THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0350

State of New Hampshire

v.

Ian Boudreau

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

BRIEF FOR THE DEFENDANT

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QUESTIONS PRESENTED

1. Whether the court erred, in response to a jury question, by failing to tell the jury that it could not return a guilty verdict based only on a finding that Boudreau more likely than not committed the charged crimes.

Issue preserved by the jury question, the hearing on the matter, the defense request and objection, and the trial court's ruling and answer. T9 1443-47.*

2. Whether the court erred by allowing the State, in its case-in-chief, to introduce evidence of Boudreau's pre-arrest refusal to speak to the police.

Issue preserved by defense objection, the parties' arguments, and the court's ruling. T3 456-58.

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* Citations to the record are as follows:
"A_" refers to the designated page of the addendum attached to this brief;
"T1 _" through "T9 _" refer to the designated page of the indicated volume of the consecutively-paginated transcript of the nine-day trial, held in May 2021;
"S" refers to the transcript of the sentencing hearing held on July 7, 2021.

STATEMENT OF THE CASE

A Rockingham County grand jury indicted Ian Boudreau with fourteen counts of aggravated felonious sexual assault (AFSA), of which eight alleged pattern offenses and six alleged single acts. T1 12-19. Collectively, the AFSA indictments alleged offenses against three victims. Five indictments alleged offenses against Boudreau's biological daughter E.B. (born 11/30/03). Six indictments alleged offenses against A.P. (born 8/5/02), the elder daughter of Boudreau's long-time domestic partner, Pam Chevalier, while the remaining three indictments alleged offenses against Chevalier's younger daughter, S.P. (born 1/6/06). In addition, the State brought five indictments charging Boudreau with possession of child sex abuse images (CSAI), each of which referred to the possession of a distinct image of A.P. T1 19-20.

Boudreau stood trial over nine days in May 2021. The jury convicted Boudreau on all AFSA counts and acquitted him on all CSAI counts. T9 1449-53. The court (Wageling, J.) sentenced Boudreau to cumulative stand-committed terms totaling 60 to 120 years. S 53-57.

STATEMENT OF THE FACTS

In 2003, when they were still teenagers, Ian Boudreau and Ashley Cote became the parents of E.B. T1 70-75; T7 1298. They soon married, and later had a son, T.B. T1 75. Boudreau worked in warehouses and as an auto detailer to support the family, and Cote went to school to become licensed as a nurse assistant. T1 75-77. When she was twenty-one, a couple of years after getting her nursing degree, Cote divorced Boudreau. T1 77-78; T7 1259, 1282. Thereafter, the children lived primarily with Cote. T6 1019; T7 1259. The parenting plan eventually settled into a pattern according to which the children stayed with Boudreau every other weekend. T1 79-80; T2 361; T6 1019; T7 1301. Boudreau paid child support. T1 80.

After the divorce, Boudreau met Pam Chevalier at work, and their friendship eventually developed into a romantic relationship. T1 80; T3 611-12; T7 1260. When she met Boudreau, Chevalier had two daughters, A.P. and S.P. T3 600-01, 611. Eventually, Boudreau moved in with Chevalier. T3 612-13; T7 1260. Initially, they lived in Raymond in a duplex they shared with Chevalier's brother. T3 613-15. Soon, though, the couple moved with Chevalier's children to Exeter, where they rented their own apartment. T3 624; T7 1261. In 2012, Chevalier gave birth to a son by Boudreau, J.B. T3 635; T6 1020; T7 1261.

For some of the time they lived together, Boudreau and Chevalier both worked at a Walmart warehouse. T2 227-28, T4 706; T7 1258. After initially both working at night, Boudreau and Chevalier took different shifts to maximize the availability of one or the other to care for the children. T3 625-26; T4 706; T7 1266-67, 1303-05, 1333-34. As the children grew, they became involved in sports and other activities outside the home, and Boudreau and Chevalier transported them to their various activities. T2 344-46; T3 626-27; T4 699-702; T7 1267-69, 1335-36. By the accounts of various witnesses, Boudreau was an excellent father. T1 99-100; T2 231-32, 300-01, 363-64, 383; T3 627-28, 630; T4 702-03; T5 897; T6 1039.

In the home they lived in for most of the years that Chevalier and Boudreau were together, A.P and S.P. shared a bedroom that had a trundle bed. T2 215, 222-26, 242, 351; T4 714; T7 1261-62. When staying alternate weekends at that apartment, E.B. slept on the floor of that room, a circumstance she disliked. T4 715-16; T6 1024-28, 1094-96. The boys, J.B. and T.B. (when present), shared the other bedroom. T6 1028; T7 1261-62. Boudreau and Chevalier slept on a sofa in the living room. T4 710-11; T7 1261-62.

In April 2019, E.B. told her mother, Cote, that Boudreau had sexually assaulted her during her weekend visits to his home. T1 108-09; T6 1084. Cote notified the

police and officers went to Boudreau's apartment. T1 109-11, 150-51, 155-56. Outside it, they encountered A.P., who had just gotten off work, and Chevalier, whom the police had called. T1 156; T2 327-28; T3 416; T4 649-50. When questioned there, A.P. denied that Boudreau had touched her inappropriately. T1 156-57, 172; T2 330. The police then entered the apartment, where they encountered Boudreau and S.P. T1 158; T3 417-18. S.P. answered the police inquiry by saying that Boudreau had touched her sexually. T1 159; T5 911. Subsequently, after learning that S.P. and E.B. accused Boudreau, A.P. likewise accused him. T2 334.

At trial, E.B. testified about one assault in the house in Raymond before the move to Exeter. T6 1051. On that occasion, Boudreau blindfolded E.B., put chocolate sauce on his penis, and had E.B. lick the chocolate. T6 1051-53. E.B. also described discrete acts that happened after the move to Exeter. On an occasion when nobody else was in the apartment, she fought back and struggled before submitting to intercourse. T6 1054-57. On another occasion, Boudreau asked to have intercourse with her on the couch in the living room and she refused. T6 1059.

Once the family moved to the apartment in Exeter, Boudreau would come to the room where she was sleeping on the floor, remove her clothes, touch her vagina and buttocks with his hand, and then have sexual intercourse with her. T6

1043-44, 1047, 1053, 1057-58. At times, S.P. and A.P. would be in the room sleeping. T6 1047, 1057, 1103-04. E.B. testified that the assaults began when she was in fourth or fifth grade. T6 1047, 1054. The assaults would happen during the weekends with Boudreau, about every other time she was there. T6 1089-91. When she was in eighth grade, about six months before she made allegations to her mother, she told a friend[1] that Boudreau was assaulting her.[2] T6 1070-71, 1090, 1099-1101. At the friend's suggestion and in the friend's presence,[3] E.B. contacted Boudreau on Snapchat to tell him that the assaults had to stop. T6 1070-74. Boudreau never again assaulted her. T6 1071, 1074-75, 1081, 1100.

A.P. testified that the first assault happened when she was around six years old, when nobody else was home. On that occasion, Boudreau handcuffed her to a bed, touched her vagina and breasts with his hand, and had intercourse with her. T2 232-38. He did not again use the handcuffs but would assault her in otherwise similar ways when they were home alone together, as often as four times per week. T2 239-40, 244-48, 261, 263, 268. At times, he would climb up into her bed in the room she shared with S.P and assault her

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[1] The friend testified at trial and recalled E.B. first telling her when they were in sixth or seventh grade. T6 1116. E.B. raised the issue again when they were in ninth grade. T6 1119-20.

[2] Before telling her mother of her allegations, E.B. told her boyfriend that Boudreau was assaulting her. T7 1245-49.

[3] The friend did not recall being present in the room when E.B. contacted Boudreau. T6 1117, 1126.

while S.P. slept in the bed below. T2 240-43. On one occasion, Boudreau had sex with A.P. after she had been drinking alcohol with friends, and he induced her to cooperate on that occasion, as he did on some others, by threatening to take her phone away if she did not cooperate. T2 251-58. When A.P. fell asleep during intercourse, Boudreau became upset and said that he would never again have sex with her when she had been drinking. T2 257. The assaults decreased in frequency over time, and the last assault happened in April 2019 the night before the police came to the house. T2 266-68.

A.P. was not aware of any assaults against S.P. or E.B. T2 242, 333, 356. She testified, though, that there came a time when Boudreau began telling her to go out if she was home, or not to come home if she was out. T2 264. Earlier on the evening of April 11, 2019, the night the police came to the house, Boudreau told her to stay out after her work shift at Dunkin' Donuts ended. T2 265-66.

S.P. testified that, beginning when she was about nine years old, Boudreau engaged in sexual acts with her. T5 898-902. She testified that, at first, the assaults would happen about once a week. T5 903. As time passed, they became more frequent, occurring every other day. T5 906. The sexual acts she described involved his penis and, sometimes, his hand penetrating her outer labia. T5 901, 904-05, 910-11,

919. She explained that he would punish her when she did not cooperate, by such means as taking her phone, or would "bribe" her by offering inducements, such as buying her a new phone. T5 907, 928. She testified that he told her that the same thing happened to A.P. and E.B., but S.P. nevertheless thought she was the only one subjected to the sexual activity. T5 908-10, 927. The final assault happened two days before the police came to the house, though S.P. believed that another assault would have happened later that night, had the police not come. T5 910-12.

Boudreau testified and denied ever sexually assaulting any of the girls. T7 1294, 1296-97, 1340-41, 1344. The State introduced no admissions by Boudreau to the police. When initially confronted by police on the night Cote reported E.B.'s accusation, Boudreau agreed to go to the police department and denied having "done anything." T1 163; T3 422-24.

Later, after the police got an arrest warrant but before they arrested him, Boudreau came to the police station. T3 450, 455-56. There, the police asked him "if he was willing to provide an interview, a statement…." T3 456. They told him that they'd "really like to talk to him." T5 880. The State elicited from the officer that Boudreau said that he did not want to talk to the police or provide a statement. T3 458-59; T5 880. The police then arrested him. T3 460; T5 880.

No anatomical evidence corroborated the allegations. Nurses examined E.B., A.P. and S.P., and those exams yielded no abnormal observations indicative of sexual assault. T3 565, 587-94, 597; T7 1184, 1217-18, 1229-30, 1236-37.

The State sought to support the accusations in a variety of ways. T.B. testified that he recalled an occasion late at night when he came out of his bedroom at Boudreau's apartment and saw A.P. and Boudreau in the living room having intercourse. T2 372-80. The State elicited testimony from a friend of A.P.'s that Boudreau would make jokes with sexual content or innuendo, referring to a "threesome," and that he had texted her photos of his clothed crotch. T3 530-34, 552, 557. On one occasion, he sent A.P. an internet meme referring to a "threesome," and, she testified, on several occasions he suggested a sexual encounter involving A.P. and her friend, or a sexual encounter involving A.P. and Boudreau's brothers. T2 310-16; T6 962-63. Forensic testing of bedsheets claimed to be used by A.P. yielded the discovery of Boudreau's DNA in semen stains. T5 804-06, 836.

The State also found on Boudreau's phone images of A.P.'s breasts, buttocks, or vagina, accompanied in some instances by messages she sent him referring to their sexual relationship. T2 280-94; T6 980-91. A.P. testified that Boudreau sent her photographs of his penis, and the police found such photos on Boudreau's phone. T2 275-79; T7

1286. In addition, the State obtained a text message exchange between A.P. and Boudreau in which, after she expressed despair following the suicide of an uncle, Boudreau replied: “I would rather lose you as a lover than lose you completely.”[4] T2 299; T4 675; T6 979.

The defense attacked the plausibility of the allegations, focusing on details to which the witnesses had testified. For example, the defense noted that none of the complainants ever saw Boudreau assault the others, even though some alleged assaults occurred in the presence of another person, while that person slept. T8 1365. Also, the defense countered certain items of prosecution testimony. For example, the defense cited evidence pinpointing the dates T.B. could have, as he claimed, stumbled upon Boudreau having sex with A.P., and noted that Chevalier was home those nights. T8 1365-66.

The jury acquitted Boudreau on all charges alleging possession of CSAI, and the defense contended that the phone on which the images were found was accessible to Chevalier and her daughters after Boudreau’s arrest. T3 465, 487; T4 668-70; T5 884-85; T6 1002. The defense accordingly urged the jury to consider the possibility that someone else put the images on Boudreau’s phone. T8 1371-74.

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[4] Boudreau testified that he spoke to A.P. about her feelings at a time she was breaking up with a boyfriend, and his response was meant to show that the boyfriend might still want to remain her friend. T7 1272-73.

SUMMARY OF THE ARGUMENT

1. The court erred in its answer to the deliberating jury's second question, which sought clarification of the meaning of the reasonable doubt instruction. The question asked whether the jury could return a guilty verdict upon finding that Boudreau more likely than not committed the charged crimes. The phrase "more likely than not" defines the preponderance-of-the-evidence burden. The question accordingly revealed confusion about whether a finding that Boudreau was probably guilty equates to a finding of guilt beyond a reasonable doubt. The court's failure to answer the question in such a way as to dispel that misconception constituted reversible error.

2. The court erred in allowing the State to introduce, in its case-in-chief, evidence that, prior to arrest, Boudreau refused to answer questions or give a statement to the police. In State v. Remick, 149 N.H. 745, 747 (2003), this Court held that "[w]hile use of pre-arrest silence to impeach a defendant's credibility is not unconstitutional, use of pre-arrest silence in the case-in-chief, in which the defendant does not testify, is unconstitutional." The error prejudiced the defense, by supplying what jurors will likely perceive as the equivalent of a confession in a case in which the State did not have evidence of an actual confession.

I. THE COURT ERRED IN ANSWERING A JURY QUESTION, ASKED DURING DELIBERATIONS, ABOUT THE APPLICABLE BURDEN OF PROOF.

Following closing arguments, the court instructed the jury as to the governing law. T8 1409-34. The instructions included the standard definition of reasonable doubt. T8 1426. The court provided each juror with a printed copy of the instructions. T8 1438.

During deliberations, the jury sent the judge two questions relevant to this appeal. T9 1443; A36, A38. The first asked for a definition of reasonable doubt, as follows: "Please define reasonable doubt to non[-]legal people and somehow quantify reasonable doubt?" A36. In response, the court sent back an answer essentially repeating the definition of reasonable doubt previously stated in the jury instructions. Thus, the court replied:

> A reasonable doubt is just what the words would ordinarily imply. The use of the word "reasonable" means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away. Rather, it is such a doubt based on reason as remains after consideration of all the evidence that the State has offered against it. The test you must use is this. If you have a reasonable doubt as to whether the State has

> proven any one or more of the elements of the crime charged, you must find the Defendant not guilty. However, if you find the State has proven all of the elements of the offense charged beyond a reasonable doubt, you should find the Defendant guilty.

A37.

The reply went on to explain why the court could not provide further information. The court told the jury:

> The New Hampshire Supreme Court provided us with this definition of the term "reasonable doubt" with instruction to not veer from it when instructing a jury. For this reason, the Court directs you once again to the definition above. However, the Court will clarify that there is no number or percentage to be assigned to the concept of "reasonable doubt."

A37. The parties all concurred that that answer was appropriate. T9 1446. The court provided the above-quoted answer to the jury at 9:54 a.m. on May 21, 2021. A37.

A short time later, plainly still struggling with the concept, the jury sent the court another note. This new note posed the following question:

> If you believe it's more than [sic] likely then not that the Defendant committed [the] accused crimes, Is that worthy of a Guilty verdict?

A38. To that question, the court gave the following reply:

> The burden of proof in this case is
> proof beyond a reasonable doubt. I
> have provided you with that definition.
> You must apply that standard in
> reaching your verdict on each charge.

A39. The defense objected to that answer and proposed a different answer.[5] T9 1443-47.

Counsel proposed that the court should answer "no" to the question whether a finding that guilt was more likely than not would justify a guilty verdict. T9 1443. If the court wanted to say anything beyond "no," counsel suggested that the court explain that the more-likely-than-not standard described the preponderance burden of proof, "which is a much lower standard than beyond a reasonable doubt." T9 1443.

The prosecutor defended the answer the court gave – a mere reference back to the previously described definition of the reasonable-doubt standard. T9 1444. While agreeing that the phrase "more likely than not" describes the preponderance standard, and while agreeing that the State in a criminal case bears a much more demanding burden, the prosecutor contended that the jury was merely persisting in its effort to get "some sort of quantifiable number of what reasonable doubt is." T9 1444. As the prosecutor expressed it,

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[5] The court delivered its answer to the jury at 10:28 a.m. A39. At 11:02 a.m., after counsel discovered that the chambers discussion about how to answer the second question had not been recorded, the court allowed counsel to put on the record the objection counsel had voiced in chambers to the court's answer. T9 1443-47. The court confirmed that the parties stated the arguments in chambers before the court answered the question. T9 1445.

> The State's concern is that by providing explanations of this is the quantifiable for this definition, preponderance of the evidence and reasonable doubt is higher than this, that it starts to define a reasonable doubt, which is not what the Court intends – which would change what the Court has already defined reasonable doubt as.

T9 1444. After thus opposing the defense's suggestion, the prosecutor defended the court's decision in the following terms:

> I think that pointing to the definition of what reasonable doubt is and instructing the jury that that is the definition and the burden of proof that they are required to use, it places the ball back in their court to make that decision. For all we know, "more than likely," to them, means 75 percent, 85 percent, 95 percent, 99.5 percent. We have no idea what they mean by that, and without further inquiry, we can't simply say "no," and we can't simply assume that they're referring to the burden of proof of preponderance of the evidence.

T9 1444.

The prosecutor concluded that the court properly decided simply to refer to the instruction defining the concept of beyond a reasonable doubt "because, again, we're instructing them of what the burden is. They are on notice.

And that they must look to themselves to apply that burden and no other." T9 1444-45.

Defense counsel responded that the jurors' question plainly referred to a burden significantly easier to meet than the law allowed. T9 1445. Addressing the prosecutor's concern that the parties should not make assumptions about what the jurors meant by "more likely than not," counsel argued:

> I understand that we don't know what they mean by more likely than not. But just colloquially speaking, that seems to mean more likely than not. It doesn't mean by a certain amount. So I think it would be appropriate to explain to them that more likely than not is a preponderance standard, and a preponderance standard is not sufficient.

T9 1445.

Essentially echoing the prosecutor's reasoning, the court declared:

> I don't know what they mean by their comment, and I didn't feel comfortable answering it with a "yes" or a "no," and I felt more comfortable answering it as I did, which is to redirect them to the definition and to make it clear what the burden is instead of getting into a semantic discussion with them as to, well, what did you mean by the comment "more likely than not." So I

> think my answer is appropriate. I think it states the correct law in this case, and in conjunction with the earlier question, I believe that this answer was appropriate....

T9 1445-46.

The court concluded the discussion by saying that if the jury asked yet another question

> that calls [the court] to a different direction ... we'll deal with it as they come. The concept of reasonable doubt is a difficult one for people that aren't in this industry, and they do the best they can with the definition that we've given them. And I believe it's a fair definition, and I've redirected them to that definition. It's very clear what the burden is when you reread that definition ... so I feel comfortable with my answer....

T9 1446. The court then repeated its intention to consider the matter further if the jury asked another question. T9 1446.

The jury did not ask another question. At 11:24 a.m., about an hour after receiving the objected-to answer, the jury returned to the courtroom to announce its verdicts. T9 1447. In overruling the defense objection and answering the jury as it did, the court erred.

In Goudreault v. Kleeman, 158 N.H. 236 (2009), this Court articulated several principles governing the circumstance in which a deliberating jury asks a question

seeking information from the trial judge. First, because the "response to a jury question is left to the sound discretion of the trial court," this Court reviews claims of error for an unsustainable exercise of discretion. Id. at 250 (quoting State v. Stewart, 155 N.H. 212, 214 (2007)). Moreover, to prevail on appeal, "the party challenging an instruction must show that it was a substantial error such that it could have misled the jury regarding the applicable law." Goudreault, 158 N.H. at 250 (quoting Francouer v. Piper, 146 N.H. 525, 531 (2001)).

Second, courts should answer juror questions. "The general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." Goudreault, 158 N.H. at 250 (citation omitted). The court "should address those matters fairly encompassed within the question." Id. (quoting Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 176 (1st Cir. 1998)). This Court has, accordingly, found error when a trial court's response "addressed one possible, though unlikely, interpretation of the jury's inquiry" or was non-responsive. Goudreault, 158 N.H. at 251. A "failure to answer or the giving of a response which provides no answer to the particular question of law posed can result in prejudicial error." Id. (citations omitted). Trial courts should "take[]

special care to specifically and accurately dispel any confusion about the law." Id.

Third, when deciding whether an instruction could have misled the jury regarding the applicable law, a reviewing court must judge the instruction "as a reasonable juror would probably have understood it." Goudreault, 158 N.H. at 250 (quoting State v. Dingman, 144 N.H. 113, 115 (1999)). Also, this Court reviews a trial court's answer "in the context of the court's entire charge to determine whether the answer accurately conveys the law on the question and whether the charge as a whole fairly covered the issues and law in the case." Goudreault, 158 N.H. at 250. However, "[i]f the court's answer is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge." Id. at 252; see also Greene, 137 N.H. at 130-31 (reversing even though initial instructions were correct, where "jury's question to the court during deliberations gave rise to the need for a specific instruction" further clarifying a point of law).

Fourth, when error is shown, this Court "will only set aside a jury verdict if the error resulted in mistake or partiality." Id. (quoting Babb v. Clark, 150 N.H. 98, 100 (2003)). In a general sense, the "influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from" the judge.

Goudreault, 158 N.H. at 251-52 (quoting Bollenbach v. United States, 326 U.S. 607, 612 (1946)). Moreover, in assessing prejudice, courts bear in mind that "a jury instruction given after deliberations have begun comes at a particularly delicate juncture and therefore evokes heightened scrutiny." Goudreault, 158 N.H. at 251 (quoting Testa, 144 F.3d at 175).

Here, the court failed adequately to answer the question. The jury heard the standard reasonable-doubt instruction at the beginning of trial, T1 34-35, and again right before deliberations. T8 1426. Upon beginning deliberations, the jurors each received a printed copy of the instructions. T8 1438. From the beginning of deliberations, the jurors thus had the standard instruction available to consult as much as they needed.

Despite having the standard instruction thus so readily available, the jury asked the first question. In asking the court to "define reasonable doubt to non[-]legal people," and in asking the court to "somehow quantify reasonable doubt," the jury plainly sought an alternative formulation of the definition of reasonable doubt. A36. At that point, the court could sustainably refer the jury to the standard instruction already provided, for until the court said so, the jury would not know that the court could offer no alternative formulation

of the concept. The court's first answer duly informed the jury of that fact.

After the jury thus learned that no alternative formulation existed, it asked another question. Unless one takes an unjustifiably dim view of the jury's intelligence, the new note did not ask the same question the court had already answered. That is, the new question did not seek the alternative formulation that the jury already knew the court could not provide. Rather, the new question sought to clarify the standard instruction already given.

Unlike the first question, which used an open-ended phrase – "please define" – to seek a broad re-definition of reasonable doubt, the second question called for a "yes" or "no" answer. It proposed a specific hypothesis, equating the beyond-a-reasonable-doubt standard with a finding that the defendant was more likely guilty than not guilty. The question asked for confirmation or contradiction of that hypothesis. In that circumstance, a response that merely referred the jury again to the standard instruction failed to answer the question.

In effect, the court interpreted the question as a mere repetition of the previously asked-and-answered question, rather than as the distinctive new question it really was. Here, as in Goudreault, the

> court responded to the former interpretation but ignored the latter. At best, the court addressed one possible, though unlikely, interpretation of the jury's inquiry. At worst, it was entirely non-responsive. Thus, it likely was, in effect, no response at all.

Goudreault, 158 N.H. at 251 (citations and quotation marks omitted); see also Bollenbach, 326 U.S. at 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy").

This case thus differs from State v. Hammell, 139 N.H. 404 (1995), in which a deliberating jury asked: "What should you do if you feel the defendant is guilty, but do not believe the State adequately proved it?" In that case, the jury's question was susceptible of two interpretations: "that the jury was confused on reasonable doubt or that the jury was confused as to what they should do if they found the State had not met its burden of proof." Id. at 406. On appeal, this Court affirmed the trial judge's decision to refer to the jury to the standard instruction, because that instruction "answered both possible interpretations of the jury question." Id. Here, by contrast and as described above, the jury posed a question that was not answered by the standard definition.

The non-response prejudiced Boudreau because it could have misled the jury as to the applicable law. The question asked whether the content of the preponderance standard –

"more likely than not" – would suffice to justify a conviction. No plausible ground for doubt exists, and indeed the parties agreed, that the phrase "more likely than not" defines the preponderance standard. Moreover, and equally indisputably, proof by a preponderance does not satisfy the State's burden in a criminal trial.

By failing to give a direct answer to the question, the court left the jury in doubt about a principle that should have been explained unambiguously. Hearing the court's answer, a juror could conclude that it fell to individual discretion to decide whether to equate the removal of a reasonable doubt with a finding that guilt was more likely than not. That is, a juror could convict on the basis of the personal belief that the merely improbable is unreasonable.

On prior occasions, this Court has reversed verdicts upon finding error in a trial court's answer to a question posed by a deliberating jury. See, e.g., State v. Kelly, 160 N.H. 190 (2010) (answer to jury question constructively amended complaint); Goudreault, 158 N.H. at 249-52 (error where answer failed to "specifically and accurately dispel any confusion about the law"); Stewart, 155 N.H. at 214-17 (answer misinformed on law); State v. Poole, 150 N.H. 299 (2003) (answer impermissibly amended complaint); State v. Greene, 137 N.H. 126 (1993) (answer impermissibly permitted non-unanimous verdict); State v. Jones, 125 N.H. 490 (1984)

(answer had effect of invading jury's prerogative to decide factual issues); Quint v. Porietis, 107 N.H. 463 (1966) (answer misinformed jury on law).

Here, the error requires reversal of the convictions because it diluted the State's burden of proof and violated Boudreau's right to due process of law. See In re Winship, 397 U.S. 358 (1970) ("proof of a criminal charge beyond a reasonable doubt is constitutionally required"); Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (constitutionally deficient reasonable doubt instruction requires reversal of conviction); State v. Aubert, 120 N.H. 634 (1980) (reversing conviction for erroneous reasonable doubt instruction). Indeed, this Court has said that "there is merit in the belief that the definition of reasonable doubt is perhaps the most important aspect of the closing instruction to a jury in a criminal trial." Aubert, 120 N.H. at 637.

In Aubert, this Court reversed a conviction when the instructions as a whole reduced the prosecution's burden. Aubert, 120 N.H. at 634, 637. The "reasonable doubt instruction should impress upon the finder of fact the need to reach a 'subjective state of near certitude' on the facts at issue." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)). Because the answer undermined the capacity of the reasonable doubt instruction to perform its crucial function, this Court must reverse the convictions.

II. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, IN ITS CASE-IN-CHIEF, EVIDENCE OF BOUDREAU'S PRE-ARREST REFUSAL TO ANSWER POLICE QUESTIONS OR MAKE A STATEMENT.

On direct examination of Exeter police officer Evan Nadeau, the prosecutor elicited testimony about the occasion, a few minutes before his arrest, when Boudreau came to the police station lobby. T3 456. Nadeau and another officer, Steven Bolduc, went to the lobby where Nadeau asked Boudreau "if he was willing to provide an interview, a statement, regarding what's been going [on] these last few days." T3 456. Defense counsel objected, citing first hearsay and then arguing that the police officer should not be allowed to testify that Boudreau declined to make a statement, as it would be unfairly prejudicial. Id. The prosecutor replied that it would be unconstitutional only to introduce a post-Miranda refusal to make a statement. T3 456-57. The court overruled the defense objection. T3 457-58.

Nadeau then testified that, before his arrest, Nadeau asked Boudreau "if he was willing to speak with us and provide a statement about what's been going on." T3 459. In response, Boudreau said that "he did not want to talk to us. He did … not want to provide a statement." T3 459.

Later during the State's case-in-chief, the prosecution elicited the same evidence again, through Bolduc. Describing the same moment, Bolduc testified:

> An arrest warrant was completed on the 16th, the following day. We also had some court paperwork to serve Mr. Boudreau. He showed up in the lobby of the police department. I went down. I spoke to Mr. Boudreau. I, essentially, asked him that, we didn't have his side of the story yet, we'd really like to talk to him, if he wanted to come to the police department for an interview. Mr. Boudreau declined. He said he just wanted to gather the paperwork that he wanted to pick up and … just go.

T5 880. The prosecutor asked whether Bolduc arrested Boudreau. Id. Bolduc replied: "Not right then. I – I just wanted to clarify with him that he didn't want to talk." Id. Bolduc went on to explain that, a few minutes later, Nadeau joined Bolduc in the lobby and they arrested Boudreau. Id.

After the State rested, Boudreau testified. T7 1256-1345. At no point during the cross-examination of Boudreau did the prosecutor ask about that moment. See T7 1332-33 (asking questions about Boudreau's activities on the 15th and 16th, without mentioning his decision not to speak with the police on the 16th). The prosecutor thus did not use the event as a basis for challenging Boudreau's testimonial credibility.

Consistent with the court's evidentiary ruling, in closing argument the prosecutor argued, as substantive evidence of guilt, Boudreau's refusal to answer the questions of the

police. T8 1403. The trial court erred in admitting the evidence.

In State v. Remick, 149 N.H. 745 (2003), this Court confronted the question of the admissibility of evidence of a defendant's pre-arrest invocation of the right to silence. Citing Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989), the Court identified the three "basic principles" that guide the application of the Fifth Amendment's privilege against self-incrimination. These are:

> (1) invocation of the right is construed liberally; (2) invocation of the right does not require any magic words; and (3) the privilege applies to suspects questioned during investigations – it is not limited to persons in custody or charged with a crime.

Remick, 149 N.H. at 746-47. Applying those principles, and following Coppola, this Court held that "[w]hile use of pre-arrest silence to impeach a defendant's credibility is not unconstitutional, use of pre-arrest silence in the case-in-chief, in which the defendant does not testify, is unconstitutional." Id. at 747.

Here, Boudreau did testify, but as noted, the State introduced the evidence during its case-in-chief, rather than during cross-examination of Boudreau. Moreover, as also shown by the State's closing argument, the State used the evidence in support of a substantively incriminating

inference, rather than to impeach Boudreau's credibility. Admission of the evidence therefore violated Boudreau's privilege against self-incrimination.

The evidence prejudiced Boudreau's defense. The State's case rested substantially on the testimony of the civilian witnesses, as the State introduced no evidence of a confession by Boudreau to the police. Under those circumstances, evidence that Boudreau refused to talk to the police served as a kind of quasi-confession, given the prevalent impression that innocent people who have nothing to hide will answer the questions of the police. See Doyle v. Ohio, 426 U.S. 610, 619 (1976) (noting "unfavorable inference" that can be drawn from suspect's silence when questioned by police). This Court must reverse Boudreau's convictions.

CONCLUSION

WHEREFORE, Mr. Boudreau respectfully requests that this Court reverse his convictions.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decisions were not in writing and therefore are not appended to the brief.

This brief complies with the applicable word limitation and contains approximately 6153 words.

Respectfully submitted,

By /s/ *Christopher M. Johnson*
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Appellate Defender Program
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Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ *Christopher M. Johnson*
Christopher M. Johnson

DATED: August 26, 2022

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

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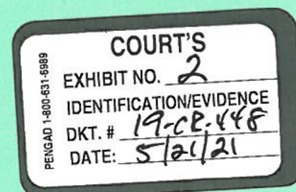
Jury Question – Exhibit 2 -Index #134..............................A 36
Jury Question – Exhibit 3 -Index #135..............................A 38

1) Please define Reasonable doubt to non legal people. and somehow quantify reasonable doubt?

2) Can we hear or see C. A. C. interview?



The State of New Hampshire

SUPERIOR COURT ROCKINGHAM COUNTY

STATE OF NEW HAMPSHIRE

v.

IAN BOUDREAU

Docket # 218-2019-CR-448

ANSWER TO QUESTION

In response to question #1:

As noted in your instructions,

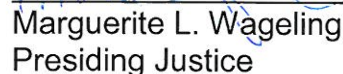
> A reasonable doubt is just what the words would ordinarily imply. The use of the word "reasonable" means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away. Rather, it is such a doubt based on reason as remains after consideration of all the evidence that the State has offered against it. The test you must use is this. If you have a reasonable doubt as to whether the State has proven any one or more of the elements of the crime charged, you must find the Defendant not guilty. However, if you find the State has proven all of the elements of the offense charged beyond a reasonable doubt, you should find the Defendant guilty.

The New Hampshire Supreme Court provided us with this definition of the term "reasonable doubt" with instruction to not veer from it when instructing a jury. For this reason, the Court directs you once again to the definition above. However, the Court will clarify that there is no number or percentage to be assigned to the concept of "reasonable doubt."

In response to Question #2:

All of the evidence admitted during the trial is before you.

5/21/21 ~~10:54~~
Date/Time 9:54 am (corrected - MW)



Marguerite L. Wageling
Presiding Justice

If you believe it's more than likely then not that the Defendent commited accused crimes, Is that worthy of a Guilty verdict?

PENGAD 1-800-631-6989
COURT'S
EXHIBIT NO. 3
IDENTIFICATION/EVIDENCE
DKT. # 19-CR-448
DATE: 5/21/21

The State of New Hampshire

SUPERIOR COURT ROCKINGHAM COUNTY

STATE OF NEW HAMPSHIRE

v.

IAN BOUDREAU

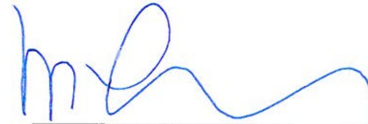
Docket # 218-2019-CR-448

ANSWER TO QUESTION

Response to question:

The burden of proof in this case is proof beyond a reasonable doubt. I have provided you with that definition. You must apply that standard in reaching your verdict on each charge.

5/21/21 10:28 am
Date/Time



Marguerite L. Wageling
Presiding Justice