III. THIS COURT MAY REVIEW THE DOCUMENTS REVIEWED BY THE TRIAL COURT *IN CAMERA.*

Prior to trial, the defendant requested that the trial court order the production of confidential materials for *in camera* review. DA13. The trial court granted the motion, reviewed the confidential materials, and ordered that some of the materials must be disclosed. DA9-10. The defendant is concerned that the trial court may have erred by not disclosing more material, and requests that this Court conduct a second *in camera* review to determine whether the trial court improperly withheld any documents. DB42.

"[This Court] review[s] a trial court's decisions on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard." *State v. Guay*, 162 N.H. 375, 385 (2011). "To meet this standard, a defendant must demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of his case." *Id*. This Court has held that "the trial court must permit defendants to use privileged material if such material is essential and reasonably necessary to permit counsel to adequately [prepare his defense]." *State v. Gagne*, 136 N.H. 101, 104 (1992). The trial court sustainably exercises its discretion when it refuses to release information that would address facts that are not in dispute or that contain information the defendant can gather from sources to which the defendant has access, for example. *See, e.g.*, *Gagne*, 136 N.H. at 104–05.

Because the State does not know the substance of the information within the undisclosed materials, it assents to the defendant's request that this Court conduct an independent *in camera* review of those materials.

However, this Court should reverse if, and only if, (1) the materials contain information that should have been disclosed to the defendant, (2) this Court concludes that the failure to disclose was unreasonable or untenable to the prejudice of the defendant's case, and (3) the error in failing to disclose did not constitute harmless error. *See State v. Girard*, ___ N.H. ___ (Oct. 16, 2020).

CONCLUSION

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

The State requests fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

April 15, 2021

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,442 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.

April 15, 2021 /s/*Zachary L. Higham*
Zachary Higham

CERTIFICATE OF SERVICE

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

April 15, 2021 /s/*Zachary L. Higham*
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