

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0148

State of New Hampshire

v.

Javon Brown

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Oral Argument Waived)

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ISSUE PRESENTED

Whether the trial court sustainably exercised its discretion when it admitted evidence of a phone call between the defendant and a police officer.

STATEMENT OF THE CASE

In August 2019, the State charged Javon Brown (“the defendant”) by complaint with one count of misdemeanor domestic violence – simple assault – unprivileged physical contact under RSA 631:2-b, III. DA¹ 3. In October 2019, a Merrimack County Grand Jury indicted the defendant on additional charges of second degree assault – domestic violence under RSA 631:2, I(f) and witness tampering under RSA 641:5. DA 4-5. In January 2020, the State filed an additional misdemeanor complaint charging the defendant with criminal threatening. DA 6.

On January 21, 2020, the defendant filed a motion *in limine* seeking to exclude at trial testimony regarding the defendant’s telephone conversation with an investigating officer from the Concord Police Department. DA 7-9. The State objected. DA 11-18. On January 31, 2020, the court (*Kissinger, J.*) held a hearing during which the parties argued the motion. MH 13-22. The court denied the defendant’s motion and found the testimony admissible. MH 19.

Following a two-day jury trial February 5 and 6, 2020, the jury convicted the defendant of domestic violence – simple assault – unprivileged physical contact; it found him not guilty on the remaining

¹ Citations to the record are as follows:

“DA __” refers to the separately bound appendix to the defendant’s brief and page number;

“DB __” refers to the defendant’s brief and page number;

“MH __” refers to the transcript of the January 31, 2020 hearing on motion *in limine* and motion to sever and page number;

“T __” refers to the two-volume, consecutively paginated transcript of the defendant’s jury trial held February 5 and 6, 2020 and page number.

charges. T 259-61. On February 11, 2020, the court sentenced the defendant to twelve months stand committed at the Merrimack County House of Corrections with 188 days of pretrial confinement credit. DA 19-21.

This appeal followed.

STATEMENT OF FACTS

A. The State's Case at Trial

The victim testified that she and the defendant met at her divorce party and dated for approximately a year and a half beginning in April 2018. T 27. She testified that she loved the defendant, but the couple argued regularly and the defendant was "very controlling and jealous." T 28. The defendant and the victim have a young child together and the victim has two children from a previous marriage. T 28-29.

The victim lived with the defendant in Manchester. T 28. During this time, she reported an incident to the Manchester Police Department in May 2019. T 29. Following this report, she ended her relationship with the defendant and moved in with friends for a couple months. T 30. During that time, the victim and the defendant remained in contact until the victim changed her number "because [the defendant] kept calling and texting from different numbers." T 30. During that time, the victim also sought and obtained a restraining order against the defendant. T 32-33

In late July 2019, the victim and the defendant reconciled. T 31. The victim was five months pregnant with their child at this time. T 31. Around this same time, the restraining order against the defendant was dropped because the victim did not appear for a scheduled hearing. T 34. The victim testified that the resumed relationship was good initially, but the defendant became jealous again following a visitation between the victim and her two children. T 38. The defendant began to question the victim's whereabouts while she was at work and accused her of a romantic relationship with her ex-husband. T 38.

As a result, the victim allowed the defendant to search through her phone multiple times. T 38-39. On August 3, 2019, during one of these searches, the defendant saw an email between the victim and her ex-husband regarding her visitations with their two children. According to the victim, the defendant became angry and accused her of cheating. T 40, 86. The defendant called her “a slut,” “a whore,” and “a liar.” T 40. He demanded she “tell [him] the truth” and continued “ranting” in this way. T 40. The victim also testified that the defendant “had this look in his eyes where he just wasn’t him anymore” and she “didn’t recognize him.” T 40.

The victim testified that it was during this altercation that the defendant hit her. T 40-41. She recounted that the couple was lying in bed during the initial argument when the defendant hit her “multiple times, sometimes with an open hand, and then, multiple times with a closed fist.” T 41. The defendant hit her in the face and elsewhere on her head. T 41. The victim testified that the defendant struck her “[t]oo many [times] to count.” T 41. The victim also testified that the defendant strangled her, stating that “[a]t one point he was above [her] and he had his hands over [her] nose and [her] mouth. And [she] couldn’t breathe.” T 44.

The victim further testified that the assault lasted “a few hours” during which time “[the defendant] would yell at [the victim], hit [her] a few times and just stop for a little bit. And then, it’s like his anger started penting up again. And he started yelling. And then, it’d be more hits.” T 49. During this assault, the defendant prevented the victim from leaving the bedroom. T 49. The victim testified that she wet the bed at one point because the defendant prevented her from going to the bathroom. T 49.

The victim also testified that the defendant had threatened to kill her and their unborn child if she “did any more statements on him” or “visited with [her] children.” T 46. The victim then testified that the defendant “forced [her] to write a letter to [her] lawyer,” in which she recanted the earlier allegations she had made to the Manchester Police Department. T 46-47.

After the assault, the defendant “apologized” and “held [the victim] while [she] cried.” T 50. That night, the couple had sex. T 50-51. The victim testified that she did this because she wanted to get away from the defendant, and “did whatever to try to please him and not anger him.” T 51.

The victim also testified to her injuries from the assault. She had bruising on her shoulder, above her eye, on the side of her head, and on her nose. T 51. She also testified that her head hurt for days. T 51. During this testimony, the State admitted photos of the victim that showed this bruising, as well as bruising on her left arm. T 52-54. The victim reiterated that this bruising was caused by the defendant’s assault, not from sex with the defendant. T 54.

The victim testified that the next morning, a representative from her car insurance company came to look at some damage to her car from a minor accident the week before the assault. T 56. She met with the woman for approximately forty-five minutes that morning and the defendant stayed with her during this time. T 56. Following this meeting, the victim and the defendant ran errands in Concord. T 56. The pair then drove to Manchester. T 56, 72. The defendant got out of the car and told the victim to wait for him. T 56. When he went around the corner, the victim left and drove to the Concord Police Department to make a statement about the assault. T 56-57.

While the victim was driving through the tolls on Interstate 93 to Concord, she began receiving calls and texts from multiple phone numbers. T 57. She testified that she believed all the calls and texts were from the defendant, who was either using an app to mask his number or borrowing other phones. T 57. The victim testified that the calls and texts continued during her interview at the Concord Police Department. T 57. According to the victim, Officer Cregg answered one of the calls and spoke with the defendant. T 57.

Officer Brian Cregg, a seventeen-year veteran of the Concord Police Department, testified about the victim's August 4, 2019, interview. T 92. He interviewed the victim for several hours that day regarding the defendant's assault on her the previous night. T 95. He described the victim's demeanor during the interview as a "roller coaster of emotions." T 95. He testified that the victim became particularly emotional when discussing things related to her unborn child. T 95.

During the interview, the victim reported the repeated phone calls from different unidentified phone numbers. T 95. Officer Cregg decided to call all the numbers. T 96. He used the police department's phone to call one of the unknown numbers and "asked if he could speak to Javon Brown." T 96, 113. The person on the other end of the call responded, "This is Javon Brown." T 96. Officer Cregg testified that he explained the nature of his investigation to the defendant and the reasons for his call. T 96. The defendant said that he had been at the apartment with the victim the previous night. T 96. When Officer Cregg asked about the victim's bruising, the defendant told him the bruising was the result of "rough sex." T 96. The defendant also said "that [the victim] had written a letter

recanting a prior incident that happened with the Manchester Police Department.” T 96. The defendant denied assaulting the victim. T 96.

Officer Cregg testified that he observed multiple bruises to the victim’s forehead near the hairline. T 100. Cregg also noted a bite mark on her right forearm, and other marks on her arms. T 100. Cregg photographed those injuries at the time of the interview and the State admitted nine of those photos at trial. T 100.

On cross-examination, counsel for the defendant asked whether Officer Cregg had investigated the victim’s apartment. T 106. Officer Cregg acknowledged that he had not gone to the apartment near the time of the victim’s report. T 106. Defense counsel also asked Officer Cregg about the insurance adjuster that the victim and the defendant met outside the apartment on the morning after the assault. T 106. Officer Cregg did not interview the insurance adjuster. T 106. Defense counsel also focused on the fact that Officer Cregg had not investigated the victim’s phone for several months, at which point her texts and emails were not available. T 116-19, 126. Finally, defense counsel emphasized that Officer Cregg had not investigated whether the mark on the victim’s arm that he identified as a bite mark matched the defendant’s teeth. T 123-24.

B. The Defendant’s Case at Trial

The defendant testified that the victim walked in on him and another woman having sex in May 2019 and that this event caused their initial breakup. T 157. The defendant then moved to Michigan for two or three months to live with his sister. T 157-58. Around July 2019, the defendant returned to New Hampshire and began dating the victim again. T 158-59.

During that time, the defendant learned that the victim had taken out a restraining order on him and that it had been dropped when she failed to appear for a hearing. T 159.

The defendant then testified he felt that people judge him because of his race and are more afraid of him because of how he looks. T 161. He testified that these concerns were on his mind when he learned about the victim's restraining order. T 161. He testified that he believed the victim could "cause some drama" for him and that could be more serious "[b]ecause [he's] a black male in New Hampshire." T 163. The defendant testified that the victim wrote the recantation letter to her lawyer to "try to deal with some of [the defendant's] insecurities about what just happened," i.e. the restraining order. T 163.

The defendant denied that he strangled, punched, or threatened to kill the victim or their unborn child on August 3, 2019. T 164-65, 168. He also testified that he did not cause the victim's bruising on August 3, 2019. T 166. He testified that he did not know how the victim got the bruises that Officer Cregg documented during her interview. T 166. He alleged that she did not have them the morning of August 4, because "[s]he would have had them when [they] were at the Social Security office." T 166. He also denied forcing the victim to write the recantation letter, and testified that she wrote it willingly. T 165. The defendant further denied that he spoke to Officer Cregg on the phone. T 165.

The defendant alleged that the victim did not drop him off in Manchester. T 164. He testified that she took him to meet with a friend at a campsite near Market Basket in Concord. T 164. On cross-examination, the State asked what the defendant had done that day. T 184. The defendant

was unable to say what he and his friend talked about or did. T 184. When asked whom else he had talked to that day, the defendant testified that he spoke with his friend's mother and another individual named Ben. T 184-85. On further questioning, the defendant testified that he hadn't talked to the friend's mother, but "she was there." Likewise, when asked what he talked about with Ben, the defendant testified, "Nothing. . . I just met him." T 185.

The defendant also testified on cross-examination that the victim's ex-husband "had problems with [him]" because of the color of his skin. T 170-71. He testified that while this caused stress in his relationship with the victim, it did not make him angry. T 171. While he continued to deny that he hit the victim, the defendant did acknowledge that he was with the victim on the evening of August 3 and the morning of August 4, 2019. T 176. He also admitted that he knew of the restraining order in August 2019 and that the allegations contained in that restraining order were sufficient to start an investigation. T 183.

The defendant disputed the victim's claim that she drove him to Manchester on August 4, alleging that she had dropped him off somewhere in Concord. T 184. But he could not recall specific details of that morning or what he had done after the victim left him. T 184-85. The State showed the defendant photos of the victim's facial bruising from August 4, to which the defendant responded that some of the photos did not depict any injuries and any injuries in the photos were likely the result of an earlier car accident. T 193-96.

C. Pre-Trial Motions Hearing Relevant to Appeal

Prior to trial, the court held a hearing on the defendant's motion *in limine* to exclude Officer Cregg's testimony regarding the August 4, 2019 telephone call between himself and the defendant. MH 13-22. The defendant argued that the call was inadmissible because the State could not properly authenticate it under N.H. R. Ev. 901. MH 13. The defendant primarily relied on Rule 901(a)(6), which pertains to evidence that a call was made to a number assigned to a particular person. MH 13. The defendant argued that "there has to be something that ties this number to this individual, which there simply wasn't here." MH 14. The defendant provided no concrete alternative identification for the person who self-identified as the defendant, arguing only that "it could've been anyone who is familiar with what [the victim's] allegations were." MH 15.

The State responded by directing the court to its written objection, in which it argued that the list of authentication methods found in Rule 901 is not exhaustive and the level of foundation for authentication is very low. DA 14. The State also noted the defendant's self-identification on the call and pointed to circumstantial evidence that corroborated this self-identification. DA 15. Specifically, the State noted that the victim had provided the number and believed the defendant was the caller. DA 15. The State observed that the circumstances of the victim's trip to the police department gave credence to the identification. Specifically, the victim dropped the defendant off, under the pretense that she would wait for him, and then drove to the Concord Police Department once the defendant was out of sight. DA 15. It was reasonable in those circumstances that the

defendant would be trying to contact her to find out where she had gone.

DA 15.

Finally, the State argued that the defendant had relayed information during the call about which he had particularized personal knowledge. The defendant admitted to being at the victim's apartment at the time of the assault. DA 15. He provided an alternate explanation for the victim's injuries, stating that they were the result of "rough sex" between the couple. DA 15; MH 14. The defendant also displayed personal knowledge about the victim's recantation letter and stated that he still had the letter in his possession. DA 15.

The court denied the defendant's motion to exclude the testimony. MH 19. The court relied on the defendant's self-identification, combined with the circumstantial evidence in the call to make its decision, noting "the substance of [the call]" was "sufficiently authenticated, at least to get in front of the . . . jury." MH 19-20. The court further explained that "the very specificity of the call provides an adequate foundation for its admissibility." MH 20.

SUMMARY OF THE ARGUMENT

The trial court sustainably exercised its discretion when it found that the defendant's self-identification, combined with circumstantial evidence corroborating that self-identification, provided sufficient authentication for the admission of testimony about the phone call between Officer Cregg and the defendant. The court based its ruling on strong circumstantial evidence that: (1) the defendant self-identified on the call; (2) the defendant exhibited intimate knowledge of events for which only he and the victim were present; and (3) the defendant exhibited knowledge of the victim's recantation letter and claimed to have it in his possession. The ultimate determination of the truth and evidentiary value of this testimony was a question of fact for the jury. The trial court correctly determined that the State had sufficiently cleared the relatively low bar for authentication under Rule 901 necessary put that testimony before the jury.

In the alternative, if the trial court erred, the error was harmless beyond a reasonable doubt. The jury convicted the defendant on only one of the charges, domestic violence – simple assault – unprivileged physical contact, stemming from the August 3, 2019 assault. Both the victim and the defendant testified about the events surrounding this altercation. The jury saw photographs and heard testimony from Officer Cregg, both of which detailed the victim's injuries. By contrast, the contents of the phone call made a *de minimus* contribution to the one charge on which the defendant was actually convicted. Moreover, the admission of this evidence did not prejudice the jury's ability to gauge the defendant's credibility because the

defendant testified. The trial record provides ample evidence from which the jury could have made a credibility determination.

ARGUMENT

THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT RULED THAT THE CONTENTS OF THE DEFENDANT'S PHONE CALL WITH OFFICER CREGG PROVIDED SUFFICIENT CIRCUMSTANTIAL EVIDENCE TO AUTHENTICATE THE DEFENDANT'S IDENTITY.

A. Standard of Review

This issue implicates the authentication of evidence under N.H. R. Ev. 901. This Court “generally review[s] the trial court’s rulings on evidentiary matters with considerable deference, and will not reverse the trial court’s ruling on authentication absent an unsustainable exercise of its discretion.” *State v. Ruggiero*, 163 N.H. 129, 135 (2011) (quoting *State v. Knapp*, 150 N.H. 36, 37 (2003)) (internal quotations omitted). “To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court’s ruling was clearly untenable or unreasonable to the prejudice of [his] case.” *Id.*

B. The trial court correctly determined that the evidence supported a finding that the call was authentic under N.H. R. Ev. 901.

Rule 901 provides that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is.” N.H. R. Ev. 901(a). “The proof necessary to connect an evidentiary

exhibit to a defendant may be made by circumstantial evidence.” *Ruggiero*, 163 N.H. at 136 (quoting *State v. Reid*, 135 N.H. 376, 383 (1992)). In proffering this evidence, “[t]he proponent need not rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. The State need only demonstrate a rational basis from which to conclude that the exhibit did, in fact, belong to the defendant.” *Id.* (internal quotations and citations omitted).

“[T]he contested evidence, if otherwise relevant, should be admitted once a *prima facie* case has been made on the issue of authentication.” *State v. Palermo*, 168 N.H. 387, 392 (2015) (quoting *State v. Stangle*, 166 N.H. 407, 409 (2014)). “Once the evidence is admitted, the rest is up to the jury.” *Stangle*, 166 N.H. at 410 (quotation omitted). “The bar for authentication of evidence is not particularly high.” *Ruggiero*, 163 N.H. at 136.

In the case of identifying phone call participants, the Reporter’s Notes to Rule 901 explain, “the mere assertion of identity by a party to the conversation is not sufficient evidence of authenticity.” This understanding tracks Federal Rule of Evidence 901, which is identical to New Hampshire’s rule. The Notes accompanying the federal rule further explain that when someone self-identifies on a phone call, “additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements. . . may furnish the necessary foundation.” Fed. R. Evid. 901 Advisory Committee Notes.

Although this Court has never opined directly on this issue, numerous federal appeals courts have done so. Each has found that a self-identification combined with some quantum of additional evidence from the contents of the speaker’s statements satisfy the requirements of Rule

901. For example, in *United States v. Roberts*, 22 F.3d 744, 754 (7th Cir. 1994), the United States Court of Appeals for the Seventh Circuit held that “[w]hen coupled with the existence of circumstances indicating that the speaker was in fact the person called . . . self-identification is adequate.” In *Roberts*, an FBI agent was given a number “at which he was told he could reach [the defendant].” *Id.* at 754. When the agent called that number, the defendant self-identified and during the ensuing conversation made a sales pitch typical of salespersons working for the suspect company. *Id.* at 754. The Seventh Circuit held that this was sufficient for a finding that the person the agent contacted was the defendant. *Id.*

Similarly, the United States Court of Appeals for the Third Circuit has held that “the content of the conversation combined with the caller’s self-identification sufficiently supported a finding that [the defendant] was the caller.” *United States v. Console*, 13 F.3d 641, 661 (3d Cir. 1993). In *Console*, a witness testified that after she sent a report to one of the defendants, someone self-identifying as that defendant called her. *Id.* at 660. The defendant stated that he had received the report and requested a bill. *Id.* The Third Circuit held that this was sufficient support for authentication. *Id.* at 661; *see also United States v. Khan*, 53 F.3d 507, 516 (2d Cir. 1995) (observing that “self-identification of the person called at a place where he reasonably could be expected to be has long been regarded as sufficient” for authentication purposes”); *United States v. Puerta Restrepo*, 814 F.2d 1236, 1239 (7th Cir. 1987) (“The authentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did.”).

The State met this burden in the instant case. The trial court based its ruling on the contents of the phone call. First, the defendant self-identified on the call. DA 15; MH 14. Then, he exhibited intimate knowledge of events for which only he and the victim were present. Specifically, he admitted to being at the victim's apartment the night before the call, when the assault occurred. DA 15. He also provided an alternative explanation for the victim's injuries, alleging they were the result of "rough sex." DA 15; MH 14. Finally, the defendant exhibited knowledge of the victim's recantation letter and claimed to have it in his possession. DA 15; MH 14.

The defendant argues that this "category" of call identification – where there is no contemporaneous voice identification or phone number verification – requires a higher degree of corroboration than other categories of phone call authentication. DB 22-23, 31. Neither the text of Rule 901, nor any of the case law cited by the defendant supports the notion that a different level of corroboration is required in this circumstance. All that is required for authentication under Rule 901 is "a rational basis" "sufficient to support a finding that the item is what its proponent claims it is." N.H. R. Ev. 901; *Ruggiero*, 163 N.H. at 136.

Moreover, the out-of-state cases to which the defendant cites in support of this claim are inapposite. For example, *Benson v. Commonwealth*, 58 S.E. 2d 312, 314 (Va. 1950), a case decided almost twenty-five years before the codification of the rules of evidence, involved a police officer calling a number he had "obtained from some person, whose name he did not remember."

The phone number in this case did not come from an unknown third party. To the contrary, Officer Cregg testified that he took it from the

victim's phone. Moreover, the *Benson* court noted that the contents of the phone call, in which the defendant essentially made a full confession to someone he knew to be a police officer, was "a most improbable occurrence." *Id.* at 315. By contrast, the defendant in this case did not confess to assaulting the victim, but gave an alternative, non-incriminating explanation for the origins of the victim's injuries.

Likewise, in *State v. Marljar*, 94 Idaho 803, 808, 498 P.2d 1276, 1281 (1972), the Supreme Court of Idaho noted that the level circumstantial evidence necessary for authentication is "*de minimus*" or "slight." In that case, the court found that witness's testimony "in no way tie[d] in the [defendant] as the caller." *Id.* The court also found that the substance of the contested call was so broad that "[a]ny interested party could determine that the [defendant's] case was pending, and make inquiries" such as those to which the witness testified. The court also found that the substance of the call was irrelevant to the charged crimes.

State v. Williams, 413 N.E. 2d 1212, 1214 (Ohio Ct. App. 1979) suffers from the same infirmity as *Marljar*. In *Williams*, the state relied only on the defendant's self-identification and a statement by the caller that he was a barber. *Id.* The court held that because "[a]nyone with the slightest knowledge of the accused could have placed the call[,]" the "conversation did not relate to matters uniquely within the knowledge of the defendant" and could not be appropriately authenticated.

Unlike *Marljar* and *Williams*, Officer Cregg's testimony did tie directly to the defendant. Crucially, the conversation referred to specific, recent events, the details of which only the defendant and the victim had reason to know. The caller's knowledge of the letter that the victim wrote,

recanting her earlier allegations, is particularly probative on this point. This takes the case well past the situations presented in *Marlar* and *Williams* and sufficiently authenticates it for the jury's consideration.

Similarly, the facts of *In Re Rhyne*, 571 S.E. 2d 879, 881 (N.C. Ct. App 2002), make that case distinguishable. In *Rhyne*, the witness was familiar with the defendant from school. *Id.* at 880. That witness "testified to receiving a telephone call from a person who identified himself as [the defendant,] but whose voice did not sound like [the defendant's]." *Id.* at 881. Because "there was no proper identification of [the defendant's] voice or any circumstantial evidence that would lead to his identification," the identity was based entirely upon the caller's self-identification and the trial court erred by admitting the testimony. By contrast, the call in this case did not involve a voice identification, but did entail a substantial amount of circumstantial evidence within the body of the call. The facts are, therefore, inapposite to those in *Rhyne*.

Finally, the defendant's reference to *Madison v. State*, 726 So. 2d 835, 836 (Fla. Dist. Ct. App. 1999) is also misplaced. In *Madison*, the District Court of Appeal of Florida, citing to local precedent, required the prosecution to demonstrate the defendant's involvement by clear and convincing evidence. *Id.* No showing rising to the level of clear and convincing evidence is required under this Court's precedents or the Rules of Evidence.

Moreover, the defendant's unsubstantiated arguments, that the victim could have colluded with some unidentified third-party to fabricate the call or that the caller could have been a "random person" who decided to "play along" with Officer Cregg's call (MH 15; DB 31-33), are

irrelevant for the authentication analysis. The trial court observed that while such arguments strained credulity, they would be entirely proper subject matter for cross-examination. MH 14-16. But as this Court has noted, to satisfy the requirements of authentication, “[t]he proponent need not rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *Ruggiero*, 163 N.H. at 136. “[T]he contested evidence, if otherwise relevant, should be admitted once a *prima facie* case has been made on the issue of authentication.” *Palermo*, 168 N.H. at 392. The facts outlined above were sufficient for a *prima facie* showing that the evidence was authentic.

Nor is it relevant that the defendant later testified at trial that the voice on the call was not him. T 165. Because the trial court ruled upon the admissibility of the challenged evidence before trial, this Court “consider[s] only what was presented at the pretrial hearing.” *State v. Nightingale*, 160 N.H. 569, 573 (2010). Limiting the review in this way, “avoid[s] the pitfall of justifying the court’s pretrial ruling upon the defendant’s response at trial to the evidence.” *Id.* The defendant’s later denials were appropriate considerations for the trier of fact, but should not impact this Court’s analysis of the authentication ruling.

Even if this Court does not restrict its review to the evidence presented to the court before and during the pretrial hearing, the victim testified at trial that she left the defendant while he was under the impression that she would wait for him. T 56-57. The jury could have credited that testimony, as well as the victim’s testimony that the defendant had previously used this same tactic of repeatedly calling and texting her from different numbers. T 30. Based on this testimony, the defendant’s self-

identification on the call, and the contents of the phone conversation itself, the jury could have reasonably concluded that the defendant spoke with Officer Cregg.

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

“An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt.” *State v. Anderson*, 148 N.H. 252, 255 (2002). The jury convicted the defendant of domestic violence – simple assault – unprivileged physical contact. This charge alleged that the defendant “did knowingly cause unprivileged physical contact with [the victim], an intimate partner, by use of physical force by striking her repeatedly in the head.” T 6. Based on the other evidence admitted at trial, the jury could have found the victim’s account of the defendant hitting her credible – particularly when coupled with the photos of her injuries –and found the defendant’s denials not credible.

Nor did the admission of the phone call evidence impact the jury’s ability to accurately assess the defendant’s credibility. The defendant is concerned about the appearance that he “changed his story” regarding how the victim got her injuries. DB 33-34. Absent the phone call testimony, the defendant claims that the jury would have found his testimony more credible. But the record belies this claim. The admission of this evidence did not affect the jury’s ability to gauge the defendant’s credibility because

the defendant testified and was subject to cross-examination. The trial record, even absent the phone call testimony, provides ample evidence from which the jury could have made a negative credibility determination. In particular, the defendant did “change his story” numerous times at trial, including when he provided contradictory explanations for the origin of the victim’s injuries.

Upon reviewing photos of the victim’s injuries on the stand, the defendant claimed that the photos did not show any injuries. T 193. He later agreed that the photos did show swelling above the victim’s eye. T 195. Regarding the origins of these injuries, the defendant first testified on direct examination that he did not know how the victim got the injuries to her face. T 166. He specifically testified that when the two parted on the day after the assault, she did not have any bruises or injuries. T 166. He noted, “she would have had them when [they] were at the Social Security office” before she left him and drove to the Concord Police Department. T 166. On cross-examination, however, he changed his account when he testified that he witnessed the victim get those injuries during a car accident several days before the assault. T 196. He then testified that the victim had the injuries to her face for the five days between the car accident and the night of the assault. T 196.

These were not the only contradictions in the defendant’s testimony. For example, the defendant initially claimed that he was not present the night of the assault, but then admitted that he was present. T 176. He also contradicted himself regarding the Manchester Police Department investigation. The defendant insisted that he had not known that the Manchester Police Department was investigating him. T 176-77. But he

admitted thereafter that he did know about the investigation “from the restraining order thing.” T 177, 183. Then he claimed that he “wasn’t aware” of the investigation. T 178. He changed his answer yet again when he admitted that he was aware that the Manchester Police had come knocking on his door, but claimed he was in Michigan at the time. T 178-79.

The defendant also alleged that he did not have a conversation about the restraining order with the victim. T 183. He then testified that he and the victim did have a conversation about the restraining order. T 183. The defendant next alleged that he spent the afternoon after the assault with a friend. But upon further questioning, he could not identify anything specific that he and the friend discussed or did. T 184. The defendant later alleged that he talked to other individuals that afternoon, but then testified that he had not actually talked to these individuals, only met them. T 184-85.

To the extent, therefore, that the jurors might have thought the defendant’s “story had changed,” the record reflects that his explanation for the victim’s injuries did change during the course of his testimony. He has failed to explain why the jury would have relied on this one inconsistency over the many others in making a credibility determination, such that it prejudiced his case. Therefore, because the phone call testimony was inconsequential compared to the uncontested evidence of the defendant’s guilt and because the defendant has failed to demonstrate that the admission prejudiced his case, any error in the court’s decision to admit this evidence was harmless beyond a reasonable doubt.

CONCLUSION

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

The State requests waives oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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November 3, 2021

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,002 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.

November 3, 2021

/s/ Zachary L. Higham
Zachary L. Higham

CERTIFICATE OF SERVICE

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

November 3, 2021

/s/ Zachary L. Higham
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