

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2020-0025**

**STATE OF NEW HAMPSHIRE**

**v.**

**MARK BOULTON**

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

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**BRIEF FOR THE DEFENDANT**

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(Fifteen-minute oral argument)**

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**Statutes**

Rule 106 of the New Hampshire Rules of Evidence . . . . . *passim*

**Remainder of or Related Writings or Recorded Statements**

**(a) If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.**

**(b) A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates:**

- (1) to the same subject matter; and**
- (2) tends to explain or shed light on the meaning of the part already received.**

## **QUESTIONS PRESENTED**

### **Issue I**

Whether Officer Baker's testimony was inappropriate as she was testifying as a lay witness rather than an expert witness.

Issue preserved by contemporaneous objections; T.<sup>1</sup> 45, 53, 136, & 142.

### **Issue 2**

Whether the court erred by sustaining the State's objection when trial counsel attempted to introduce specific statements from Mr. Boulton's recorded interview with the Moultonborough Police Department pursuant to the Rule of Completeness Doctrine, codified by Rule 106 of the New Hampshire Rules of Evidence.

Issue preserved by contemporaneous objections; T. 307-311 and Motion to Reconsider; T. 612-625, and Memorandum of Law in Support of Motion to Reconsider A. 1-20.

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<sup>1</sup> Citations to the record are as follows:  
"App." Designates the appendix to this Brief  
"T." Designates the trial transcripts

### **STATEMENT OF THE CASE**

On May 26, 2017 the State obtained four indictments from a Carroll County Grand Jury charging Mark Boulton with Aggravated Felonious Sexual Assault. RSA 632-A:2, IV. On the same date a Complaint issued against Mr. Boulton for Sexual Assault.

The matter went to trial by jury, the Honorable Ignatius, J., presiding.

After the direct testimony of Detective John, trial counsel sought to have portions of Mr. Boulton's interview with the Moultonborough Police Department read into the record. T. 304. The State objected. T. 305-309. The Court denied the request. T. 308-311. At the conclusion of the State's case, counsel asked the Court to reconsider the prior ruling; T. 612; and provided the Court with a Memorandum of Law in Support of Motion A. 1-20 The Court denied this Motion T. 624.

Following a five-day trial, Mr. Boulton was found guilty of all charges. After sentencing, a timely Notice of Appeal was filed.

## STATEMENT OF FACTS

In 2016, fifteen-year old J.B. lived with her mother and stepfather in Wisconsin. T. 491. Her father grew up in New Hampshire and had recently moved back to the area. T. 155, 491. The Defendant, Mark Boulton, was J.B.'s uncle – her father's brother. T. 492. In the summer of 2016, J.B. came to New Hampshire and visited her father and other family members, including Mr. Boulton, at a lake in Moultonborough. T. 495. Mr. Boulton's son and daughter – J.B. cousins – visited as well. T. 496

One night that summer J.B. and her cousin Brandon were watching a movie in one of the bedrooms T. 498-500. They were lying down on an air mattress. T. 498-500. Mr. Boulton came into the room and lay down on the mattress next to J.B. T. 500-501. As they were watching the movie, Mr. Boulton slid his hands into J.B.'s pants and inserted his finger in her vagina and left the room a short time later. T. 501-504. At trial, J.B. claimed that after Mr. Boulton left the room, Brandon asked if he had touched her and she said that he did not. T. 505-506.

Brandon's testimony differed from J.B.'s testimony regarding the movie. He recalled that Mr. Boulton was scratching himself under the blanket. T. 352, 407. After approximately thirty minutes, Mr. Boulton left the room and J.B. volunteered that the Defendant was "touching her inappropriately" T. 408. According to Brandon, there was no further conversation about the incident because Mr. Boulton came back into the room. T. 418. However, during his forensic interview, Brandon claimed J.B. had said she was "raped" by the Defendant and that he did not believe her, stating "come, on he was clearly just itching [sic] himself." T. 474.

On another night during the summer, J.B. was watching television and Mr. Boulton invited her outside to look at the moon. T. 508-510. While

they were outside, Mr. Boulton touched her breast. T. 510. J.B. walked back inside the house and Mr. Boulton followed her. T. 510-513. He inserted his fingers into her vagina. T. 512-513. When she protested, he told her to “shut the fuck up” and pulled down her pants. T. 514-515. Mr. Boulton bent her over a table and inserted his penis in her vagina. T. 514-515. He later forced his penis into her mouth, and then later into her vagina again. T. 537-538.

According to her mother, prior to the 2016 trip to New Hampshire, J.B. was a typical teenager. T. 159. When she returned from the trip, she was completely different. T. 159. She was angry and withdrawn. T. 159. In late September, J.B. and her mother had a significant argument. T. 215. J.B. had lied to her mother about where she was going one night and had a peer call her mother pretending to be another adult to allay any concerns she may have regarding where J.B. was that evening. T. 212-213. During this argument J.B. was told that if she refused to follow the rules of the house, she would have to move to New Hampshire and live with her father. T. 159-160. Upon hearing that, J.B. had a panic attack and ended up disclosing the assaults to her mother. T. 160-161.

Judy Baker of the Moultonborough Police Department was the lead investigator in this matter. T. 42-43, 56. She received a call from J.B.’s mother regarding the allegations in September of 2016. T. 56-58. As J.B. had returned home to Wisconsin, Officer Baker made arrangements for a forensic evaluation to take place there. T. 57-58. During the course of the investigation, Officer Baker interviewed several family members and took photographs of the house; but did not seize or secure any items for forensic testing. T. 90, 107, 109, 134-136.

Detective Peter John of the Moultonborough Police Department assisted Officer Baker in this investigation. T. 256-258. Specifically, he was tasked with interviewing Mr. Boulton. T. 261, 286. At the time of the



interview, Mr. Boulton was already aware that J.B. has accused him of sexual assault. T. 262. Mr. Boulton denied the allegations repeatedly during the course of the interview. T. 268-269, 275-276, 329.

## **SUMMARY OF THE ARGUMENT**

- I) Officer Baker was improperly allowed to present testimony beyond her stated role as a lay witness. Instead, her testimony, which discussed the how sexual assault victims behave regarding disclosure was the type of testimony that is reserved for a witness who has been disclosed as an expert prior to trial.
  
- II) Rule 106 of the New Hampshire Rules of Evidence states that when a party introduces all or part of a writing or recorded statement, an adverse party has the right to introduce any other part of the writing or recorded statement. By refusing to allow trial counsel to introduce either the entirety of Mr. Boulton's recorded statement to the Moultonborough Police Department – or even selected portions of it – the Court misapprehended Rule 106.

## **ARGUMENT**

### **I. Throughout the course of her testimony, Officer Baker was improperly permitted to give expert testimony**

As the Defendant lodged timely objections to the improper testimony, T. 45, 53, 136, 142; this Honorable Court must review the ruling of the Trial Court to determine whether they were unsustainable exercises of discretion. *State v. Lambert*, 147 N.H. 296, 296 (2001). The case will be reversed “only if the appealing party can demonstrate that the ruling was untenable or unreasonable and that the error prejudiced the party’s case.” *State v. Searles*, 141 N.H. 224, 227 (1996). The Defendant has met this burden in the instant matter.

As set forth above, Officer Baker was the lead investigator for the Moultonborough Police Department in this matter. T. 42-43. In that capacity, she testified as to the steps that she took regarding this case including interviewing witnesses, canvassing the scene, and the like. T. 90, 107, 109. Despite the fact that Baker was never deemed or considered an expert witness, T. 196, during the course of the trial, there were multiple instances where the Court allowed, over the objection of counsel, for Baker to testify as such. These objections should have been sustained and the evidence precluded from the jury’s consideration.

Specifically, during direct testimony, Baker was asked to explain what a Child Advocacy Center does. T. 45. This drew an objection from counsel who raised the concern that Baker was going to testify as an expert. T. 45. The State suggested to the Court that the testimony was simply background information; T. 48, which the Court allowed. T. 48, 52. Shortly thereafter, the State asked Baker about her specific experience concerning child sexual abuse cases. T. 53 This drew another objection from counsel T. 53. The Court overruled the objection stating, essentially, that the question

was not improper, but warning that if the witness were seen vouching for witnesses or perhaps procedures, that she would “sustain the objection”, but implied that the witness had not yet crossed the line. T. 55.

Despite the legitimate objections and concerns of trial counsel that Baker’s answers were bordering on improper expert testimony, the State asked the witness to talk about “processing”. Baker answered “When a traumatic event occurs - and we know this, you know, essentially, from our training and how to approach . . .” T. 136. This drew an objection from counsel who again expressed concern that Baker was testifying as an expert. T. 136. The Court allowed the State to question the witness, holding, *inter alia*, “I will allow the State . . . to ask her about the – her to explain why, in some cases, it’s not appropriate to interview . . . or it’s better to let them process before going through the interview.” T. 141

The witness then gave the following answer:

“I was saying, before, that, you know, a police-involved shooting, for example, we would never interview the officer involved or officers, you know, right site on scene [sic], you know, three minutes after it happened: what did you see; what did you – I mean, often, they’ll take a quick statement from them. By that, I mean, like, how many shots do you think you fired, and go from there, go home, rest. They seize the firearm. My training with working with child advocacy centers and forensic interviewing, you know, they always – we just constantly are saying, disclosure is a process. And a traumatic event, as we know, can – you know, for anyone, just a general, you know, like, [sic] you go through a tough time, you lose a parent or something, no matter what age you are, and you become depressed, that’s a reaction to that. And it’s hard to process information on the event and whatnot [sic]. And it does take time, and you remember little things, And that’s why it’s important and we often do go back and talk to people, sometimes informally. Like I said, it’s not, you know, always, like, oh, [sic], push play, you know, record. For victims and suspects, yes, we – there are certain things in place, But other than that, no.” T. 142.

It was improper for the Court to allow this statement to be made to the jury as it was improper expert testimony<sup>2</sup>.

The question of admissibility in this instance turns on the characterization of Baker's testimony. See *State v. Gonzalez*, 150 N.H. 74, 77 (2003). Expert testimony involves "matters of scientific, mechanical, professional or other like nature, which requires special study, experience or observation not within the common knowledge of the general public. *Gonzalez* at 77. *State v. Martin*, 142 N.H. 63, 65 (1997). Lay testimony, on the other hand, must be confined to "personal observations which any lay person would be capable of making." *Gonzalez* at 77. *Martin* at 65. The focus is not on whether a professional speaks from personal observation, but also whether the personal observations require specialized skills not within the ken of the ordinary person. *Martin* at 65-66.

Viewed through this lens, there can be no doubt that the testimony given by Officer Baker crossed well into the realm of expert testimony. Baker herself testifies that "when a traumatic event occurs - and we know this, you know, essentially, from our training and how to approach . . ." T. 136. She concedes that her basis of knowledge is from specific training.

It is important to remember that the focus of the improper expert testimony was based on Officer Baker's attempts to explain why J.B. may have taken time to disclose what had happened to her, as well as why there may be inconsistencies in the retelling of the allegations of sexual assault.

This Honorable Court has specifically found that these issues – the explanation of the actions or inactions of sexual assault victims – requires expert testimony. In *State v. Gonzalez*, this Court held that "the tendency or frequency of sexual abuse victim's denials and recantations are not

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<sup>2</sup> Prior to this lengthy, improper answer, trial counsel had objected to this line of questioning. T. 136. It should also be noted that at the conclusion of the answer, it appears counsel renewed her objection. Although this second objection was not recorded in the transcript, the Court does "overrule" the objection. T. 142.

observations that any lay person is capable of making. *State v. Gonzalez*, 150 N.H. 74, 78 (2003). See also *State v. Cressey*, 137 N.H. 402, 411 (1993); *State v. MacRae*, 141 N.H. 106, 109 (1996).

As in *Gonzalez*, Baker's employment and training provided her with specialized knowledge and experience not available to the general public and beyond the common experience of an average juror. *Id* at 78, *Martin*, 142 N.H. at 65; *MacRae*, 141 N.H. at 109. This type of testimony is clearly "expert testimony and inadmissible as lay witness testimony". *Gonzalez* at 79. See also *State v. Chamberlain*, 137 N.H. 414, 417 (1993).

It is not enough for Mr. Boulton to show that the testimony was improperly admitted. He must also show that the error affected the outcome of the proceeding. See *State v. Cassavaugh*, 161 N.H. 90, 101 (2010). Mr. Boulton is able to satisfy this burden.

This entire case rested on the credibility of J.B. There were no witnesses who actually saw either of the alleged assaults take place. There was no scientific or forensic evidence introduced at trial. The only direct evidence that anything improper happened came solely from J.B. There were considerable inconsistencies in her testimony which the State tried to explain away by the introduction of Officer Baker's improper testimony. Without this testimony, the jury could have been left wondering why there were gaps or inconsistencies in her story. Instead of allowing trial counsel to exploit those gaps, this improper testimony smoothed them away.

It is important to note that the improper testimony of Baker was not simply limited to the answers she gave on direct and re-direct examination. The State came back and echoed this improperly admitted testimony during closing arguments in order to, again, explain away the inconsistencies in J.B.'s story. In reference to a hypothetical car accident, the prosecutor stated "There are going to be pieces of that traumatic event that stay with you. But there are going to be pieces of that traumatic event that don't." T.

674. Mr. Boulton contends that the improperly admitted testimony of Officer Baker formed the foundation of this portion of the closing argument. Without the admission of testimony concerning how hard it is to process traumatic events and that disclosure itself is a process, T. 142, this closing argument would have been improper. Yet in arguing these facts to the jury, the State reinforced just how crucial and important this improperly admitted testimony actually was to their case.

**II. The Court misapprehended Rule 106 of the New Hampshire Rules of Evidence when it denied Mr. Boulton the right to have portions of his recorded interview read into the record.**

As set forth above, Detective Peter John of the Moultonborough Police Department interviewed Mr. Boulton. T. 261, 286. The interview was recorded and, at some point in the proceedings, a transcript was made from the recording.<sup>3</sup> During the course of the Detective's direct testimony, trial counsel expressed concerns that the State was unfairly characterizing portions of the interview and informed the Court that she intended to "ask that his transcript be admitted as evidence so the jury can read it in full" T. 272. The Court expressed no opinion as to whether it would be appropriate at that time. T. 273.

During cross-examination of Detective John, counsel stated "what I would like to do is give you the transcript so that you have it in front of you while maybe having you read your questions and me reading his answers [sic]" T. 304. This drew an objection from the State and a lengthy side-bar conference. T. 305-313. During the bench conference, counsel suggested:

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<sup>3</sup> There does not appear to have been any testimony elicited at trial specifically stating that the interview was recorded. However, the parties make repeated reference to the fact that the interview as recorded at bench conferences and during argument (see, e.g. T. 307). Numerous references are also made to the fact that a transcript was made from the recording (see, e.g. T. 272), although there is no explicit testimony concerning this fact.

“Rule 106 allows me to talk about the portions of the interview that I now want to talk about. What Rule 106 says is that, ‘if a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.’ And so I think in fairness, I, under Rule 106 . . . that we should be able to get into what we want to out of this transcript. The State can’t just pick and choose and then leave it out there.” T. 306.

The Court held that “we’re not going to have a rereading of the transcript. . . I disagree with your reading of [Rule] 106” T. 307- 308.

Once questioning resumed, the State lodged another objection which the Court sustained, stating “we’re not going to read the transcript aloud” T. 313.

At the conclusion of the State’s case, the Defendant asked to have the court reconsider the previous ruling. T. 612. In addition to arguing the matter before Court, trial counsel filed a Memorandum of Law in support of the Motion to Reconsider. A. 1-20. In the oral Motion and in the Memorandum, trial counsel indicated that the Court misapprehended Rule 106. After hearing argument on this matter, the Court denied the Motion. T. 624. These rulings were incorrect.

This Honorable Court must review the ruling of the Trial Court to determine whether it was an abuse of discretion to preclude this testimony. See *State v. Warren*, 143 N.H.J. 633, 636 (1999). Mr. Boulton must demonstrate that the Court’s ruling was unreasonable or untenable to the prejudice of his case. *State v. Graham*, 142 N.H. 357, 362 (1997). Again, Mr. Boulton is able to meet this burden.

A party has a right to introduce the remainder of a writing, statement, correspondence, former testimony, or conversation that an opponent introduced so far as it relates to the same subject matter and tends to explain or shed light on the meaning of the parts already received. *State*



v. *Crossman*, 125 N.H. 527, 531 (1988). The purpose of the doctrine is to prevent a selective and out of context presentation of evidence from misleading the trier of fact. *State v. Warren*, 143 N.H. 633, 636 (1999).

There are two requirements; first, the statement must be part of the same conversation; and second, admission of only a portion would mislead the jury. *State v. Mitchell*, 166 N.H. 288, 293 (2014); *State v. Warren*, 143 N.H. 633, 636 (1999). Both of these requirements are met in the instant matter.

Certainly, there is no question that the statements are all part of the same conversation. Mr. Boulton was interviewed by Detective John at the Moultonborough Police Station for a little over two hours. T. 260, 287, 304. There is nothing in the record to indicate that there was a second interview or to suggest that there was more than one recorded conversation with Mr. Boulton.

In terms of the second requirement, the portions of the interview elicited from Detective John were completely out of context and served to mislead the jury. See *State v. Warren*, 143 N.H. 633, 636 (1999); *State v. Mitchell*, 166 N.H. 288, 293 (2014). Specifically, the State had Detective John testify that Mr. Boulton eventually told him about the contents of a phone call he received regarding the allegations. T. 262; that Detective John was under the impression that Mr. Boulton knew when the allegations supposedly took place. T. 264-265; that Mr. Boulton told him that he was not at work on the days of the allegations. T. 265; that Mr. Boulton did not remember that J.B. was covered with a blanket while watching the movie. T. 267; that Mr. Boulton said that he did not make any movements while on the air mattress, but if he had, his son would have seen the movements. T. 268; that his mother told him that she did see J.B. in the room with him. T. 275; that he said that he watched movies with J.B. in the living room without mentioning doing so in the bedroom. T. 275; and that Mr. Boulton

gave a reason for why J.B. might be making up the allegations. T. 275-276; 277-278.

However, the introduction of these statements without appropriate background was fundamentally unfair. See *Warren* at 635-638. A review of the actual transcripts (A. 7-20) from Mr. Boulton's interview provided much needed context and to preclude counsel from introducing them prevented Mr. Boulton from receiving a fair trial.

For example, far from simply telling Detective John that he received a phone call regarding the allegations, what Mr. Boulton actually states was that he was "in shock even hearing an allegation like that" (A. 7). Regarding with his son would have seen any movements he made while watching the movie, he also stated "there's no continual motion. There's nothing that happened." (A. 14).

Essentially, the purpose behind Rule 106 is to prevent one party from gaining an advantage by misleading the jury regarding prior recorded statements or writings. *State v. Mitchell*, 166 N.H. 288, 293 (2014); *State v. Lopez*, 156 N.H. 416, 421 (2007). In the instant matter, by allowing the State to present portions of Mr. Boulton's interview completely out of context the Court misapprehended the law and deprived Mr. Boulton of his right to a fair trial.

**CONCLUSION**

FOR THE reasons set forth above, Mr. Boulton requests this Honorable Court set aside the verdicts in this matter or, in the alternative, order a new trial.

Undersigned counsel requests fifteen minutes of oral argument.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief shall be served upon the State of New Hampshire through the New Hampshire Supreme Court's electronic filing system.

/s/ William A. Korman  
William A. Korman

Dated: September 25, 2020

**APPENDIX**

Memorandum of Law in Support of Motion to Reconsider . . . . A1-6  
Attached Excerpts from Transcription of Moultonborough  
Police Department Interview of Mark Boulton . . . . . A7-20

**THE STATE OF NEW HAMPSHIRE**

**CARROLL, SS.**

**SUPERIOR COURT**

**State**

**v.**

**Mark Boulton**

**17-CR-146**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER**

NOW COMES the Defendant, Mark Boulton, by and through his Counsel, Amy Ashworth, Esq., Public Defender, and submits this Memorandum of Law in Support of Defendant's Oral Motion to Reconsider.

In support of this Memorandum, the following is stated:

**FACTS**

1. Mr. Boulton is charged with four counts of Aggravated Felonious Sexual Assault and one count of Sexual Assault.
2. Mr. Boulton's trial started on September 9, 2019. During trial, the State called Detective Peter John of the Moultonborough Police Department to testify about a recorded interview he had with Mr. Boulton.
3. Specifically, the State asked Detective John about Mr. Boulton's responses to his questions in the following areas of the interview:
  - a. that Mr. Boulton eventually told him about the contents of a phone call;
  - b. that Detective John was under the impression that Mr. Boulton knew when the allegations supposedly took place;

- c. that Mr. Boulton told him that he was not at work on the days of the allegations;
- d. that Mr. Boulton said he did not remember a blanket being involved because he was not focused on that;
- e. that Mr. Boulton said that he did not make any continual movements but that his son would have seen any movements;
- f. that his mother told him that she did see Jasmine in the room with him;
- g. that he said that he watched movies with Jasmine in the living room without mentioning doing so in the bedroom; and
- h. that Mr. Boulton gave a reason for why Jasmine might be making these allegations up and that it was not a reason for such serious allegations.

4. This information elicited from Detective John's testimony is directly from the recorded interview. The State did not use exact quotations, but Detective John testified both that Mr. Boulton made specific answers and about how he interpreted those answers.

5. During the direct, the Defense objected to the testimony regarding what Mr. Boulton said about what his mother told him. The State asserted that the evidence went to Mr. Boulton's consciousness of guilt. The State did not introduce all of Mr. Boulton's statements regarding what his mother told him.

6. During cross-examination, the Defense attempted to introduce Mr. Boulton's specific statements regarding the topics listed above to provide context for the statements Detective John reported. Each statement Detective John testified about was part of a larger statement that constituted more detailed responses by Mr. Boulton.

See attached Excerpts from Transcription of Moultonborough Police Department Interview of Mark Boulton, pp.26, 29, 35-36, 45, 49-50, 51-53. By not cherry-picking the statements, and paraphrasing the statements without using exact words of the defendant, the State created a misleading impression that could only be cured by the admission of the entire statements on those subject matters, in the exact words of the defendant.

7. The State objected to the introduction, arguing that since the State did not specifically read Mr. Boulton's exact words, that the defense cannot do so either. Rather, what the State did was allow Detective John to put his own interpretation on what Mr. Boulton said by leaving out pieces of the conversation, which created a misleading impression for the jury as to what Mr. Boulton actually said.

8. The Court agreed with the State and sustained the objection. The Court misapprehended the law, and therefore must reconsider its prior ruling and admit Mr. Boulton's actual words to prevent causing a misleading impression.

### ARGUMENT

9. "A motion for reconsideration is designed to bring to the trial court's attention 'points of law or fact that the Court has overlooked or misapprehended.'" Farris v. Daigle, 139 N.H. 453, 455 (1995). Thus, the motion must state with particularity points of law or fact that the Court has overlooked or misapprehended. N.H. Crim. Pro. R. 43.

10. The Court misapprehended the Rule of Completeness Doctrine, which is codified in the New Hampshire Rules of Evidence as Rule 106. The Court found that because Mr. Boulton can choose to testify to provide context for the statement that the Defense cannot introduce his exact words to the jury. In State v. Warren, the defendant

did not testify, but the Court reversed his conviction because the trial court allowed the State to introduce part of his statement without allowing the defense to introduce the remainder of the statements. 143 N.H. 633, 635-38 (1999). Thus, the defendant's ability to testify does not negate his right to produce all proofs favorable under Part 1, Article 15 of the New Hampshire Constitution and does not prevent his right to prevent the State from creating a misleading impression.

11. The Court also misapprehended the fact that because the State did not specifically quote the recorded interview that the defense is precluded from doing so. The fact that the State did not use the actual language in the interview substantially increases the probability that the testimony would be misleading, as doing so permitted Detective John to leave out portions of the interview that would provide context and to discuss the portions that he interpreted to be most inculpatory. Detective John put an inculpatory spin on each statement by cherry-picking parts of the statements. Doing so made those statements sound inculpatory, when there was further context to each statement that made each statement neutral or even helpful to the defense.

12. The State, by cherry-picking and not using exact words created the misimpression about statements made to the detective has opened the door that the defendant may cure by specific contradiction within the transcript. This applies "when one party introduces evidence that provides a justification beyond mere relevance for an opponent's introduction of evidence that may not otherwise be admissible." State v. Morrill, 154 N.H. 547, 550 (2006). In this case the exact words of the defendant are justified because of the State's introduction of misleading paraphrased statements. "The initial evidence must have reasonably created a misimpression or misled the fact-



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finder in some way. The rule thus prevents a party from successfully excluding evidence favorable to his opponent and then selectively introducing this evidence for his own advantage, without allowing the opponent to place the evidence in proper context".

Id. The State selectively and inaccurately introduced evidence for their own advantage and this Court must now allow the defendant to place the evidence in the proper context.

13. Furthermore, the Court overlooked that the best evidence to prove the content of a recording or writing is the recording or writing itself. N.H. R. Ev. 1002. The interview with Mr. Boulton was recorded; therefore, when Detective John testified about the interview, he was testifying about the contents of the recorded interview. The State did not use the actual recording to avoid using Mr. Boulton's actual words to create a misleading impression. Using the actual words is the best way to prove what Mr. Boulton actually said, to allow the jury to make the judgments about his statements that Detective John was impermissibly allowed to do instead.

14. Additionally, the Court misapprehended Mr. Boulton's Right to Confrontation under the Federal Constitution. By not being able to confront Detective John with his inaccurate and misleading rendition of the statements introduced, Mr. Boulton was not able to test the witness' reliability, veracity, or bias before the jury, which is the point of cross-examination and the right to confront. He was not able to demonstrate that Detective John took those statements out of context to make them seem inculpatory.

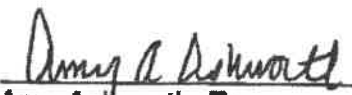
#### CONCLUSION

15. The Court misapprehended the law in prohibiting the defense from cross-examining Detective Peter John about what exactly Mr. Boulton actually said during his

recorded interview under the doctrine of "Opening the Door", Rules 106 and 1002 of the New Hampshire Rules of Evidence, Mr. Boulton's right to present all proofs favorable under Part 1, Article 15 of the New Hampshire Constitution, the opening the door doctrine of specific contradiction, and the Right to Confrontation under the Sixth Amendment of the Federal Constitution.

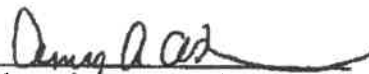
WHEREFORE, for the for the above stated reasons, Mr. Boulton respectfully requests that this Honorable Court overrule the State's objection and allow the defense to enter into evidence the entirety of Mr. Boulton's statements pertaining to the topics listed above.

Respectfully Submitted,

  
Amy Ashworth, Esq.  
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**CERTIFICATE OF SERVICE**

It is hereby certified that on this the 12th day of September 2019 a copy of the forgoing was forwarded to Steven Briden, Esq., Deputy Carroll County Attorney.

  
Amy Ashworth, Esq. New  
Hampshire Public Defender

DETECTIVE JOHN: Um -- and what have you heard? What's -- um -- can you tell me what you know about -- um -- the allegations -- um -- and -- um -- what information have you heard and from who? Who have you heard that information from?

MARK BOULTON: Well, I mean, the first call was right at the -- um -- at the dinner table. And I got called and was yelled at that I assaulted her and hung up, and that was it. And as the time unfolded the one guy called and everything else, so there was, you know, disruption there. The family guy -- um -- um -- company bonded, and I haven't seen in like 20 years, so. And they were in the other room --

DETECTIVE JOHN: Um-hum.

MARK BOULTON: -- But, you know, just in shock even hearing an allegation like that.

DETECTIVE JOHN: Yeah. Now, who called you?

MARK BOULTON: It was Jasmine's stepfather.

DETECTIVE JOHN: Okay. And what's his name?

MARK BOULTON: I don't know. I never paid attention.

DETECTIVE JOHN: Um -- and what did he say to you? He called you up? Your phone?

MARK BOULTON: Yeah, he called my phone.

DETECTIVE JOHN: Okay.

MARK BOULTON: And -- um -- just said, "You fucker, you -- you -- you" -- um -- I don't know what it was -- the word he used. He just yelled it, and then that was -- that was it and hung up. I was like what? So.

DETECTIVE JOHN: So when you say, you know, you fucker, and that was it, and he hung up, I mean what did he say?

MARK BOULTON: "You did that to Jasmine." You know, "You fucker, you -- you -- you did this to her." I'm not sure what -- how -- what -- what -- how it was said, but yeah.

DETECTIVE JOHN: Okay. So as he -- when you hung up the phone what was your impression that he thought you had

done?

MARK BOULTON: He was -- oh, he was saying after everybody -- after the phone and everybody was looking at me, and I'm going, "What was that?" And then that's -- so he did say -- yeah, he says, "You raped her," and -- um -- and I said that to everybody else. I go, "He just accused me of doing that to Jasmine."

DETECTIVE JOHN: Of raping Jasmine?

MARK BOULTON: Right.

DETECTIVE JOHN: Okay. And -- um -- did he say anything consistent or anything more than that?

MARK BOULTON: No.

DETECTIVE JOHN: Okay. So how long was this phone call?

MARK BOULTON: I don't know. Probably 10 -- 10, 15 seconds. It was pretty short, I guess.

DETECTIVE JOHN: Okay. All right. Um -- and who were -- you said you were at a dinner table.

MARK BOULTON: I had my brother right next to me, Danielle, my daughter, and my son.

DETECTIVE JOHN: Okay. All right. Um -- now, do you know when this incident that he was referring to took place?

MARK BOULTON: They're saying that it was at the last night that she was there.

DETECTIVE JOHN: Okay. And so you talked to more people because you're saying that they're saying. So what -- who else have you spoken to about this?

MARK BOULTON: Um -- DCYS in Laconia and -- um -- um -- a lady there in Wisconsin.

DETECTIVE JOHN: Okay.

MARK BOULTON: I can't remember her name.

DETECTIVE JOHN: Is there an investigator out of Wisconsin?

MARK BOULTON: Kristen. Chris. Yeah.

DETECTIVE JOHN: Okay.

MARK BOULTON: I -- I -- no, I think I had it off. I think -- I think Sherry was coming up that day.

DETECTIVE JOHN: Okay. And then Tuesday, the 5th?

MARK BOULTON: Yeah, Tuesday the 5th.

DETECTIVE JOHN: Were you working or did you have it off?

MARK BOULTON: No, I -- I think I worked a little bit, too, but not -- not the whole day.

DETECTIVE JOHN: Landscaping or --

MARK BOULTON: Yeah.

DETECTIVE JOHN: Okay.

MARK BOULTON: And then in the evening it was back to Wilkinson-Beane.

DETECTIVE JOHN: Okay. And when you say back, you were on call for that.

MARK BOULTON: On call for that, yeah.

DETECTIVE JOHN: Okay. And then -- um -- Wednesday. Were you -- did you do any landscaping on Wednesday?

MARK BOULTON: Yeah, I was working.

DETECTIVE JOHN: Okay. All right. Um -- so what happened -- um -- tell me about the family events -- um -- that happened like 4th of July. Um -- did you -- you made mention of a cottage. Do you guys --

MARK BOULTON: Yeah, we have a --

DETECTIVE JOHN: It seems like, from what you told me, you have a large family. Um --

MARK BOULTON: Yeah.

DETECTIVE JOHN: I say large. I come from a family -- your genuine traditional nuclear family. There's only four of us.

MARK BOULTON: Just normal get-together, I guess.

DETECTIVE JOHN: Okay. Now, Mark, is there any -- has there ever been a time that you've watched a movie in a different room in the house?

MARK BOULTON: No, it was always -- I used to have a TV up in my room, but that's no longer there. Um --

DETECTIVE JOHN: Okay.

MARK BOULTON: -- we just always had it downstairs.

DETECTIVE JOHN: Now, when you say your room, which room is that if I go up the stairs right in there, the living room?

MARK BOULTON: Oh, the main --

DETECTIVE JOHN: So I go up these stairs, and I'm looking down that hallway.

MARK BOULTON: So you have two stairs.

DETECTIVE JOHN: Yeah. So I'm in the living room.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: I go up that set of stairs.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: I'm looking down the hallway of the second floor now.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: Lead me to your room.

MARK BOULTON: So you go all the way down past two bedrooms and the bathroom, and then across from the bathroom is mine.

DETECTIVE JOHN: Okay.

MARK BOULTON: And then straight ahead is my parents'.

DETECTIVE JOHN: Okay. Okay. Because there's a lot of rooms up there, and I didn't know which --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: \*\* which one was yours. All right, Mark. Now, listen. At the beginning of this interview \*\*

MARK BOULTON: Um-hum.

DETECTIVE JOHN: \*\* um \*\* I asked that you -- that you be honest and truthful with me \*\*

MARK BOULTON: Um-hum.

DETECTIVE JOHN: \*\* okay. Now, listen. I want you to think. I want you to go back through your memory, your recollection, you know. And I asked you real quick, and you answered me real quick. I just want you to take some time and think.

Has there ever been another time during that weekend, July, let's say, 2nd to 5th, that you watched a video in a different room other than the living room at your parents' house here on Redding Lane? And, as I told you in the beginning, there's some questions I'm gonna know some responses to.

MARK BOULTON: Yeah. Yeah. No. I think I have.

DETECTIVE JOHN: And this is just -- you know, I just want to make sure -- you know, put you down on record here.

MARK BOULTON: Yeah.

DETECTIVE JOHN: And I just want -- you know, I want to give you the benefit of the doubt. That's all.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: So you were about to say something. Was there another time that maybe \*\*

MARK BOULTON: My son and I were watching, I think, up in -- um -- Jasmine's room -- um -- we were watching movies there for a little bit.

DETECTIVE JOHN: Okay. And great. I'm glad you made mention of that, okay --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: \*\* because that's the one I'm talking

about.

MARK BOULTON: Yeah.

DETECTIVE JOHN: That was -- that was the time, so --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- good. I'm glad you took that extra minute to think about it. That was important.

MARK BOULTON: Yeah. I really almost forgot about that.

DETECTIVE JOHN: Yeah. Not -- not a problem, Mark.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: I just wanted to make sure for the record, you know, that we --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- made mention of that. And -- um -- so it was you and your son, Brandon.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: Okay. And which room were you in?

MARK BOULTON: Jasmine's room.

DETECTIVE JOHN: Okay. And now -- again, I'm in the living room. I go up the staircase, I'm up on the second floor.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: I'm looking down the hallway.

MARK BOULTON: Yeah.

DETECTIVE JOHN: Which room is Jasmine's room?

MARK BOULTON: The room that's on the right right across from her father's room.

DETECTIVE JOHN: Okay. Now, there's a few rooms on the right.

MARK BOULTON: There's only two.



getting the truth here, and I understand that memories could be faded, but it's important. You know, sometimes -- um -- there's some questions -- again, I'll repeat. There's some questions that I know the answer to --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- and I ask, and I just want to make sure your credibility --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- is sustained to the questions that I don't know the answers to, okay?

MARK BOULTON: Yeah.

DETECTIVE JOHN: So it's to build -- this is your interview, and it's to build your credibility. That's all.

MARK BOULTON: Yeah.

DETECTIVE JOHN: Okay. Um -- so at that time when all three of you are laying down is there anytime whatsoever -- um -- that maybe there was a sheet that -- um -- Brandon or Jasmine pulled up or anything like that?

MARK BOULTON: No. I don't know. Or that's nothing that was really being focused on.

DETECTIVE JOHN: No. Okay. All right. Um -- now, Jasmine makes accusations -- um -- that at that time -- um -- you had touched her. And just a minute before you shake your head no here. Specifically -- um -- that you had your hands down her pants.

MARK BOULTON: No.

DETECTIVE JOHN: Okay.

MARK BOULTON: Absolutely not.

DETECTIVE JOHN: Okay.

MARK BOULTON: Nothing.

DETECTIVE JOHN: Well, let me just explain here, Mark.

MARK BOULTON: Okay.

DETECTIVE JOHN: Okay. Now, would he ever report to law enforcement or to anybody -- um -- that he may have seen or heard anything take place during that time?

MARK BOULTON: I don't know if he actually had been asked anything.

DETECTIVE JOHN: Okay. Now, if he had been asked those questions, though, Mark --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- um -- would your son be able to -- um -- honestly report that he did see something happen, a continual motion or heard something or any noise like that?

MARK BOULTON: I guess.

DETECTIVE JOHN: Okay. And why would he be able to report that?

MARK BOULTON: Because he's being asked, and I'm sure he's sitting there thinking about stuff. Some things that I'm trying to think of.

DETECTIVE JOHN: Okay. So you think it's a possibility for Brandon to say you know what, I did see -- um -- my father's hand go under Jasmine's pants?

MARK BOULTON: I don't know. I don't -- I don't -- no.

DETECTIVE JOHN: Okay. Um -- would he be able to say that you know what, there was a continual motion going on?

MARK BOULTON: Very -- all sitting right close to one another.

DETECTIVE JOHN: Yeah.

MARK BOULTON: There's no continual motion. There's nothing that happened.

DETECTIVE JOHN: Okay. Now, if there -- if there was, is Brandon -- was Brandon close enough that he would have been able to see it?

MARK BOULTON: Yes, we are all like inches apart from one another.

DETECTIVE JOHN: Um-hum. Okay. All right. So he would

have a good understanding if something did take place or it didn't take place?

MARK BOULTON: Right.

DETECTIVE JOHN: Okay. Okay. Um -- now, you said that the information that you got from Wisconsin didn't make mention of that night, but you did read some paper work from them. What was the -- was it another situation that you read about?

MARK BOULTON: Hmm-um.

DETECTIVE JOHN: Okay.

MARK BOULTON: No, there's no -- they didn't -- they never mentioned what we were just talking about.

DETECTIVE JOHN: Okay. Okay. Um -- so there was another situation as well which was reported --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- okay. Um -- and it was -- um -- on the 5th. So it was the day before that Jasmine left, okay. Um -- at that point -- um -- so I'm going off my memory. It looks like -- is that a Wednesday? This would have been a Tuesday.

MARK BOULTON: Yes, Wednesday, yep.

DETECTIVE JOHN: This would have been a Tuesday.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: So Tuesday night. So -- um -- do you recall being at -- um -- your parents' house on Tuesday night?

MARK BOULTON: Yeah.

DETECTIVE JOHN: Okay. Okay. And what -- run me through what happened on Tuesday night.

MARK BOULTON: Tuesday night we all went out to a family dinner.

DETECTIVE JOHN: And where did you go out for dinner?

MARK BOULTON: We went to the Bob House Restaurant.

DETECTIVE JOHN: Okay.

MARK BOULTON: We all finished dinner, returned home, watched some TV, and everybody slowly started migrating off to bed.

DETECTIVE JOHN: Okay. All right. So -- um -- you know, when people migrate off to bed, I mean, were you all what? After dinner you came home. I'm assuming you're all in the kitchen or living room.

MARK BOULTON: Yeah, hanging out. And everybody just kind of dropped off.

DETECTIVE JOHN: Okay. And started going to bed or something like that?

MARK BOULTON: Getting ready, yeah.

DETECTIVE JOHN: Yeah. About what time was that?

MARK BOULTON: Um -- I don't know. 9:30.

DETECTIVE JOHN: Okay.

MARK BOULTON: 9:30, 10.

DETECTIVE JOHN: Yeah.

MARK BOULTON: About that.

DETECTIVE JOHN: All right. Um -- and explain that situation. People started going to bed. Um --

MARK BOULTON: The TV's on. We were watching TV. And as everybody's dropping off, I'm playing with my phone, and -- and -- um -- um -- at some point my mother came down and said, "I'm heading to bed." And I was like, "All right, and I'm gonna go, too."

DETECTIVE JOHN: Um-hum.

MARK BOULTON: And I followed up after.

DETECTIVE JOHN: Okay. Now, at that point when your mom comes in and says hey, I'm gonna go to bed --

MARK BOULTON: Um-hum.

DETECTIVE JOHN: -- who is in the living room at that point?

MARK BOULTON: Nobody. But when I talked with my mother about it she says that Jasmine may have been down there, too. And I told her I don't recall her being down there.

DETECTIVE JOHN: Okay.

MARK BOULTON: I know I was there. She says, "Make sure you shut everything off." And I says, "All right. I got to get going, too," walked around the house, shut off the TV, checked the lights and the doors, and went to bed.

DETECTIVE JOHN: Um-hum. Now, if Jasmine was down there, would that be -- when you say there, down in the living room?

MARK BOULTON: Yeah, we had -- somewhere down in there.

DETECTIVE JOHN: Okay. Now, would you have seen her if she was down there? Now, I just want you to -- now, before you answer that, again, just take a couple minutes. Um -- refresh your memory here, okay. Because, again, I just want you to make sure that you're gonna be complete and thorough with your statement, okay.

Um -- now, if Jasmine was down there, just -- there's no -- absolutely nothing wrong with you and Jasmine being in the same room because you're staying in the same house together.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: Okay. I just want to make sure, though, that the -- the statements and -- and from perhaps what witnesses have said that it's consistent. That's all. Again, it works towards your credibility.

So I've been to the house, the living room, the kitchen. It's not -- it's not overwhelming. It's not some -- you know, I mean, it's a nice house, but it's not, you know, impossible to look around and to see everybody. So if Jasmine was there, it would be -- it would be --

MARK BOULTON: I just don't -- I just do not remember her being downstairs.

DETECTIVE JOHN: Okay.

MARK BOULTON: I just know -- I just remember looking up at my mother and her telling me that -- um -- she's going to bed --

DETECTIVE JOHN: Yep.

MARK BOULTON: -- make sure everything's shut off, and I say, "Yep, I got to get going, too."

DETECTIVE JOHN: Um-hum.

MARK BOULTON: So I went and shut everything down.

DETECTIVE JOHN: Okay.

MARK BOULTON: Followed up -- up the stairs.

DETECTIVE JOHN: Oh. So there's a possibility that Jasmine could have been down there, right?

MARK BOULTON: I just don't remember her being downstairs if she was there. I think my mother and I talked about it a bunch of times.

DETECTIVE JOHN: Um-hum.

MARK BOULTON: And for a while she wasn't saying -- saying that she was there at all. She doesn't recall seeing her there, and later on she was like, "I think she was down there," and I said -- I just told her I just don't know.

DETECTIVE JOHN: Um-hum.

MARK BOULTON: I --

DETECTIVE JOHN: Now, you spoke to your -- your parents earlier today?

MARK BOULTON: Um -- she was gonna bring down some mail for me.

DETECTIVE JOHN: And she told you that I had spoken to her --

MARK BOULTON: Yes.

DETECTIVE JOHN: -- and I -- I went by the house.

MARK BOULTON: You and Jerry came down.

MARK BOULTON: No.

DETECTIVE JOHN: Okay. Um -- now, the allegation about that night -- um -- involves you having intercourse with --

MARK BOULTON: Absolutely not.

DETECTIVE JOHN: -- Jasmine.

MARK BOULTON: Absolutely not.

DETECTIVE JOHN: Okay. Um -- well, let me just explain, okay. Um -- not only intercourse but also oral as well.

MARK BOULTON: There's nothing to explain. There's nothing --

DETECTIVE JOHN: Okay.

MARK BOULTON: Nothing happened.

DETECTIVE JOHN: Well, I just want to explain the facts, okay.

MARK BOULTON: I know what you -- yeah, what you're hearing.

DETECTIVE JOHN: Yeah. And I just -- listen. I'm not -- I'm just saying this to inform you, okay?

MARK BOULTON: Yep.

DETECTIVE JOHN: All right. I just -- I'm telling everybody -- um -- or not telling everybody, but I'm telling everybody the facts of the situation, and obviously you're a very important -- um -- person of this investigation, and so I just got to make sure that, you know, I'm being thorough and truthful and complete with you as well, okay?

MARK BOULTON: Um-hum.

DETECTIVE JOHN: Um -- at any place did anything like that ever take place?

MARK BOULTON: No, absolutely not.

DETECTIVE JOHN: Okay. Um -- now, why would Jasmine make allegations like that?

MARK BOULTON: I don't know.

DETECTIVE JOHN: Okay. Have you ever been affectionate -- extra affectionate to Jasmine?

MARK BOULTON: No, not that I treat -- treated her no differently than my own kids.

DETECTIVE JOHN: Okay. Um -- hugs, kisses?

MARK BOULTON: Yeah.

DETECTIVE JOHN: Okay.

MARK BOULTON: Just normal, general.

DETECTIVE JOHN: Yeah. Yeah. Okay. Um -- now, if a case like this -- let's -- let's say if a case like this would go to trial, what would you want to tell the jury?

MARK BOULTON: Nothing happened.

DETECTIVE JOHN: Okay. And how would you tell the jury that?

MARK BOULTON: There's nothing to tell. There's nothing that happened. Absolutely nothing had happened. What is there to say?

DETECTIVE JOHN: Um-hum. Okay. Now, what -- is there anything -- if you wanted to communicate to Jasmine -- let's say Jasmine was here with us right now.

MARK BOULTON: Um-hum.

DETECTIVE JOHN: What would you express to her or what would you communicate to her?

MARK BOULTON: Why would you say something like that to me -- about me?

DETECTIVE JOHN: Um-hum.

MARK BOULTON: Why would you ever want to fabricate up anything like that?

DETECTIVE JOHN: Um-hum. Now, is there anything that you've done to her in her past or that weekend that would make her want to have some sort of revenge towards you?