THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0364

State of New Hampshire

v.

Richard Racette

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Ten-Minute Oral Argument Requested)

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ISSUES PRESENTED

I. Whether the trial court sustainably exercised its discretion when it barred the defendant's improper cross-examination of Samantha Fogg.

II. Whether the State's introduced sufficient evidence to prove the charge of pattern attempted intercourse beyond a reasonable doubt. The defendant raises this claim as plain error.

III. This court may review the records reviewed by the trial court *in camera*.

STATEMENT OF THE CASE

A Rockingham County Grand Jury indicted Richard Racette ("the defendant") with four pattern counts of attempted aggravated felonious sexual assault ("AFSA") (RSA 632-A:2, III), stemming from offenses against G.F. ("the victim"), committed between January 1, 2016 and July 20, 2017. T[1] 3-5. Each of the charges alleged a different type of AFSA: attempted intercourse, touching the victim's breasts, touching the victim's buttocks, and touching the victim's vagina. T 3-6.

Following a three-day trial in February 2020, a jury convicted the defendant on each of the four charges. T 357-58. On July 17, 2020, the trial court (*St. Hilaire*, J.) sentenced the defendant to two consecutive terms stand-committed of ten to thirty years on two of the convictions. SH 87. On the third and fourth convictions, the court sentenced the defendant to two suspended sentences of ten to thirty years, concurrent with each other, but consecutive to the second stand-committed sentence. SH 88-89.

This appeal followed.

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[1] Citations to the record are as follows:
"DA__" refers to the separately bound sealed appendix to the defendant's brief and page number;
"DB__" refers to the defendant's brief and page number;
"SH__" refers to the transcript of the July 17, 2020 sentencing hearing and page number;
"T__" refers to the transcript of the defendant's three-day jury trial held February 11-February 13, 2020 and page number.

STATEMENT OF THE FACTS

A. The State's Case at Trial

In 2016 and early 2017, Karen Galinha was living in a three-bedroom apartment on Lafayette Street in Hampton Falls, New Hampshire with her minor daughter, the victim, and her adult daughter, Samantha Fogg ("Fogg"). T 169-71. Galinha and the victim's father were separated on amicable terms and had maintained a flexible, informal custody arrangement. T 174, 233. This changed when the victim's father began using drugs and stopped seeing his daughter and providing child support. T 174-75.

During this time, Galinha worked irregular hours cleaning houses. T 175. Galinha testified that she would come home from work at various times between 3:00 p.m. and 6:00 p.m. depending on the job. T 181. In October 2016, Galinha injured her knees. T 175. She did not work for the month of October and thereafter cut back her work hours to approximately twenty hours per week. T 176. Around this time, in need of money to pay rent, Galinha asked Fogg to begin contributing to the rent. Instead, Fogg moved out of the Hampton Falls apartment. T 177.

Around this same time, Galinha asked the defendant to move into the apartment with her and the victim. Galinha had known the defendant for approximately fifteen years and he agreed to move into Fogg's vacant bedroom and pay half of the rent each month. T 178.

The victim testified that she lived with her grandmother at the time of trial and done so for nine months prior to trial. T 33. She testified that she lived with her sister in Epping for two years prior to that. T 33 Before

she lived with her sister, the victim lived in Galinha's apartment in Hampton Falls for seven years. T 39-40. The victim testified that throughout that time, Galinha allowed people to rent rooms in the apartment "on-and-off." T 40.

The victim testified that she met the defendant before he moved into the Hampton Falls apartment at the home of a family friend. T 42. The defendant moved into the Hampton Falls apartment when the victim was "nine or ten." T 43. He moved into a bedroom that the victim's sister had formerly occupied. T 43. The victim further testified that after he moved into the apartment, the defendant would take her shopping, take her to get her nails done, and take her to get coffee at Dunkin Donuts. T 44. He also took her to Barnes & Noble "a lot." T 44. The victim testified that her mother was sometimes present, but that most often the victim and the defendant did these activities alone. T 45. The defendant would sometimes buy the victim coffee, toys, or makeup at Walmart. T 45.

The victim also testified that she and the defendant would spend time together at the Hampton Falls apartment. T 46. She testified that they would sometimes watch movies together in the defendant's bedroom. T 46-47. The victim testified that the defendant would sometimes show her "Asian girls" on TV. T 47-48. Specifically, the defendant would watch "Asian girls" who were "in their bathing suits in a slimy tub." The victim further explained that, "they were, like, fighting so sometimes [the bathing suits] would . . . slip off []." The victim stated that her mother was not present while the defendant watched these shows. T 49.

The victim then testified about the assaults. She said that the defendant would come into the bedroom while she was sleeping and "try to

touch [her].” T 50. She further explained: “He’d either try to pull my clothes off and get in my pants and -- yeah.” T 50. When asked what part of her body he would touch, the victim stated “either my boobs, my butt, or my vagina.” T 50. She further testified that he did this both over and under her clothes. T 50. The State asked what his hands would be doing during this. T 50. The victim replied that he would rub or massage these parts of her body. T 51. She also testified that if her clothes were off, the defendant would attempt to “stick his finger up in [her] vagina.” T 57.

The victim explained that these assaults began “a month or so” after the defendant moved into the Hampton Falls apartment and occurred “most nights” thereafter until the defendant moved out of the apartment. T 55-57. The victim also testified that her mother would be “[s]leeping on the couch” during these assaults. T 51. She said that she did not go out into the living room to tell her mother because she didn’t want her mother to “get stressed about it[.]” T 58. The victim also testified that she knew her mother was not working and that the defendant was paying rent at the time. T 59.

The victim also testified that the defendant would “[s]ometimes” attempt to put his penis into her vagina. T 53. She testified that on these occasions, his penis would be “kind of sagging” and his pants and underwear would be pulled down. T 54. The victim testified that the defendant would pull her pants down and would “take [her] legs and, like bring them down, and then he’d like try to try to come.” T 54. The victim testified, “I’d try to kick him away, push him, just get him out of my room.” T 55. She further explained that the defendant would leave if she

kicked and pushed him. T 55.

The victim recounted that the defendant moved out of the Hampton Falls apartment at some point. T 59-60. She also testified that she knew that she and her mother planned to move into the defendant's house in Rye in the summer of 2017. T 60.

The victim also testified about her interview at the Child Advocacy Center (CAC). She testified that during her CAC interview she told the interview that the defendant beat her. T 61. She later explained that this was a lie and the defendant did not beat her. T 62. She confirmed again at trial that the defendant did not beat her. T 61, 87-88. When the State asked the victim why she lied about this in her CAC interview, the victim explained that she did it because "what he did was wrong" and she "wanted to get him in more trouble." T 61.

Fogg also testified. Fogg testified that she had lived in the Hampton Falls apartment with Galinha and the victim. T 116-17. She moved out in October of 2016; about a week after the defendant moved into that apartment. T 117, 120. Fogg testified that she had regular contact with the victim after she moved out of the apartment. T 121-22. She testified that during that time she would sometimes drive the victim to school because Galinha "would wake up late usually" and still be sleeping on the couch when it was time for the victim to go to school. T 122. Fogg testified that Galinha would often still be asleep on the couch when Fogg arrived to take the victim to school. T 122.

Fogg also testified that she saw the defendant when she went over to the Hampton Falls apartment. T 124. She testified to seeing the victim and the defendant interacting at the apartment. T 124. Her testimony was that

the victim seemed uncomfortable around the defendant. T 125, 128. She observed that the defendant would put his hand on her and she would brush it off. T 127-28. Fogg also testified that after the victim disclosed the assaults, Fogg got full custody of her. T 129.

Galinha testified about the living situation during the months the defendant lived in the Hampton Falls apartment. According to Galinha, the defendant left for work around 6:30 a.m. and returned to the apartment between 4:30 and 6:00 p.m. T 181. Galinha testified that the defendant helped the victim with her homework, read books with her, drove her to school, took her to his motocross races, brought her to the beach, and took her to visit Fogg. T 181-82, 242. He also bought things for the victim, such as a Hoverboard. T 182. Galinha also testified that the victim's performance and attendance in school declined during this period. T 184.

Because the victim's bedroom was very small, it did not contain a bed. Therefore, the victim slept with Galinha in her bedroom. T 182. Galinha testified that she would put the victim to bed around 8-9 p.m. and stay up watching TV on the living room sofa for several hours. T 183. She testified that she sometimes fell asleep on the sofa and on some occasions slept there the entire night. T 184, 238-39. Galinha testified that she would be up "during all hours of the night" because she was "a very light sleeper." T 239.

The defendant moved out of the Hampton Falls apartment in February 2017 and moved to Rye, New Hampshire, but returned to live in the apartment for approximately one month in April 2017. T 185. After he moved to Rye, the defendant paid Galinha to clean his home in Rye. T 185. In July 2017, Galinha was evicted from her apartment in Hampton Falls. T

191-92. According to Galinha, the defendant had been encouraging her to move into his home in Rye as early as May 2017. T 209, 212-13.

According to text messages between Galinha and the defendant, the defendant was eager for her and the victim to move into his home. He said, "We need to get you out of that place sooner the better," and "You really need to get -- to get away from that place." T 213. Another message from the defendant read, "Boy, I'm telling you, I just don't like living in Rye. It's for old people. It's nice that I can run around naked, but that's the only good thing about living here." T 214. Galinha testified that she planned to move there with the victim after the eviction. T 191. However, before she could do this, the victim disclosed the defendant's abuse on July 23, 2017. T 206.

Galinha testified to taking Suboxone from 2008 until her knee injury in 2016. T 216-17. The State then impeached her with texts referring to current Suboxone use in July 2017. T 220-22. Galinha also testified that she lost custody of the victim following the disclosure and that Galinha's mother has since acquired guardianship over the victim. T 225.

Kimberly Pelchat, a child protective service worker from the Division for Children, Youth, and Families (DCYF), also testified. Pelchat testified that she became involved with the victim and her family in July of 2017. T 258. Pelchat testified that when she went for a home visit with the victim and Galinha, she found Galinha at home. T 261-62.

Pelchat approached the residence at 10:45 a.m. and stood outside the door, which had "no glass or screen panel in it" such that Pelchat could see into the residence. T 261. Pelchat testified that she could see Galinha "asleep on the couch" inside and got her to come to the door "[a]fter quite a

bit of knocking and yelling her name." T 261-62. Pelchat testified that she "started off knocking, saying her name multiple times, and then getting louder for her name, and continuously banging on the door" and that this went on for "approximately, a minute or two" "until [Galinha] was able to wake up." T 262.

Once she was able to speak with Galinha, Pelchat noted that Galinha appeared to be under the influence. T 263. She testified that Galinha "was slurring her words, was not making sense. It took a while for her to kind of understand what we were talking about and for her to sit up on the couch and stay in the upright position." T 263. At the home visit, Pelchat learned that Galinha was going to be evicted "within a few days or a week or so" and planned to move into the defendant's home. T 264-65. Ultimately, Pelchat and DCYF determined that it was unsafe for the victim to live with Galinha. T 270.

B. The defendant's cross-examination of Samantha Fogg.

The defendant challenges the trial court's ruling that some statements Fogg made in an earlier interview with prosecutors were inadmissible for impeachment purposes on cross-examination. Relevant to this issue, the State made the following inquiry during its direct examination of Fogg:

> Q So Sam, when you would go to the apartment in Hampton Falls while [the defendant] was living there and [the victim] also was living there, did you make any observations about [the victim's] behavior towards [the defendant]?
>
> A Yes. She didn't like being around him.

Q Okay. And what was she doing that made you think that?

A He would, I guess, go near her or put his hand on her, and she would brush it off and --

Q Okay.

A -- she didn't really like him being around.

T 127-28. On cross-examination, defense counsel revisited this topic:

Q Okay. And I believe it was your testimony on direct that you said she felt uncomfortable?

A She did.

Q Do you remember saying that? Okay.

A I could tell by her body language. She didn't like being around him.

T 146. Defense counsel then produced a copy of Fogg's earlier interview with prosecutors and asked her to point out where in that interview she had mentioned the victim being uncomfortable around the defendant. T 147. Following a bench conference, defense counsel and Fogg had the following exchange:

Q Okay. Well, I guess I'll just ask you before you keep reading. You never told anybody during that interview that you noticed [the victim] feeling uncomfortable around [the defendant]?

A Okay. Was I asked a question about that in the interview, though?

Q I didn't ask what questions you were asked.

A Okay.

Q I asked if you told anybody during that interview if you noticed [the victim] behaving uncomfortably.

A No, but if I wasn't asked the proper question, then I wouldn't have been able to answer that for you.

Q Well, you know that you were being interviewed because of an alleged sexual assault, right?

A I'm aware.

Q Okay. And so it's your testimony that because somebody didn't ask you the specific question about what you had seen, it wouldn't be in there?

A Correct.

Q Okay. So would you agree with me that nowhere in that transcript does it say you watched [the victim] push his hand away?

A No, but I saw it.

Q Okay. Nowhere -- okay. When did you see it?

A When I was interacting with them, when I would go over there in the afternoons or in the mornings.

Q So for months and months, you would watch [the victim] behave uncomfortably around –

A Correct.

Q – [the defendant]? Okay. And for those months and months of noticeable discomfort on the part of your sister while she's pushing his hand away, you didn't think it was important to tell the interviewer?

A Again, I wasn't asked that question, so.

T 148-49. Shortly after this exchange, the State objected and the parties approached for another bench conference. Following an initial conference in the jury's presence, the court excused the jury while the parties discussed Fogg's testimony. T 153.

Outside the jury's presence, defense counsel proffered that Fogg had said in an earlier interview that she "had a hard time believing that Richard

was capable of doing all of this." T 154-55. Fogg's relevant statement from her November 15 interview at the Rockingham County Attorney's Office reads:

> Samantha Fogg: I had a hard time believing that Richard was capable of doing all this when my mom was there, and for as long as it went on. I mean, I don't think she was - - I don't think she was sober. I don't think anybody that would be sober would not know if their daughter was being raped. I just - - I don't believe it.

DA 28. Defense counsel argued that this statement would allow the jury "to weigh in on [Fogg's] credibility because she's here saying things that she's never said before to the county attorney, certainly not to the police." T 152.

The State argued that examining Fogg about these statements constituted asking one witness to opine on the credibility of another witness, in violation of *State v. Lopez,* 156 N.H. 416 (2007). T 154. Defense counsel replied that this was not opining on the victim's credibility: "She's not saying, I thought [the victim] was lying. She's saying, based on my observations of him, I didn't think this was possible." T 155.

After hearing the parties' arguments and reading the transcript of Fogg's interview, the trial court agreed with the State:

> The rest of [the proffered line of questioning], however, though is a backdoor way to get into her belief as to whether it happened or not which is prohibited by case law. Secondly, if you read the rest of that transcript, the reason why she didn't believe it, according to the interview, was because her mom was in the room. But then she backpedals and talks about, well, her mom was drunk or whatever, so it's very unclear to figure out – it's not that she doesn't believe her sister. In my view could go many ways. But the fact of the matter is, the Defense

> is trying to use it somehow to, A, say that she's not credible, but B, to want the jury to believe that she actually did say and think that it couldn't happen. So to me, that flies in the face of what the Defense wants. I mean, you don't want -- you're not going to impeach her with a statement that she made and say, that wasn't true, she didn't think that it didn't happen, you should believe that it did happen. So where's the credibility argument when it comes to getting out that statement in front of the jury? So that's where my belief is the statement -- you want the statement to come out so the jury believes that this witness doesn't believe her sister. That's how I'm interpreting it.

T 156-57. Based on this reasoning, the trial court ruled that the earlier statement was inadmissible. This exercise of discretion forms the basis of the defendant's first issue on appeal.

SUMMARY OF THE ARGUMENT

I. The trial court sustainably exercised its discretion when it barred the defendant's improper cross-examination of Samantha Fogg. The defendant's line of questioning would have impermissibly called on the witness to opine on the credibility of other witnesses. Additionally, if the trial court erred in barring this line of cross-examination, the error was harmless beyond a reasonable doubt. The statement with which defense counsel sought to impeach Fogg was not inconsistent with Fogg's trial testimony and the defendant had already impeached Fogg on this point. Finally, Fogg's interview statement would have undermined the defendant's own theory of the case.

II. The trial court did not commit plain error when it declined to *sua sponte* overturn the jury's guilty verdict on the charge of attempted pattern sexual intercourse. The State provided evidence that the defendant attempted sexual intercourse with the victim on more than one occasion over a four-month period sufficient for a rational trier of fact to find the defendant guilty.

III. This Court may order additional review the documents reviewed by the trial court *in camera* because the trial court did not have the benefit of this Court's recent decision in *State v. Girard*, 173 N.H. 619 (2020), when it conducted its original *in camera* review. If the trial court determines that it would not have released any further documents under the *Girard* standard, this Court should determine whether that decision represents a sustainable exercise of discretion. If the trial court's exercise of

discretion was unsustainable, this Court should determine whether the error was harmless beyond a reasonable doubt.

ARGUMENT

I. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT BARRED THE DEFENDANT'S IMPROPER CROSS-EXAMINATION OF SAMANTHA FOGG.

A. Standard of review.

The defendant suggested in his brief that this court's review may be plenary if the trial court misinterpreted the rules of evidence. DB 17-18. However, he did not subsequently argue a misinterpretation of the rules of evidence. To the contrary, his argument rests entirely on the trial court's factual determination regarding the admissibility of certain proffered impeachment evidence. "The admissibility of evidence is a matter left to the sound discretion of the trial court." *State v. White*, 155 N.H. 119, 123 (2007). "[This Court] will not reverse the trial court's decision to admit evidence absent an unsustainable exercise of discretion." *State v. Lopez*, 156 N.H. 416, 420 (2007). "To sustain his burden, the defendant must show that the trial court's decision was unreasonable to the prejudice of his case." *White,* 155 N.H. at 123. "[In determining] whether a ruling made by a judge is a proper exercise of judicial discretion, [this Court considers] whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *State v. Lambert*, 147 N.H. 295, 296 (2001).

B. The trial court properly barred a line of cross-examination that would have called for Fogg to opine on both the victim's credibility and the defendant's credibility.

Fogg testified on direct examination that she observed interactions between the defendant and the victim that led her to believe the defendant

made the victim uncomfortable. T 127-28. On cross-examination, defense counsel impeached Fogg by showing that she had not previously told police or prosecutors about these observations. T 146-49. Defense counsel then tried to impeach Fogg on this point a second time with a statement she made during an interview with prosecutors. T 150-51.

At trial, defense counsel interpreted Fogg's interview statement to mean, "based on my observations of him, I didn't think this was possible." T 155. The State does not agree with this characterization of the statement, which is based on a loose reading of a truncated piece of Fogg's answer. However, for the sake of argument, if the defendant's interpretation of Fogg's words is accurate, the line of cross-examination for which the defendant sought to use that statement was wholly inappropriate. It called for Fogg to opine on the credibility of both the victim and the defendant.

"[I]t is the province and obligation of the jury to determine the credibility of witnesses. Therefore, while witnesses may give lay opinion testimony on a variety of topics, they are not permitted to give lay opinion testimony regarding the credibility of [another] witness." *State v. McDonald*, 163 N.H. 115, 121 (2011) (internal citations omitted). "This prohibition applies with equal force to testimony about a criminal defendant who does not testify as a witness at trial." *Id*.

The defendant's argument for admission relies on this Court's 1884 decision in *Concord v. Concord Bank*, 16 N.H. 26 (1884). To the extent that the defendant argues that *Concord Bank* stands for the "widely accepted view" (DB 20) that "in case of doubt the courts should lean toward receiving such [potentially inconsistent] statements to aid in evaluating testimony," such a rule is inapplicable here.

The trial court did not exclude the proffered statement because it was a borderline case of inconsistent prior statement. It excluded the evidence because it found that the statement called for one witness to opine on the credibility of another, which is impermissible under the modern Rules of Evidence. *N.H. R. Ev.* 701. Moreover, *Concord Bank* was decided more than a century before this State adopted its modern Rules of Evidence. A broad and general common law principle cannot stand in the face of a rule of evidence that specifically displaces it. *See N.H. R. Ev. 100* ("To the extent these rules alter or conflict with the common law, the rules shall govern.").

Furthermore, the trial court correctly applied Rule 701. In this case, the risk of admitting this line of questioning was two-fold. First, the State argued, and the trial court agreed, that the defendant intended to use of Fogg's earlier statement to show the jury that Fogg doubted the truth of her sister's allegations. That this was the defendant's intention is apparent from defense counsel's statements during the bench conference on this issue. During that conference, defense counsel repeatedly attempted to characterize Fogg's interview statement as a statement of disbelief about the victim's allegations: "what [Fogg] does say is, I had a hard time believing that Richard was capable of doing all of this. She's not saying, I thought [the victim] was lying. She's saying, based on my observations of him, I didn't think this was possible."

The defendant argues that "a person can express surprise upon hearing of an event without implying disbelief in its occurrence." DB 18. While this is true, it is inapplicable here. The defendant did not argue at trial that Fogg had "express[ed] surprise," he argued that she "didn't think

this was possible." Despite defense counsel's cursory attempt to distinguish the two, a statement that an allegation is impossible is equivalent to stating that the victim was lying or mistaken. Either result would have been a comment on the victim's credibility. As this Court noted in *McDonald*, "the prohibition on opinion testimony applies both to testimony that comments on credibility explicitly, as well as testimony that comments on credibility indirectly." 163 N.H. at 123.

Moreover, the statement that Fogg, "had a hard time believing that [the defendant] was capable" of sexual assault was not simply a comment on the victim's credibility. It constituted an endorsement of the defendant's credibility as well. This is precisely the type of opinion testimony that *McDonald* prohibits. Although the discussion at the trial court focused on the statement's commentary on the victim's credibility, neither the victim's credibility, nor the defendant's credibility were permissible topics of cross-examination under *McDonald*. Therefore, the trial court sustainably exercised its discretion when it barred the defendant from cross-examining Fogg with this statement.

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. Wall*, 154 N.H 237, 245 (2006).

1. Defense counsel had already impeached Fogg on this point, so further impeachment would have been cumulative.

In addition, any error in the decision to bar this line of cross-examination was harmless because it would have been cumulative with the questioning and impeachment that immediately preceded it. Immediately prior to the defendant's attempt to impeach Fogg with her interview statement, defense counsel had successfully impeached her with the same document. T148-49. As the defendant's brief recognizes, this "second line of attack" (DB 15-16) was intended to impeach Fogg on exactly the same point upon which he had already impeached her, "specifically on the credibility of her testimony that [the victim] seemed uncomfortable around [the defendant]." DB 21.

State v. Deschenes, 156 N.H. 71, 80-81 (2007) is instructive on this point. In *Deschenes*, the trial court admitted an officer's testimony to impeach the defendant's credibility over the defendant's objection. *Id* at 80. On appeal, this Court affirmed the admission as harmless error. *Id*. The Court first noted that it was "not at all clear that the disputed testimony even qualifie[d] as impeachment evidence." *Id*. While acknowledging the importance of the defendant's credibility, the Court concluded that, when placed in context of all the credibility evidence admitted at trial, "the disputed testimony could not have affected the verdict of a reasonable jury." *Id*. at 81.

Likewise, this Court should examine the value of this particular credibility evidence in the context of all the credibility evidence offered at trial. Fogg was not present for the assaults and did not even live in the

Hampton Falls apartment for most of the period that the defendant resided there. Much of the testimony Fogg provided was background information about the family. Crucially, defense counsel had already impeached Fogg on the one substantial point of testimony she provided, *i.e*. her observations of the victim's discomfort around the defendant, and had done so in a manner that did not require Fogg to opine on any other witness's credibility. T 148-49. Further impeachment on this same topic, using a statement with dubious impeachment value, would have been cumulative and added little value to the questioning. Therefore, the trial court's error, if any, was harmless beyond a reasonable doubt.

2. The interview statement with which defense counsel sought to impeach Fogg was not inconsistent with Fogg's trial testimony.

In the previous section, the State assumed, for the sake of argument, that the defendant's reading of Fogg's interview transcript was correct. Under that interpretation, the evidence impermissibly called on Fogg to opine on both the victim's credibility and the defendant's. However, the full statement demonstrates that the defendant's interpretation is inaccurate. The statement was inconsequential as impeachment evidence and far more problematic for the defendant. Fogg's full statement reads as follows:

> I had a hard time believing that Richard was capable of doing all this when my mom was there, and for as long as it went on. I mean, I don't think she was - - I don't think she was sober. I don't think anybody that would be sober would not know if their daughter was being raped. I just - - I don't believe it.

DA 28.

In its full context, this statement reads, not as surprise at the allegations against the defendant stemming from Fogg's observations of his upstanding character, but shock at Galinha's inattentiveness to the goings-on in her apartment. This is not inconsistent with Fogg's trial testimony that the victim was uncomfortable around the defendant. And it is consistent with Fogg's testimony that she often had to drive the victim to school because Galinha was asleep on the couch when it was time for school. Because it would have served as poor impeachment material, the exclusion of this statement from trial was inconsequential and, therefore, harmless beyond a reasonable doubt.

3. The defendant's argument ignores the fact that the admission Fogg's full interview statement could have undermined the defendant's case.

Fogg's statement could have undermined the defendant's own case. If the trial court had allowed the defendant to introduce the first part of Fogg's statement, "I had a hard time believing that Richard was capable of doing all this," the State would have been able to admit the remainder of the statement under *N.H. R. Ev.* 106(a). The defendant notes this possibility in his brief (DB 22), but argues "[t]hat possibility did not disentitle the defense from presenting evidence of the credibility-impeaching statement."

This argument ignores the damage that the remainder of Fogg's statement could have done to the defendant's case. Fogg's full statement referred to Galinha's struggle with sobriety and speculated that it caused her to overlook the assaults happening under her own roof. If the entire statement had been admitted, therefore, it could have seriously undermined

the defendant's assertions that the victim's story did not make sense because Galinha was asleep on the couch mere feet away at the time of the assaults. T 30. Evidence that Galinha was under the influence while the defendant committed the assaults could have seriously undermined this claim in the eyes of the jury. The defendant's repeated objections to mention of Galinha having an opioid addiction or using drugs during the timeframe of the assaults confirms the defense understood this. T 17-22, 196-200, 202-03, 220-22.

Plainly, defense counsel understood that evidence which tended to show that Galinha was under the influence and inattentive to the victim and the defendant's actions during the timeframe of the assaults was problematic for the defense. Fogg's interview statement, that she didn't think Galinha was sober during the period of the assaults, would have further undercut the defendant's already-difficult effort to portray Galinha as a watchful mother. This proffered evidence, therefore, was not only cumulative and inconsequential; it could have done considerably more harm than good for the defendant's case. As a result, its exclusion was harmless beyond a reasonable doubt.

4. The defendant suffered no prejudice from the exclusion of this evidence.

Finally, the defendant argues that he suffered prejudice from the trial court's exclusion of this evidence. DB 23-25. This claim is meritless. The defendant argues that the court's ruling "deprived the defense of an opportunity to negate" the "incriminating consideration" which might arise

from Fogg's testimony that she saw the victim's discomfort around the defendant.

But as the State has argued, the defendant had already impeached Fogg about this point prior to trying to introduce the excluded evidence. He was able to undermine her statement by showing that she did not tell the CAC interviewer or the County Attorney about her observations, despite their obvious relevance to the investigation. T 148-49, 160-61. Although Fogg replied that she "wasn't asked that question," defense counsel effectively attacked this response by pointing out that Fogg knew she was being interviewed about a sexual assault and yet "didn't think it was important to tell the interviewer" about the victim acting uncomfortable during her interactions with the defendant. T 148-49. Because of this effective cross-examination, the defendant suffered no prejudice from the exclusion of this "second line of attack."

II. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR REGARDING THE SUFFICIENCY OF THE STATE'S EVIDENCE OF PATTERN ATTEMPTED INTERCOURSE.

A. Standard of review.

The defendant raises this claim as plain error pursuant to *Sup. Ct. R.* 16-A "[T]o find plain error: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights.... If all three of these conditions are met, [this Court] may then exercise [its] discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Mueller*, 166 N.H. 65, 68 (2014) (internal quotations omitted). "[T]he rule should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *State v. Russell*, 159 N.H. 475, 489 (2009).

The defendant raises as plain error the sufficiency of the evidence for one of the four pattern sexual assault charges for which he was convicted. Evidence is insufficient if "no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *State v. Stanin*, 170 N.H. 644, 648 (2018).

B. The trial court did not commit plain error.

The defendant alleges that the trial court committed plain error by not overturning the defendant's guilty verdict on the charge of pattern attempted intercourse under RSA 632-A:2, III. The statute provides that "[a] person is guilty of aggravated felonious sexual assault against another

person when such a person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age." RSA 632-A:1, I-c defines "pattern of sexual assault" as "committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years." The defendant argues, "the State introduced insufficient evidence because it elicited no testimony that [the defendant] attempted intercourse more than once, nor that any second such act occurred at least two months after a first act." DB 26. The record does not support this claim.

Galinha testified that the defendant moved into the apartment in September or October, 2016 (T 84, 176) and left in February, 2017. T 185. The victim testified that the defendant began his attempts to assault her "a month or so" after he moved into the Hampton Falls apartment and continued until he moved out of the apartment. T 56. She also testified that the attempted assaults occurred "most nights" during that period. T 55-56. When specifically discussing the defendant's attempted sexual intercourse, the victim testified that he would "sometimes" attempt to insert his penis into her vagina. T 53.

Viewing all of the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant attempted to sexually assault the victim many times over the period of November 2016 to February 2017 – a period of more than two months – and that those assaults "sometimes" involved attempted intercourse. The victim's use of the word "sometimes" supports the rational inference that this occurred more than once over the span of four months – November, December, January, and February.

The testimony quoted above directly contradicts the defendant's assertion that the State "introduced no evidence sufficient to prove the frequency or temporal spacing elements with respect to this charge." DB 28. Viewing the evidence and inferences in this light, a rational trier of fact could have concluded that the State met its evidentiary burden on this charge. "Plain is synonymous with clear or, equivalently, obvious." *State v. Guay*, 162 N.H. 375, 384 (2011). Based on this record, the court committed no error, let alone plain error, when it allowed the jury's verdict to stand.

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

Prior to trial, the defendant requested that the trial court order the production of confidential materials for *in camera* review. DA 11-15. The trial court granted the motion, reviewed the confidential materials, and ordered that some of the materials must be disclosed, subject to a protective order. DA 9-10. The defendant is concerned that the trial court may have erred by not disclosing more material, and requests that this Court conduct a further *in camera* review to determine whether the trial court improperly withheld any documents. DB 33.

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

Because the State does not know the substance of the information within the undisclosed materials, it assents to the defendant's request that this Court conduct an independent *in camera* review of those materials. However, this Court should reverse if, and only if: (1) the materials contain

information that should have been disclosed to the defendant, (2) this Court concludes that the failure to disclose was unreasonable or untenable to the prejudice of the defendant's case, and (3) the error in failing to disclose did not constitute harmless error. *See State v. Girard*, 173 N.H. 619 (2020).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the trial court.

The State request a ten-minute 3JX argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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September 28, 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 6,891 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.

September 28, 2021 /s/*Zachary L. Higham*
Zachary Higham

CERTIFICATE OF SERVICE

I, Zachary L. Higham, hereby certify that a copy of the State's brief (both sealed and redacted versions) shall be served on Christopher Johnson, Esquire, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

September 28, 2021 /s/*Zachary L. Higham*
Zachary Higham