THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0025

State of New Hampshire

v.

Mark Boulton

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Elizabeth C. Woodcock
N.H. Bar No.: 18837
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

(10-minute 3JX oral argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

I. Whether the police officer testified improperly as an expert, where her testimony was related to her experience as a police officer and was not expert testimony.

II. Whether the defense should have been allowed to read portions of a transcript of the defendant's statement to the police in place of asking questions on cross-examination.

STATEMENT OF CASE

The Carroll County grand jury charged the defendant with four counts of aggravated felonious sexual assault. RSA 632-A:2, IV; *see also* T[1] 8-9. He was also charged, via complaint, with misdemeanor sexual assault. RSA 632-A:4. After a jury trial (*Ignatius*, J.), the jury convicted him on all charges. T 706. The court sentenced him to not more than 20 years nor less than 10 years (Charge No. 1373381C), a concurrent 10 to 20 year sentence (Charge No. 1373380C), a concurrent 10 to 20 year sentence (Charge No. 1373378C), a suspended 10 to 20 year sentence (Charge No. 1373379C), and a concurrent 12-month sentence for the misdemeanor charge (Charge No. 1373382C), ST 80-84.

This appeal followed.

---

[1] Citations to the record are as follows:
"DB __" refers to the defendant's brief and page number;
"DA __" refers to the appendix attached to the defendant's brief and page number;
"T __" refers to the consecutively paginated transcript of the jury trial held September 10-16, 2019;
"ST __" refers to the consecutively paginated transcript of the sentencing hearing held on October 25, 2019, November 27, 2019, and December 16, 2019.

STATEMENT OF THE FACTS

A. The State's Case

The victim's mother and father moved to Lisbon, Wisconsin when the victim was a month old. T 153, 155. The victim's mother and father divorced and the victim's mother remarried. T 153. The victim's father and the defendant were brothers. T 155. In 2016, the victim was 15 years old. T 157.

In the summer of 2016, the victim flew to New Hampshire to visit her father, who had left Wisconsin and moved to Moultonborough. T 158. After the victim's parents divorced, the father had moved to be closer to his parents because they were getting older and he "was under financial stress" in Wisconsin. T 175. The victim stayed in New Hampshire at her grandparents' house for approximately three and one-half weeks. T 158, 496. The victim's grandparents lived in Moultonborough and, during 2016, the defendant lived some of the time with them. T 156. The defendant had a girlfriend, but they were "in and out" at the time. T 156.

While staying with her grandparents, the victim slept in a small bedroom with an air mattress. T 349, 405, 465. One evening, the victim recalled watching a movie with her cousin B.B. in her bedroom. T 499. They were both lying on the air mattress. T 499. The defendant came into the room and laid himself down behind the victim. T 500. There were blankets on the bed and they were pulled over the victim. T 500. As she was lying on the bed, watching the movie, the defendant put his hand underneath her pants and underpants and digitally penetrated her. T 502. He told her not to make a sound. T 503.

After the defendant left, the victim recalled that B.B. asked her if the defendant had touched her, but she said that the defendant had not. T 505. Asked why she had said that he had not, the victim said that B.B. was "going through a lot as a person" and that she was embarrassed. T 505-06.

B.B., the defendant's son, remembered the victim's 2016 summer visit to New Hampshire. T 344. He recalled that she returned to Wisconsin on July 6. T 345. A few days before she left, he remembered that they spent time at the family's cottage, which was short distance from their grandparents' house, for much of the day. T 346. B.B. recalled the night that the defendant entered the room as he and the victim were lying on her air mattress watching a movie. T 348. B.B. recalled that the defendant got into the bed with them and the defendant and the victim were under a blanket and he noticed a "slight shaking" of the air mattress. T 352. He thought that the defendant was scratching mosquito bites. T 352-53. His father got up to go to the bathroom and the victim told B.B. that she thought that the defendant "was trying to touch [her] inappropriately. And she was in sort of a panic." T 408.

The night before she was going to leave for Wisconsin, B.B. and his sister were not at the grandparents' house. T 507. The victim's grandmother went to bed, leaving the victim alone with the defendant. T 509. He suggested that they go out onto the porch to look at the full moon. T 509. When they went out onto the porch, he put his hand under her shirt and touched her breast. T 510. She told him that she was "uncomfortable" and he pulled his hand away. T 510.

They went back into the living room and the victim sat on the couch. T 511-12. She heard the defendant, who was standing behind the couch,

unbuckle his pants and he began to touch his penis. T 512. He asked her to stand up and he put his hands in her pants and digitally penetrated her. T 513. He moved her to a table and said, "Shut the fuck up." He pulled her pants down and, as she faced the table, he penetrated her vagina with his penis. T 514-15.

Later, the defendant made the victim perform oral sex. T 515. "He grabbed my head and pushed me to the ground and then forced himself -- his penis into my mouth, and just force it, thrusting himself into my mouth." T 516. He pulled her hair as he did so. T 516. The victim recalled "[g]aging" and crying. T 516.

The victim recalled that her grandmother came down at some point and the victim went into the bathroom. After her grandmother left, the defendant "grabbed me again into the same position as the first time," again penetrating her from behind. T 519. After that, he told her to get cleaned up and the victim went to the bathroom and cleaned herself. T 520. She then went to her room and left for Wisconsin the following day. T 520. At some point after she returned to Wisconsin, the defendant sent her a text, asking if she had menstruated. T 523.

When the victim returned to Wisconsin, her mother noticed that she was "angry and withdrawn." T 159. In September, the victim's mother told her that if the victim did not comply with the rules of the home, she would have to go to New Hampshire to live with her father. T159-60. The victim "pretty much fell apart." T 160. The victim had "a complete panic attack, started to shake, hyperventilate." T 160. The victim said that she "was never going back to her dad's." T 160. In response to this response, the

mother called the victim's counselor, called the authorities in New Hampshire, and called the victim's father. T 161.

Moultonborough Police Officer Jody Baker was the school resource officer for the Moultonborough schools. T 42-43. On September 26, 2016, the victim's mother contacted the Moultonborough Police Department and Officer Baker spoke with her. T 55, 61. Because the victim and the mother were living in Wisconsin, the officer asked Wisconsin authorities to conduct a Child Advocacy Center interview of the victim. T 56-58.

Moultonborough Police Detective Peter John interviewed the defendant. T 261. The defendant said that he was at the house in Moultonborough on July 3 and 5, 2016. T 265. The defendant initially said that he had watched television with the victim in the living room, but later admitted that he had watched television with her and his son in an upstairs bedroom. T 266. He said that he saw his son and the victim on an air mattress on the floor of the bedroom and he joined them. T 266. The children were watching an animated Disney movie, but he could not remember the name of it. T 267.

The defendant could not remember if there was a blanket on the bed. T 267. Asked if he had touched the victim, he said that he "maybe had brushed up against her" and "put his hand on her shoulder," but denied doing anything else. T 268. He denied digitally penetrating the victim. T 269.

The defendant recalled that, on July 5, 2016, the family went out for dinner and returned at about 9:30 p.m. T 269. When they returned, he sat in the living room. T 269. He told the detective that everyone else in the house went to bed, except his mother, who he recalled was going upstairs. T 273.

He told the detective that he was alone, but that he had spoken with his mother who remembered that the victim was in the living room. T 274. He said that he did not remember that the victim was also in the living room. T 275. He denied that he had been on the porch with the victim. T 275. He told the detective that he had argued with the victim who told him that he should "spend more time with [his] family and [his] kids and not with [his] girlfriend." T 277.

B. The Transcript Of The Defendant's Statement

During Detective John's cross-examination, the defense focused in part on the transcript of the detective's interview with the defendant. Specifically, the defense felt that the State had not made the answers provided by the defendant completely clear. Rather than impeach the detective by using the transcript as a guide for cross-examination, the defense attempted to have him read his questions from the transcript of the defendant's recorded interview, leaving defense counsel to read the answers provided by the defendant. T 304. The State objected, telling the court that it did not see how the defense could read the entire transcript into the record. T 305. Defense counsel responded: "I don't intend to read the entire record. I said I wanted to go over some of the things he testified to in more detail." T 305. The defense contended that, under Rule 106, it was entitled to explore areas not presented by the State in its direct examination. T 306.

The State responded that it had not given the detective a copy of the transcript and that he had testified from memory. T 306. The defense then argued that, because Detective John had testified about the contents of the interview and because the interview had been recorded, it should be

allowed to proceed by having the detective read parts of the transcript. T 307. To this, the court responded, "you can question about him the contents of the interview, but that doesn't mean you get the transcript put in." T 307.

Defense counsel persisted: "I want to read his questions and my client's answers…I can stand up there and read them all, but that's not –" T 307. The court interjected, "No, you can't. We're not going to have a rereading of the transcript. If he has a question that he can't remember and the transcript would help to refresh his recollection, that's a possibility." T 307.

To this, the defense responded:

> There is a specific rule that says that I can introduce partial or all of the statements when they ought to be considered in fairness. The State has picked -- cherry picked the statements that they want to use, and my client also has a constitutional right, which trumps the Rules of Evidence, that allow me to do this under my client's right to produce all proofs favorable, and my client's right to effective assistance of counsel, and my client's right to a fair trial.

T 309. The State responded that there was a hearsay rule against allowing a party to introduce his own statements and that the completeness doctrine only applied if the opposing party's questions has left an inaccurate impression. T 310. The court told defense counsel: "[Y]ou're entitled to ask him were there other reasons [that the victim would fabricate]. But to have him read aloud sections of the transcript does not -- I see no basis for that. You can ask him -- and if he's -- you can bring up more aspects of the interview if you want." T 311.

On the fourth day of trial, two days after the detective had testified, after the conclusion of the State's case, the defendant asked the court to

reconsider its ruling. Defense counsel told the court: "the Defense attempted to basically impeach Det. John with what he claimed [the defendant's] words were during the interview," but the court had precluded counsel from doing so. T 612. The defense asked the court for permission to recall Detective John and then "for each of those specific conversations in the interview that Det. John testified to that were misleading," the defense wanted "to, under the rule of completeness, read [the defendant's] actual words to fix the misleading impression that was caused by that testimony." T 616.

The State responded: "And I have concerns about a number of different ways that was just represented. So what happened was we did a direct examination. There was no refreshing the recollection. We did not enter anybody's statement. We testified based off of his recollection of the conversation with the Defendant." T 618. The State continued:

> [W]e've included both his denials and the statements that we found inculpatory -- and the request by Defense at that point was first enter the entire transcript under the rule of completeness. And then when that argument failed because you made an initial ruling that you did not believe the rule of completeness applied to that question -- and then we supplemented that argument with the fact that the rule against hearsay, talking about Defendant's statements, is very clear that the State has the ability to get the Defendant's statements in.
>
> But the Defense does not have the ability to get the Defendant's self-serving statements in unless it's specifically to correct that misapprehension because the Defendant has the right -- has the ability to take the stand if he so chooses. So that was the foundation of that argument. And then where it climbs from there was, well, you are allowed to impeach

> with things that are different from the way that you believe the State characterized them. And to say that they didn't read the transcript in impeaching is incorrect.
>
> I will talk about one specific thing where I think it was obvious -- where they were talking about the phone call. And Det. John had testified that he believed that he wasn't kind of immediately forthcoming about who called him. Attorney Ashworth walked through the transcript using verbatim language from the transcript to impeach him with what her argument was -- that he actually was truthful.

T 618-19. The State pointed out that it had rested and that the argument to reconsider did not raise new points of law. T 619-20.

The defense responded that it was not trying to get the defendant's "self-serving statements." T 621. But the defense contended that the State had "cherry pick[ed]" the defendant's statements, creating a "misleading impression." T 621-22.

The court reminded counsel that the transcript had been used during cross-examination and that the defense argument for reconsideration appeared to be "basically is we should have done more in cross and so we'd like to do it again through putting in some sections of the transcript that we didn't think to ask about before." T 622. The court concluded that the request was "not appropriate." T 622. When the defense reiterated its claim that its examination had been curtailed, the court responded:

> I don't remember any objection to a targeted question to say you said [the defendant] said, X, here in the transcript -- it says right here, didn't in fact he say, Y? Take a look at the transcript in the normal course of using a transcript. I don't remember that being prohibited or objected to by the State.

T 623-24. The trial court declined to reconsider its earlier ruling. T 624.

C. Officer Baker's Testimony

As she was testifying, Officer Baker began to describe the responsibilities of Child Advocacy Centers (CAC). T 45. The defense objected and, at sidebar, said that the officer was not an expert. T 45. The State countered that the description was simply background. T 46. The court suggested that "some background" was fine. T 46. The defense contended that that Officer Baker's testimony was "building up the reliability of the CAC interview and bolstering the truthfulness that goes on at a CAC interview." T 50. The court responded:

> [I]f you have cross-examination about ways in which CAC interviews are not as successful as it's been presented or as trustworthy, you can ask this witness if that's her training, if that's what she's been trained to do. You can cross-examine that. She said nothing about this particular interview.

T 50. Later, the court added, "I think if we don't go further into the background and the explanation and all of that or, what -- or, you know, her assessment of reliability would be -- this is an appropriate sort of end point to that." T 52.

When the State resumed its direct examination, it ask the officer, "How many investigations have you been in charge of with regard to, like, child sexual abuse?" T 53. This drew another objection and, at sidebar, the defense argued that the officer's experience with sexual assault cases was irrelevant. T 54. The defense argued that the question was an attempt to "bolster[ ] her credibility that she has done so many sexual assault investigations -- she wasn't even doing the sexual assault investigation in this case." T 54. The State responded that Officer Baker was the lead

investigator. T 54-55. The court then ruled: “I don’t find the question improper. I’m going to overrule the objection and allow the question about number of investigations as part of her training, part of her experience. If there’s -- I don't hear that there’s intention to this.” T 55. But the court also told the State to be careful not to let the officer “vouch.” T 55.

On cross-examination, the defense asked the officer about the “proper ways to interview witnesses.” T 65. The officer answered that there were “many ways to conduct an interview.” T 65. Defense counsel asked if all interviews should be recorded and the officer replied, “It depends on the interview.” T 66. But she added, “Suspect and victim interviews are always recorded.” T 68. Shortly thereafter, defense counsel asked, “So another proper procedure is that when you interview witnesses, you interview them separately; is that correct?” T 77. The officer responded that it was not always the case. T 77.

Then defense counsel questioned Officer Baker on the reasons to interview witnesses separately in “any kind of investigation. “ T 78. She responded, “It varies widely,” and explained that certain crimes took longer to investigate. T 78. After defense counsel interjected, the officer completed her answer, adding, “if an event occurred, like, now, real time, sometimes it is beneficial, actually, to wait for a person to process that information before we speak with them.” T 79.

Defense counsel asked, “So would you agree that as a police officer interviewing or investigating a case that you should not tell witnesses about facts about the suspect? Would you agree with that?” T 81. The officer again responded that she did not necessarily agree. T 81.

Defense counsel then asked about deficiencies in the officer's report on the victim's father's interview, which drew a hearsay objection. T 92. At sidebar, defense counsel told the court: "I am trying to show that she did not do a good job in her investigation and writing a complete report, which she just said she's trying to do." T 98. Defense counsel confronted the officer, stating that she omitted from her report that the victim's father did not notice anything different about the victim on the morning. T 101. Counsel asked, "So that, you would agree, is potentially a fact that would be helpful for the defense to know?" T 101. The officer disagreed, stating, "I would not agree with that whatsoever, based on my training, experience, and working with teenage victims, especially…" T 102.

Defense counsel challenged the officer because she did not seize the air mattress which had been deflated and put in a bag. T 116-17. The officer responded that she did not seize the mattress because it "would've been touched by many hands, by that point." T 117. She added that the police "didn't have any information to believe that there were any fluids involved in this case, at that point." T 117.

Defense counsel pressed the officer on why she did not interview B.B.'s older sister. T 124. The officer said that the sister, who was a minor, did not want to be interviewed. T 124. The officer also stated that the sister was "not a witness to either of these events." T 125.

Finally, defense counsel questioned the officer's failure to seize the table, where the second assaults took place, and the rug underneath it, claiming that the reports were that there was "ejaculate all over the table and the floor." T 134. Officer Baker responded, "I don't honestly recall that." T 134.

On re-direct examination, the State in response to issues explored on cross-examination, asked several questions about investigating a sexual assault case. T 136. The State asked:

> You talked a little bit, at the beginning of that cross, about giving people time to process. Counsel had asked you questions about immediately interviewing witnesses and alleged victims. And you started to talk a little bit about processing. What do you mean by that?

T 135-36. The defense objected and, at sidebar, told the court: "She's not testifying as an expert, so I don't think she gets to talk about processing, internal mind, all of that stuff." T 136. The court responded: "Well, you've elicited on why one interviews right away, and she said, no, not necessarily… then started to explain what her reasoning was. And why is that improper for her to explain why the protocol you were even asking about?" T 136

The State added, "Her training tells her what she's supposed to do. And now I just want her to explain her training and why she didn't interview people right away." T 137. The court then ruled, "I think it's fair. The question's about why she didn't - why you interview right away, and she disagreed with you on this, and it's a fair response." T 137.

Resuming its redirect, the State reminded the officer about the cross-examination concerning "the protocol or the procedure is to interview people right away. And your response, if I understand you correctly -- correct me if I'm wrong -- was that not always and that sometimes people need to process. Was that your answer?" T 141. When the officer responded that it happened many times, the State asked the officer to "[e]xplain that." T 141.

Officer Baker then said:

> 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, 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[s] -- 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, 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.
>
> 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, push play, you know, record. For victims and suspects, yes, we -- there are certain things in place. But other than that, no.

T 142. Defense counsel then stated: "She's talking generally about it." The court overruled the objection. T 142.

SUMMARY OF THE ARGUMENT

I. Officer Baker gave appropriate testimony and the damaging testimony to which the defendant alludes simply never took place. The officer's testimony was relevant, she testified consistent with her knowledge and experience, and she did not offer an opinion as to why the victim might have delayed disclosing the abuse. The trial court committed no error in allowing this testimony.

II. The trial court properly excluded the transcript of the defendant's statement to the police and properly restricted its use to cross-examination. The transcript was not used in direct examination and the defense's attempts to read portions of it to the jury were not proper cross-examination. The defendant's rule of completeness argument is simply misplaced on these facts.

ARGUMENT

I. THE OFFICER'S TESTIMONY WAS NOT EXPERT TESTIMONY.

Officer Baker properly testified on direct examination about her experience. The testimony was not expert testimony, but simply provided her own background and investigation of the case. But even if this brief testimony on direct examination should have been excluded, after defense counsel's cross-examination, the questions posed on redirect and the answers provided gave the jury undeniably relevant information.

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." *N.H. R. Ev.* 602. Relevant evidence is generally admissible; irrelevant evidence is not admissible. *N.H. R. Ev. 402.* The officer's testimony was properly admitted under Rule 602 and Rule 402.

Officer Baker described what she had done to investigate the case and why, in her investigation, she did not seize certain evidence or conduct certain interviews. She recounted her years as an officer, T 42-43, and, on cross-examination, her training, T 63. Having established that she had experience investigating sexual assault cases, the State properly asked general questions about the investigation. This does not mean that the State was using her an expert. To the contrary, Officer Baker offered fact testimony, based on personal knowledge, to explain the duties of an officer in investigating a sexual assault case. *Cf. State v. DePaula*, 170 N.H. 139, 154 (2017) (cell phone records custodian was not an expert but "possessed

sufficient 'personal knowledge' regarding the operation of cell towers because of his training and experience").

In addition, Officer Baker was the State's first witness and, as such, she explained certain terms (i.e., forensic interview, Child Advocacy Center) that the State had reason to believe might be repeated during the trial. Her testimony regarding her investigation also set the stage for the witnesses who would follow.

As the trial court observed when the defense objected to the State's question about her experience with sexual assault cases, "And every DWI, we hear, how many arrests you've done and how many times you've stopped vehicles… [W]hy is this any different?" T 53-54. The defendant's response was telling: the officer's experience "bolstered" the conduct of the investigation. T 54. The objection was not that the answer was not relevant, but that the defendant's case turned on undercutting the credibility of the police and the reliability of their investigation. In answering this way, it is clear that the defendant confused the weight of the evidence with its relevance. *Cf. State v. Ranger*, 142 N.H. 140, 143 (1997) ("If a proffering party can link evidence to the defendant, thus allowing a court reasonably to find it relevant, the opposing party's objections go to the weight of the evidence, rather than its admissibility.").

But even if her testimony concerning her experience was not relevant on direct examination, the officer's testimony was made relevant by the defendant's questions on cross-examination. *See DePaula*, 170 N.H. at 146-49 (discussing the "opening the door" doctrine). Indeed, the defense repeatedly challenged the officer's investigation, questioning her decision not to seize the air mattress as evidence, or failing to interview B.B.'s

sister, for example. Having asked the questions, the defendant cannot now complain that the officer answered those questions to the best of her ability, based on facts that she possessed as the result of her experience. Nor can he complain that, on re-direct, the State sought to clarify the answers brought out on cross-examination.

Even if the testimony can be characterized as opinion testimony, it was, at most, lay opinion testimony about the best way to conduct an investigation. Under Rule 701, opinion testimony by lay witnesses must be "limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue." *N.H. R. Ev.* 701. Her answers, therefore, about the "processing" that witnesses go through were based on the experience she had in nearly two decades of police work.

In contrast, expert opinion 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." *State v. Gonzalez*, 150 N.H. 74, 77 (2003) (quotation omitted); s*ee also Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.,* 161 F.3d 77, 81 (1st Cir.1998) ("To be admissible, expert testimony must be relevant not only in the sense that all evidence must be relevant, *see Fed.R.Evid.* 402, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue."); *United States v. Montas,* 41 F.3d 775, 784 (1st Cir.1994) ("Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value.")

The officer's testimony simply did not reach the level of expert testimony. She merely talked about "processing" an event, a term jurors might not use, but a means of dealing with a startling or traumatic event with which they were certainly familiar. *Cf. State v. Magoon*, 2019 WL 2946024 *3 (July 9, 2019) (describing a victim who had "trouble *processing her thoughts* that even narrating the events of a particular day [was] difficult and time-consuming") (unpublished) (emphasis added).

The defendant contends that "the focus of the improper expert testimony" was that the officer explained "why [the victim] may have taken time to disclose" and to explain inconsistencies in her testimony. DB 13. This is simply incorrect. The officer did not explain why the victim might have delayed reporting the assaults, nor did the officer explain inconsistencies in her statements. To the contrary, the defense tried to take advantage of the delayed disclosure and the lack of an explanation for it, drawing an objection from the State. *See* T 180-81 (THE STATE: "So counsel's going into this, and I feel like, in fairness, the State should be able to present evidence that victims don't do that, that they react in any number of ways. But we tried to get into a little bit of that with [Officer Baker], and you drew an objection. But now, [defense counsel is] essentially putting this in front of the jury like, well, she didn't call you crying, so therefore she couldn't be a victim; she didn't do this, so therefore she couldn't be a victim."). The court overruled the State's objection. T 182.

The defendant also contends that the "only direct evidence that anything improper happened came solely from [the victim]." DB 14. Setting aside the fact that sexual assault cases do not need corroboration, *State v. Simpson*, 133 N.H. 704, 705 (1990), this statement ignores the

definition of direct evidence. Direct evidence "is evidence which, if accepted as true, directly proves the fact for which it is offered, without the need for the factfinder to draw any inferences." *State v. Kelley*, 159 N.H. 449, 454 (2009) (citation omitted). Direct evidence includes "the testimony of a person who claims to have personal knowledge of facts about the crime charged such as an eyewitness." *State v. Newcomb*, 140 N.H. 72, 80 (1995). In that regard, B.B.'s testimony about watching the movie and the defendant "scratching" himself was direct evidence of the first assault. So, too, were the defendant's statements to Detective John.

Finally, the defendant contends that, without the testimony about delayed disclosure, the State's closing argument mentioning reasons for it would have been improper. DB 15. This, again, is a dubious conclusion. In closing argument, counsel may "draw reasonable inferences from the facts proven." *State v. Lake*, 125 N.H. 820, 822 (1984). During the trial, the defense explored the victim's counseling history with her mother. *See* T 159, 164-66, 172-74. The delay in reporting was undisputed. These facts alone would have allowed the State to draw reasonable inferences concerning the effect of trauma in delaying disclosure.

But the point ignores another fact: the State's reference to a car accident in its closing was a direct response to the defendant's closing argument, T 672 (THE STATE: "Because Defense counsel in her closing just talked about the fact that these are the type of things that you would forget and that she would remember all these things incorrectly."). The defense objected to the analogy and the court overruled the objection. T 673. There was nothing improper in the State's closing and the record does not support a contention to the contrary. *Cf. State v. Demond-Surace*, 162

N.H. 17, 24 (2011) ("[A] prosecutor may ordinarily use a closing argument to respond to defense counsel's closing.").

In short, Officer Baker did not provide expert testimony and the objections to her testimony, and to the State's arguments, on that basis were ill-founded.

II. THE TRIAL COURT COMMITTED NO ERROR IN DECLINING TO ALLOW THE DEFENDANT TO READ PORTIONS OF THE TRANSCRIPT TO THE JURY WITHOUT ASKING QUESTIONS OR CALLING A WITNESS.

The trial court made no error in declining to allow the defendant to read portions of the transcript of his statement to the detective. The court did not restrict the use of the transcript in cross-examination, it simply stated that reading the transcript could not substitute for cross-examination. The rule of completeness simply does not apply to this situation.

The doctrine of completeness is a common law rule. It gives a party the right to introduce "the remainder of a writing, statement, correspondence, former testimony or conversation that his or her opponent introduced so far as it relates to the same subject matter and hence tends to explain or shed light on the meaning of the part already received. *State v. Lopez,* 156 N.H. 416, 421 (2007) (quotation omitted). The doctrine "exists to prevent one party from gaining an advantage by misleading the jury." *Id.* (quotation omitted). "Thus, there are two requirements to trigger the doctrine respecting conversations: first, the statements must be part of the same conversation; and second, admission of only a portion would mislead the jury." *Id.* (quotation omitted). "The rule does not render evidence automatically admissible, though 'otherwise inadmissible evidence may be admitted to prevent a party from gaining a misleading advantage.'" *State v. Mitchell*, 166 N.H. 288, 293 (2014) (citation omitted).

The rule was "partially codified by New Hampshire Rule of Evidence 106, which expressly applies to writings and recorded statements." *State v. Botelho,* 165 N.H. 751, 760, 83 A.3d 814, 822 (2013)

(citation omitted). Rule 106 states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *N.H. R. Ev.* 106. "Rule 106 permits the introduction of the remaining parts of a recorded statement in order to prevent the misleading impression given by an out-of-context presentation from taking root." *Botelho,* 165 N.H. at 760 (citation omitted). "The trial court has discretion under Rule 106 to determine whether 'fairness' requires admission of remaining parts or related documents." *Id.* (quotation marks omitted).

At the outset, the rule of completeness does not apply. The State did not introduce a part of the recorded interview or part of the transcript. It simply asked the detective what he recalled. The court properly declined to allow the defense to virtually substitute the transcript of the interview for live testimony.

Moreover, the trial court did not prevent the defendant from "completing" the statement provided to Detective John. As the court made clear, the defense was free to use the transcript to impeach the detective with inconsistent statements. But the defense was not entitled to require a witness to ask questions to which defense counsel would respond, all from an interview transcript. The effect of the defendant's attempt at cross-examination would have been to reverse roles: the witness would have been asking the questions and defense counsel would have been providing the defendant's answers. It was a question of mode, not substance, and it was well within the court's discretion to prevent the defense from introducing

the defendant's statements by any means other than through cross-examination, including impeachment with the transcript.

Notably, the State never offered the transcript as an exhibit. And neither did the defense. The State did not play even parts of the recorded interview for the jury. The attempt, therefore, to introduce the defendant's statements by reading parts of the transcript violated the rule against hearsay. *See N.H. R. Ev.* 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

The motion to reconsider, similarly, was properly denied. The motion is dated September 12, 2019, DBA 6, but the defense did not call it to the court's attention until the following day, T 612. At that point, the State had concluded its presentation of the case and had told the court that it intended to rest. T 601. The defense had already made a motion to dismiss the case. T 602-04. And the court had denied the motion. T 611. After the motion to dismiss was denied, T 611, the defense asked the court to allow it to "read the actual statements in their entirety into the record." T 616.

The trial court correctly declined to allow the transcript - or portions of it - to be read into the record. Otherwise, the defense would have been allowed to introduce exact wording of the defendant's statements without allowing the jury to hear his testimony or giving the State the chance to cross-examine him. The rule against hearsay specifically prohibits the introduction of statements by the party who made them, absent some exception. See *N.H. R. Ev*. 801(c). And the defendant offered no exception to that rule.

Moreover, there was ample reason to conclude that the defendant was simply disappointed with the cross-examination of Detective John and sought to remedy the disappointment by substituting the transcript. But the defendant was given full opportunity to cross-examine the detective and that is all the Confrontation Clause affords. *State v. Fleury*, 111 N.H. 294 (1971) ("[S]uccess in criminal trials and perfection in trial tactics are not guaranteed by the Constitution. 'He who wars must sometimes win and sometimes lose. The Constitution, it must be remembered, commands a battle, but not a victory.'") (rejecting an ineffective assistance claim based on cross-examination) (quoting *Odom v. United States*, 377 F.2d 853, 859 (5th Cir. 1967)).

The defendant points to two statements that Detective John made that it feels were misleading. He states that "[f]ar from telling Detective John that he received a phone call regarding the allegations," he actually said that he was "in shock even hearing an allegation like that." DB 18. He actually said both: that he received a telephone call regarding the allegations and that he was in shock. DA 7. But the defense drew Detective John's attention to the defendant's statement that he was in shock. T 313. The defendant, however, misunderstands that he could have used the transcript to cross-examine Detective John. The court only required the defendant to ask questions rather than recite the transcript.

The second statement involved the defendant's statement to the detective about being in bed with B.B. and the victim. DB 18. The defendant notes that he told the detective that there was "no continual motion." DB 18 (citing DA 14). But the detective was never asked about this statement. If the detective had not remembered, the defense could have

confronted him with the transcript and asked the question again. But the defense counsel's inability to use the transcript to ask questions does not make the trial court's ruling wrong.

The trial court made no error in ruling as it did and this Court should affirm its ruling on this issue.

CONCLUSION

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

The State requests a 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

January 5, 2021

/s/Elizabeth C. Woodcock
Elizabeth C. Woodcock
N.H. Bar No.: 18837
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,957 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.

January 5, 2021 *<u>/s/Elizabeth C. Woodcock</u>*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on William R. Korman, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

January 5, 2021 */s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock