

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2021-0310

State of New Hampshire

v.

Timmy Rouleau

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

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

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### **ISSUES PRESENTED**

- I. Whether evidence about the defendant's requirement that the victim review an Amazon wish list – prepared by him – and comprised of sexual toys and lingerie for her to pick out her birthday and Christmas presents was intrinsic to the charged crimes.
- II. Whether any error in the admission of this evidence was harmless.

### **STATEMENT OF THE CASE**

The Strafford County grand jury charged the defendant with twelve counts alleging sexual offenses against the minor victim. T 4-9.<sup>1</sup> Six charges alleged aggravated felonious sexual assault (AFSA), of which two alleged a pattern offense and four alleged single acts. A seventh charge alleged attempted AFSA. In addition, the grand jury indicted the defendant on three counts of felonious sexual assault and two counts of sexual assault.

The jury returned verdicts of guilty on all counts. T 346-49. The court sentenced the defendant to cumulative, stand-committed terms of twenty to sixty years, with two and a half years of the minimum subject to being suspended upon completion of sex offender treatment. ST 36-41; A3-A32, A39. The court also imposed suspended terms of twenty to 40 years. DBA 33-38.

This appeal followed.

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<sup>1</sup> “DB” refers to the defendant’s brief and page number. “DBA” refers to the appendix to the defendant’s brief and page number. ST refers to the sentencing transcript and page number. “T” refers to the trial transcript and page number.

### **STATEMENT OF FACTS**

At the time of trial, the victim was 15 years old. T 40. She had three younger siblings, who were 9, 12, and 14 years old, on her mother's side and two siblings on her father's side. T 41, 44. She lived with her mother and the three maternal siblings. T 41. At the time of trial, she lived in Laconia, but at the time of the assaults she lived in Lee with her mother, her maternal siblings, and the defendant. T 44.

In March 2016, when the victim was in fifth grade, her mother had recently divorced and had started a relationship with the defendant, who was her sister's daughter. T 45-46, 48. The victim's family lived in Apartment 1 and the defendant lived in Apartment 3 in an apartment in Cedarwood Estates, an apartment complex. T 46-47.

In April or May 2016, while her siblings were either outside playing or were in their rooms and her mother was not home, the defendant "asked [her] to cuddle with him" on the couch in the living room. T 52. The victim thought it was "weird," but did not know if this was a "usual thing for parents to do with their kids." T 53. The victim lay down on the couch with the defendant and he "put his arms like around [her] and started moving his hand up towards [her] shirt" and "had his other hand moving down near [her] shorts." T 53.

The victim explained: "his arm was going up my shirt, his hand was kind of placed like right below my stomach before going into my shorts... His hand had been touching my breasts before his hand then went down into my shorts," under her underpants. T 55. He penetrated her vagina with his hand. T 54.

The victim felt “[c]onfused and unsettled. Kind of sick.” T 55. This same “cuddling” happened on other occasions, “almost always on the couch in the living room.” T 55. According to the victim, it happened “quite frequently.” T 55. At first, it happened “almost every day”; later it happened every day or every other day. T 55. The assaults occurred right before the defendant left for work, in the late afternoon. T 58. The victim estimated that these assaults occurred “a few hundred” times. T 58.

When the victim was in seventh grade, the family moved into a different apartment, this time with the defendant. T 49-50. When she reached seventh grade, the victim “would kind of remove [herself] from the situation.” T 58. She would go to her room or stay after school until the late bus left. T 58. At home, she would say that she was working on an art project and “would like get [her] canvas and [her] paints out and try to work on something.” T 58. The defendant continued to ask her to come onto the couch with him, but she made excuses. T 59. When she did, he would become “quite upset” and try to make her feel guilty. T 59.

Once, when she was in in the sixth grade, she had stayed home from school because she was sick and was left alone with the defendant. T 61. The defendant asked her if she wanted to watch a movie. T 61. They watched the movie in the defendant’s and the mother’s bedroom and the defendant touched her breasts, and put his mouth on her breasts, and had her touch his penis. T 61. He made her touch his penis on other occasions by “grabbing [her] hand” and “moving it over to his side of the bed to touch his penis.” T 62-63. He moved her hand “up and down on his penis.” T 63.

On one occasion, when she was in sixth or seventh grade, the defendant asked her if she “liked what he was doing to” her and she said “no.” T 66. That did not stop the assaults, but the victim thought that it was “out of character” “for him to actually have said something if anything.” T 66.

The victim did not tell anyone. She explained:

I was just afraid of what would happen afterwards. Like I had said earlier, everybody was pretty happy with him... The boys were happy, and they had a better father figure in their life. [Her sister] was happy... [S]he never knew him, never knew her father. That was kind of her thing growing up, she had just never known him, and so figuring out that she had met her father, I figured that’s kind of just a crappy thing to do is to just away somebody’s parent from them, especially your little sister.

My mom was happy. Later, when they decided they wanted to get married, I know how much a wedding would cost, so I didn't want to go through sort of taking out all that financial sort of thing and just putting that money down the drain.

T 68-69.

For Christmas and birthdays, the other children wrote “wish lists,” but the victim had to put her wishes on Amazon. T 72. The defendant would have her “sort through different things” that he had “put on there for [her] to figure out” if she wanted them. T 73. She explained: “A lot of them were like sex oriented.” T 73. Some she “didn’t know 100 percent what they were at the time.” T 73. “[T]here were sex toys on there, lingerie, different things like that.” T 73. She added: “And I wasn’t allowed to delete them off of the list. I had to put them from what I wanted the most, what I wanted the least.” T 73.



One of the items was a “lollipop of chocolate, and it was shaped in the shape of a penis.” T 73. The victim explained that she was afraid that she would get that for Christmas or her birthday. T 73. She said:

[W]hen I didn’t get it for Christmas, on my birthday, I was terrified because I had friends around, and like he had given me an Amazon package and telling me that I shouldn’t open it until I got home, and so I was terrified that it would be that. It did not turn out being that, but I just remember being so terrified that it would be that.

T 73.

The victim recalled the April 2019 assault that occurred after her school jazz band had performed at Disney Springs. T 75. The band had “the worst luck” getting home because the flights were delayed due to snowstorms. T 75. When the students finally arrived in Boston, it was one or two o’clock in the morning. T 76. The victim’s mother picked her up at the school after they arrived in New Hampshire and took her home. T 77. The victim’s sister had cleaned her room and put laundry on her bed during that process, so the victim wound up sleeping in her mother’s bed with her mother. T 78. When she woke up, the defendant was touching her breasts and her vaginal area. T 78-79.

Her mother was still in bed with them, lying on her right side as was the victim. T 79. The victim was “kind of frozen” and stayed frozen “for however long it was.” T 79. She tried to reach out her hand to her mother, and tried to “pull on her sweatshirt,” but she “just couldn’t get her attention.” T 80. The defendant pulled her shorts down and put his penis between her legs. T 80. The defendant “was moving it back and forth between my legs, and, eventually, it felt like he was trying to put it into

[her] vagina.” T 81. “It felt like the tip of the penis had gone in, but not the whole thing.” T 81. The victim said: “It hurt.” T 81. The defendant did not stop until the mother woke up when the victim started to cry. T 81-82.

The victim did not tell her mother about the assault until they went downstairs. T 82. The victim’s mother sat the victim “down at the table and she was asking [her] like what had happened.” T 82. The victim explained: “I was trying to explain to her the best I could, and I remember saying that he had touched me, but everything was happening so quickly, I was just kind of panicking, so I couldn’t get all of my words out.” T 82.

The victim’s mother was “startled” and the victim went back to sleep in her own room. T 83. When the victim woke up, the other children were getting ready for school and she did, as well, but her mother told her that she should not go to school that day. T 83. Later, on April 3, the victim’s mother asked the victim if the assault had been an accident “or if it was meant for her.” T 84. The victim told her mother that it was not an accident and that “it had happened before. It wasn’t the first time and that sort of thing.” T 84. The victim felt “relieved” after disclosing the abuse, although the experience also felt “surreal.” T 85.

The victim’s mother said that she did not marry the victim’s father and that, after they broke up, she started dating the defendant. T 128. They began dating in 2006 and they broke up when the mother was three or four months pregnant with the victim’s sister. T 129. In 2007, the mother dated and then married the father of her two youngest children. T 130. They were together for eight years, but broke up in December 2015. T 130-31. Toward the end of December 2015, the mother reconnected with the defendant. T 131. In March 2016, the mother and her four children moved

into the apartment complex in which the defendant resided. T 131-32. In November 2017, the mother, her children, and the defendant moved into the same apartment in a complex called the Darby Field Commons. T 133.

The mother and the defendant became engaged in the summer of 2018. T 134. They planned a wedding for July 2019, reserving the Portsmouth Country Club and hiring a photographer. T 134. She estimated that the initial financial commitment was about \$5,000. T 135.

The victim's mother worked as a nurse for Visiting Nurses in Rochester. T 136. In August 2018, she became the manager in the office, working from 8:00 a.m. until 4:30 p.m., Monday through Friday. T 136. She was also studying for her master's degree in nursing. T 137. The defendant worked a nightshift, and the mother trusted him to be alone with the children. T 137.

As the victim grew older, her mother noticed that she "started to become more withdrawn. She spent more time in her bedroom." T 138. The victim "really didn't want to be home if [her mother] wasn't home." If the mother was "going somewhere, she would want to go with [the mother], and the defendant would get upset that [the victim] was always the one to go places with [the mother]." T 138.

The mother recalled the jazz band trip and the delayed return to New Hampshire. T 139. She picked the victim up at school and drove her home. T 140. The defendant was asleep on the couch. T 140. The mother and the victim went to sleep in the mother and the defendant's bed, leaving the defendant asleep on the couch. T 141. When the mother woke up, the victim was crying and the defendant was in the bed with them. T 141. The mother asked the victim what was wrong and the victim told her that

the defendant “had touched her inappropriately.” T 142. The mother “had her come out of the room at that point” and the victim told her that the defendant had “touched her boob, and that his penis was in between her legs.” T 142.

Before getting the three youngest children off to school, the mother went upstairs to talk to the defendant. T 143. She asked him “why he wasn't coming out of the room. He told me that no one wanted to be around him.” T 143. The mother recalled: “I told him that I would most likely end up needing to file a police report, and he told me if I did that, he would never see any of his kids again. And when I asked him about what had happened, he told me he didn't remember.” T 143. She said that he “didn't know, and that he wouldn't do anything to hurt the kids.” T 143. She recalled that, when she woke him, the defendant started to cry. T 144.

The victim's mother took the victim to work with her that morning after getting the other children off to school. T 144-45. The mother had a Wednesday team meeting that she was responsible for running, but she left with the victim after that. T 145.

The mother did not immediately report the assault to the police because she was “trying to figure out what had happened.” T 145. The mother said that she “initially thought that maybe he mistaked her for” the mother in his sleep. T 145. The victim said that she “didn't know if she wanted to file a police report, because she didn't want to ruin the father figure for her younger three siblings, and it was a very emotional day” for them. T 145. The victim was “very tired and upset.” T 145. The mother called the victim's father to let him know what the victim had told her. T 145.

The mother told the defendant that she was going to make a report to the police. T 147. She ended the relationship with the defendant and cancelled the wedding. T 146. At the end of the school year, the mother and the children moved back to Laconia where the mother had family. T 147.

On April 3, 2019, the victim's mother contacted the Lee Police Department and then met with Lee Police Officer Annie Cole. T 191-92. Five days later, the Strafford County Child Advocacy Center interviewed the victim. T 193.

Kira Hietala worked as a forensic interviewer for the Strafford County Child Advocacy Center and interviewed the victim. T 175, 179. The victim "spent most of the interview kind of like curled over onto herself, kind of like curled up. Not in a ball, but like hunched over as she was talking to me, and she was tearful through a good portion of" the interview. T 179-80.

Cornelia Gonsalves, a pediatric nurse practitioner at Dartmouth-Mary Hitchcock Hospital, was qualified as an expert in pediatrics and child abuse. T 207. She examined the victim and the exam was normal. T 219. Gonsalves noted that "more than 90 percent of the kids have a normal exam, and that is because the [vaginal] area is very elastic, so often times, with sexual abuse, there may be no injury because the tissue can stretch." T 219.

#### **A. The Defendant's Case**

The defendant testified. T 230. At the time of the assaults, the defendant worked at the Rusty Lantern Gas Station, "a family-owned gas station, basically a convenience store with gas pumps." T 231. He was also

studying computer science and technology at Great Bay College. T 231. He was “ecstatic” and “happy” about being a father to the victim and her siblings. T 236. His relationship with the victim’s brothers was “[f]antastic.” T 238. The brothers “always looked up to” him. T 237. One of the brothers was “just like [his] shadow.” T 237. He “[a]bsolutely” felt that he had a good relationship with his own daughter and he had thought that his relationship with the victim was good. T 237-38.

The defendant said that, when the victim and her family moved to Cedarwood, the victim was a “built-in babysitter at that point” and that she had other chores. T 238. He denied attempting to have sexual intercourse with the victim. T 238-39. He claimed that his time alone with the children was “sporadic.” T 239. He said that the times that he was alone with the victim were “[v]ery, very rare.” T 240. He said that this was because “95 percent of the time any of the kids were there or [the mother] was around.” T 240.

On the evening that the mother went to pick the victim up at school, the defendant had a drink of bourbon, but was not intoxicated. T 244. He fell asleep on the couch. T 244. He did not recall going upstairs to go to sleep, but the next thing he knew, the victim’s mother was “yelling” at him. T 245. He said:

I was being told that I, apparently, tried to do something that I wouldn’t do, that I know I didn’t do because I’ve never had those thoughts before, and she was trying to tell me I did something that her daughter was accusing me, and I was still pretty much out of it and in shock at that time because I was – I’m just trying to wake up, and I didn’t know what to think.

T 246. He said that he tried to talk to the victim, but that she “refused” to talk to him. T 247. After the accusation, the defendant left the apartment to live in a motel. T 248.

**B. The Objection to the Amazon Wish List Testimony, the State’s Response, and the Court’s Ruling**

The State turned to the Amazon wish list by asking the victim following question: “Were there ever any other times during this timeframe when he would make any kind of sexual reference to you?” T 69. The defense objected and, at sidebar, counsel told the Court: “I’m curious where the State is going, but that’s an offer of proof, not that we’re trying to get into any type of grooming-type behavior.” The defense pointed out that the State had not filed a Rule 404(b) to admit the evidence. T 70.

The State responded that the victim was going to describe an Amazon Wish List that the defendant had given her. T 70. The State continued:

He would ask her to rank the items that she wanted the most versus that wanted the least, and on that wish list was like sexual toys and things like that, and one thing she particularly described was a penis-shaped lollipop. The only reason this isn't 404(b) evidence, Your Honor, is that it's not prior to; it's not a grooming behavior, and, also, that it happened prior to the sex assault. It happened in the midst of this timeframe. It's more intrinsic to the sexual assault.

So then you can put a relevancy argument in, and I think more probative than it is prejudicial, because it goes to the fact that the defendant had a sexual relationship with [the victim] and was making these kinds of sexual references to her even when he wasn't molesting her, and it's no more prejudicial than pretty much any of the other things that we've gone into thus far.

T 70.

The defense responded that there was “a danger” in admitting the evidence because “if someone is going to buy sex toys, that seems like that's a grooming-type behavior,” which “squarely falls into 404(b).” T 70. The defense added that the State had not learned of the wish list “until about a week ago when it did testimony review, so I didn't know about it any earlier, but I think it is still highly prejudicial.” T 71.

The Court then ruled:

Somebody (indiscernible) the State's offer of proof, I find that the evidence is not 404(b) evidence. It is intrinsic, and it is inextricably intertwined with your -- with the conduct. It does reflect on the defendant's intent as well, and so the -- I'll find, also, that its probative value is not (indiscernible) but it's prejudicial effect. So your objection is overruled.

T 71.



### **SUMMARY OF THE ARGUMENT**

I. The evidence about the defendant's requirement that the victim review an Amazon wish list – prepared by him – and comprised of sexual toys and lingerie for her to pick out her birthday and Christmas presents, was intrinsic to the charged crimes. The evidence helped explain the victim's insecurity and attempt to isolate herself from the defendant as she grew older and the abuse continued. It also helped to explain her reluctance to report the ongoing abuse to her mother. In light of the fact that the other children were not required to pick presents, of a sexual nature, it explained why the victim felt even more alienated, as witnessed by her efforts to avoid the defendant by spending more time at school and in her room.

II. If the court did err, any error in the admission of this evidence was harmless. The evidence of the defendant's assaults was corroborated to a degree that is unusual in sexual assault cases. Since the defendant elected to testify, the jury had the opportunity to weigh his credibility against that of the victim. Any error in the admission of the wish list testimony was harmless as it did not affect the verdict in light of the State's overwhelming evidence of guilt.

## ARGUMENT

### **I. THE AMAZON WISH LIST TESTIMONY WAS PROPERLY ADMITTED.**

The court properly admitted the Amazon wish list testimony. Although the defendant contends that this was Rule 404(b) evidence and that the State did not provide proper notice of its intent to introduce it, DB 17-18, the prosecutor correctly stated that the wish list was not Rule 404 evidence.

This Court reviews evidentiary challenges under the unsustainable exercise of discretion standard. *See State v. Letarte*, 169 N.H. 455, 461 (2016). “For the defendant to prevail under this standard, he must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case.” *Id.* (quotation omitted). “In applying [the] unsustainable exercise of discretion standard of review, [this Court will] determine only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made.” *Id.* (quotation omitted). This Court’s “task is not to determine whether [it] would have found differently, but is only to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it.” *Id.* (quotation omitted).

New Hampshire Rules of Evidence 401 and 402 address the admissibility of evidence. Under Rule 401, “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Similarly, Rule 402 favors the admissibility of evidence unless

it is otherwise prohibited by statute, the Rules of Evidence or other court rules, or the State or United States Constitution. Under New Hampshire Rule of Evidence 403, evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

“Evidence is ‘intrinsic’ and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.” *State v. Thomas*, 168 N.H. 589, 598 (2016).

In this case, the sole issue was whether the defendant assaulted the victim on specific occasions and as part of a pattern of abuse. The defendant made this clear in the opening statement which consisted of repeated denials that he had ever assaulted the victim. *See* T 31 (“He is not guilty of any of these charges.”); T 33 (“He thought he had a good relationship with [the victim] and the boys.”); T 34 (On the morning of April 3, “he was shocked; he was stunned; he was surprised...”); T 37 (instead of admitting that she is wrong, the victim “doubles down”).

Although the argument at sidebar was relatively brief, the wish list was relevant for several purposes. First, it helped to explain the victim’s isolation and fear of discovery. The other children drew up Christmas lists, but the victim’s wish list was dictated by the defendant. Her fear that she would be given a sexually explicit chocolate lollipop helped to explain her delayed disclosure. She was concerned that disclosure would undermine the contentment of others in the family with the living situation. But her

testimony also suggested that she was fearful that her friends would see that she had been given a gift that she did not want and should not be receiving.

Although the Amazon wish list occurred in conjunction with the abuse and, therefore, was not traditional “grooming,” *see State v. Abram*, 153 N.H. 619, 625 (2006), the wish list was further evidence of the victim’s isolation from the other children in her family and explained her withdrawal from family life.

According to defense counsel, the State learned of the wish list shortly before trial and, therefore, did not file a Rule 404(b) motion. T 71. But the wish list is not Rule 404(b) evidence. Rule 404(b) prevents the admission of propensity evidence. *See* Rule 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”). “The purpose of the rule is to ensure that an accused is tried on the merits of the crime charged and to prevent a conviction that is based upon propensity and character inferences drawn from evidence of other crimes or wrongs.” *State v. Addison (Capital Murder)*, 165 N.H. 381, 463 (2013).

The wish list did not show that the defendant had the propensity to sexually assault the victim. Rather, it helped to provide an example of the victim’s isolation, humiliation, and fear as a way of explaining why she endured the abuse for as long as she did without reporting it.

Still, the defendant contends that the wish list was not intrinsic because the State did not show that the defendant used the list “before,

during, or immediately after any sexual assault.” DB 21. But that reading of intrinsic evidence is too narrow. In *State v. Wells*, 166 N.H. 73, 77-78 (2014), this Court described intrinsic evidence as “other acts that are inextricably intertwined with the charged offense” as “background evidence.” *Id.* (quoting *United States v. Handy*, 228 F.3d 745, 747 (6th Cir. 2000)). “Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness’s testimony, or completes the story of the charged offense.” *Wells*, 166 N.H. at 77-78 (internal quotation marks and citation omitted). This Court noted that “events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of [the charged] act so that it may realistically evaluate the evidence.” *Id.* (internal quotation marks and citation omitted).

Obviously, since Christmas and a person’s birthday are annual events, the wish list was probably not a prelude to every assault. But the victim’s testimony was that the assaults were nearly daily occurrences, so the wish list was almost certainly close in proximity to at least some of the assaults. And the fact that the defendant was charged with both pattern and single incident offenses make the testimony relevant to at least some of the charges. *See* T 4 (indictments include March 1, 2016, through June 15, 2018). Notably, the victim’s birthday in each indictment is listed as June 15, 2005. T 4. As a result, the review of the birthday wish lists necessarily occurred near the end date of the pattern charges.

But the testimony was also an “integral part of a witness’s testimony.” The victim was, by her own account, the “odd man out” in the

family. Her brothers enjoyed the defendant's attention and father-figure role. Her younger sister was pleased to be part of her father's life. And her mother was planning to marry the defendant. The Amazon wish list showed how isolated she was from her siblings and her mother when the defendant was involved.

## **II. ANY ERROR WAS HARMLESS.**

If the court committed error in admitting testimony of the wish list, however, any error was harmless beyond a reasonable doubt.

“The erroneous admission of evidence is harmless only if it is determined, beyond a reasonable doubt, that the verdict was not affected by the admission.” *State v. Hebert*, 158 N.H. 306, 316 (2009) (internal quotation marks and citation omitted). “This standard applies to both the erroneous admission and the exclusion of evidence.” *State v. Racette*, 175 N.H. 132, 137 (2022).

“[I]t is not a question whether the evidence, apart from that erroneously admitted, would support a finding of guilt, but whether it can be said beyond a reasonable doubt that the inadmissible evidence did not affect the verdict.” *Hebert*, 158 N.H. at 316. An error may be harmless beyond a reasonable doubt if: (1) the other evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight; or (2) the evidence that was improperly admitted or excluded is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt.” *Racette*, 175 N.H. at 137 (citations omitted).

First, the victim's testimony was detailed and credible. Credibility is a determination for the jury, and the jury was able to

compare her accounts with the defendant's denials. The jury apparently resolved the inconsistencies in favor of the victim. *See State v. Alwardt*, 164 N.H. 52, 57 (2012) (“[E]valuation of witness credibility, resolving conflicts in the testimony, and determining the weight to be given to the evidence are matters within the province of the jury.”).

The defendant's testimony gave the jury ample reason to credit the victim's testimony above his denials. For example, on direct examination, he said that he had one glass of bourbon and that he was not intoxicated on the evening before the April assault. T 244. However, on cross-examination, he acknowledged that he had also taken a sleeping pill and a pain pill for a pinched nerve in his shoulder. T 259. He said that he was not drunk, but acknowledged that, when he was interviewed by the police, he told them that he was “drugged.” T 261 (Prosecutor quoting from police interview: “I’m like, I’m still freaking drugged out of my head from the freaking tramadol.”). He tried to draw a distinction between being drunk and being drugged, but also told the prosecutor that the pills and alcohol had not affected his memory. T 261-62.

Again, on cross-examination, the defendant said that he was “told” that the victim was crying on the morning of the assault, but then acknowledged that he told the police that also he saw her in the hallway and that she was crying. T 262. On redirect, defense counsel read the defendant his statement to the police in which the defendant apparently told them: “The only thing in my” ... “head -- honestly, the only thing in my head I could think of, I thought it was [the victim's mother] like I would go to bed, roll over, and grab my woman.” T 269. But then he

contradicted his statement to the police, stating: “I don’t believe it happened. I know it didn’t happen because I wouldn’t have done anything like that with her.” T 270. He dismissed his statement to the police as his attempt to “[c]ome up with something to answer his questions.” T 270. On re-cross-examination, the defendant was asked if he thought that the transcript of his police interview was not accurate when it reflected his statements about the effect of the pills and alcohol and how they could make a person sleepwalk. T 274. He responded that he thought that it was not accurate because the statement was “something [he] would not say.” T 274.

Moreover, at least with respect to the April assault, the victim’s testimony was supported by her mother’s account and, at least with respect to his presence in the bed, the defendant’s own admissions. Their accounts of the trip to Disney World, the reason that the victim slept in her mother’s bed, and the victim’s reaction to the assault were consistent with each other.

The victim’s accounts of the other assaults, although not as extensively corroborated, were also supported by the mother’s observations. The mother noted that the victim became more withdrawn and spent more time in her room, which the victim had explained was an attempt to protect herself from ongoing abuse. Even the defendant acknowledged that the victim spent time in her room. T 240 (noting that the victim spent time in her room, watching television). Although corroboration is not required in a sexual assault case, *see State v. Blackstock*, 147 N.H. 791, 793 (2002), the victim’s accounts of the ongoing abuse had a significant amount of corroboration.



Notably, the wish list testimony was relatively brief. The victim's testimony began on page 40 and the wish list testimony began on page 72 and ended on page 73. It was followed by the victim's account of the April 3 assault. T 75-83. The victim's direct testimony ended on page 85. Cross-examination began on page 86 and concluded on page 119. Redirect examination concluded on page 124, with re-cross lasting another page. The fact that the wish list took only two pages of more than fifty pages of testimony highlights its relatively minor impact, particularly when it was followed by the brazen April 3 assault which occurred as the victim's mother was asleep in the same bed.

In addition, the victim acknowledged that the defendant never bought her any of the sex toys when asked on cross-examination. T 112. Instead, the defendant bought her the art supplies that she had selected for her wish list. T 112. Although the wish list provided context for the victim's state of mind, the defendant did not actually purchase any of his selections for the victim, with the exception of some lingerie. T 112.

Further, neither the defense nor the State discussed the wish list in closing arguments. While the evidence helped explain the victim's feelings of isolation and humiliation, it did not, by itself, cause the jury to return guilty verdicts on the sexual assault charges.

In sum, based on the evidence presented at trial, it is clear – beyond a reasonable doubt - that the wish list, if erroneously admitted, did not cause the jury to find the defendant guilty of sexual assault.

**CONCLUSION**

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

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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April 28, 2023

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**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 6,020 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 28, 2023

*/s/Elizabeth C. Woodcock*

**CERTIFICATE OF SERVICE**

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Chief Appellate Defender Christopher M. Johnson, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 28, 2023

*s/Elizabeth C. Woodcock*