THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0350

State of New Hampshire

v.

Ian Boudreau

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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(Fifteen-minute oral argument requested)

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I. Whether the trial court erred in redirecting the jury to its prior definition of reasonable doubt in answering its question.

II. Whether the trial court erred in allowing the State to admit evidence of the defendant's pre-arrest declination in its case-in-chief.

STATEMENT OF THE CASE

In July 2019, the Rockingham County grand jury issued 14 indictments against the defendant charging him with various counts of aggravated felonious sexual assault ("AFSA") committed against three child victims, A.P., E.B., and S.P., between January 2008 and April 2019. T[1] 12-20; RSA 632-A:2. Eight of the AFSA charges alleged pattern offenses and six of the charges alleged single AFSAs. T 12-19. In May 2021, prior to the defendant's jury trial, the Rockingham County grand jury issued five indictments against the defendant charging him with possession of child sexual abuse images ("CSAI"). T 19-20; RSA 649-A:3.

Following an eight-day trial in May 2021 on all 19 charges, the jury convicted the defendant of all 14 AFSA charges and acquitted the defendant of the five possession of CSAI charges. T 1449-1453. On July 7, 2021, the trial court (*Wageling*, J.) sentenced the defendant to "six sets of 10-20" year stand committed sentences. ST 53-57. Each pair of charges was concurrent with the other charge in its pair, but consecutive to the other pairs of sentences. *Id*. Thus, the defendant was sentenced to a 60-120 year stand committed sentence. *Id*. On the two remaining AFSA convictions, the defendant was sentenced to two concurrent 10-20 year state prison sentences all suspended for 25 years beginning upon the defendant's release from incarceration. ST 57.

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[1] Citations to the record are as follows:
"DA_" refers to the defendant's brief addendum and page number;
"DB_" refers to the defendant's brief and page number;
"ST_" refers to the sentencing hearing transcript and page number;
"T_" refers to the trial transcript and page number.

On each of the stand committed sentences, the trial court recommended the defendant for sexual offender treatment while incarcerated and allowed for earned time credit reductions. ST 53-54. On all of the sentences, the trial court imposed a "no contact" order with the victims and ordered no unsupervised contact with anyone under the age of 18. ST 55. This appeal followed.

STATEMENT OF FACTS

I. The State's Case

Ashley Cote met the defendant in high school. T 72. The two began dating and had a daughter, E.B. *Id*. Approximately eighteen months later, the two had a son, T.B. T 75. In June 2005, Ms. Cote married the defendant, but three years later, the couple divorced. T 76-78. Following the divorce, the children visited the defendant at his residence every other weekend. T 79-80.

The defendant subsequently met Pam Chevalier while working at the Walmart Distribution Center. T 611-12. The two became friends and eventually dated. T 612. While the two were still friends, the defendant moved in with Ms. Chevalier in Raymond, New Hampshire. T 613. Ms. Chevalier had two daughters, A.P. and S.P. T 80-81.

Approximately a year later, the defendant and Ms. Chevalier moved to Exeter, New Hampshire. T 624. Following this move, E.B. did not want to see the defendant. T 87. When E.B. visited the defendant in Exeter, she did not have a bed, so she slept on the floor with a blanket and pillow, in a sleeping bag, or on a gymnastics mat in A.P.'s and S.P.'s shared bedroom. T 92, 214, 370.

On April 11, 2019, E.B. told her mother that the defendant was sexually assaulting her. T 108, 150. Ms. Cote reported E.B.'s disclosure and her concerns for A.P. and S.P. to Exeter Police Sergeant Jeffrey Butts. T 110-11, T 151. Sgt. Butts contacted Ms. Chevalier and asked to meet with her. T 650. During the meeting, Sgt. Butts asked Ms. Chevalier if she believed that the defendant was "having a sexual relationship with her

children." T 649. She responded that she did. T 651. Sgt. Butts and Sgt. Peter Tilton then drove to Ms. Chevalier's residence. T 155. Ms. Chevalier drove there separately. *Id*. Once there, Sgt. Tilton spoke with A.P. and S.P., who confirmed that the defendant had "inappropriate contact" with them. T 159.

Sgt. Butts then seized A.P.'s and S.P.'s cell phones. T 158-60. Sgt. Tilton met the defendant and asked him to meet at the police department. T 160. The defendant agreed. *Id*. The defendant drove himself to the police department. *Id*. Sgt. Butts remained at the residence and helped Ms. Chevalier complete an emergency protection order. T 160, 653. Sgt. Butts returned to the police department and spoke with the defendant in the lobby. T 163. Sgt. Butts handed the defendant the emergency protective order, and the defendant responded that "Ms. Chevalier had tried this before, and she was just being paranoid and that he hadn't done anything." *Id*. The defendant then left the police department. T 164.

On April 15, 2019, E.B., A.P., and S.P. were interviewed at the Child Advocacy Center ("CAC"). T 440. All three children willingly spoke with the forensic interviewer and disclosed the charged conduct. T 447, 887. Following these interviews, New Hampshire State Police Trooper Evan Nadeau, an Exeter police detective in 2019, obtained an arrest warrant for the defendant on April 15, 2019. T 438, 450-51. Trooper Nadeau and his supervisor, Sergeant Bolduc, attempted to contact the defendant via telephone to notify him of the arrest warrant, but did not reach him and had to leave a voicemail. T 450.

On April 16, 2019, the defendant arrived at the Exeter Police Department at approximately 11:54 a.m. T 455-56. The officers had not

informed the defendant that they had a warrant for his arrest. T 458. Upon his arrival, the defendant spoke with Sgt. Bolduc, who was soon joined by Trooper Nadeau. T 456. Before Trooper Nadeau arrived, Sgt. Bolduc told the defendant that the police did not have his "side of the story," and that they "would really like to talk to him, if he wanted to come into the police department for an interview." T 880. The defendant "declined." *Id*.

Trooper Nadeau also asked the defendant if he wanted to provide a statement. T 459. The defendant said he did not want to do so. *Id*. Following this conversation, he and Sgt. Bolduc arrested the defendant and read him his *Miranda* rights. T 460. At the time of his arrest, officers obtained and executed a search warrant for the defendant's cell phone that was in his truck at the police department. T 881.

A. Testimony of A.P.

At trial, A.P. was 18. T 190. When A.P. was six years old, the defendant sexually assaulted her for the first time. T 232-33. He undressed her and handcuffed her hands and feet to his bed while her mother was at work and her sister was at gymnastics. T 232-33, 236. After handcuffing her, the defendant grabbed A.P.'s breasts, inserted his finger and then his penis into her vagina, and then ejaculated onto the bed. T 235-36, 238. Ms. Chevalier later confirmed that she and the defendant used handcuffs in their bedroom during sexual intercourse. T 681-82. At some point, the handcuffs were placed in storage. T 681-82. When the police searched the storage unit, they did not find the handcuffs. T 682, 882.

After this first sexual assault, the defendant sexually assaulted A.P. by having vaginal intercourse with her every time her mother was at work

and her sister was at gymnastics. T 239. A.P. said that her sister attended gymnastics four times a week and that her mother worked "every night." T 233, 240. Sometimes the defendant would only digitally penetrate her or only grab her breasts and buttocks. T 240.

The defendant also touched A.P.'s vagina and her breasts with his hands at night and had vaginal intercourse with her while she and S.P. were asleep in their bunk beds. T 240-43. She said that she was asleep when the defendant began touching her, which would wake her up. T 240-41. When the defendant did this, A.P. would tell him to stop. T 241. The defendant would also "play with" her vagina by placing his hands in her pants. T 243. The defendant also tried to have vaginal intercourse with her during the day while her mother and sister were at the pool. *Id*. The defendant forced A.P. to have vaginal intercourse in "every room" in their home. T 247. The sexual assaults would stop once the defendant ejaculated, either inside of her vagina, on a bed, or on the floor. T 248-49.

A.P. recounted a time when she was 15 or 16 and drank alcohol with some friends. T 252-53. When she returned home, the defendant told her that she could go to bed or "lay with" him. T 252. When she chose to go to bed, the defendant called and texted her, threatening to take her cell phone away if she did not "lay with" him. *Id*. A.P. knew that "lay with" the defendant meant sexual intercourse. T 253. A.P. went out to the living room and laid on the couch with a pillow over her face to try to sleep. T 256. As she fell asleep, the defendant had sexual intercourse with her, but was angry with her that she fell asleep, telling A.P. that they would not have sexual intercourse if she had been drinking. T 257.

The defendant often took A.P.'s phone away if she did not have sexual intercourse with him and told her mother that he took A.P.'s phone because she was "sneaking out." T 258-59. He also threatened to take A.P.'s phone away if she did not send him naked pictures of her breasts, buttocks, and vagina through Snapchat. T 279-80. The defendant also sent her pictures of his naked penis via Snapchat. T 275.

The sexual assaults occurred from the time A.P. was six years old until she was sixteen years old. T 267. The last time the defendant had sexual intercourse with her was in April 2019, the day before the police arrived at her home. T 266-67. The defendant told her she could not tell anyone what he was doing because the defendant would "get in trouble for it" and "he'd be put in jail for a long time." T 263.

B. Testimony of S.P.

When S.P. testified at trial, she was 15. T 889-90. She was nine years old the first time the defendant sexually assaulted her. T 898. That day, the defendant asked S.P. to "lay[] with him." *Id*. The defendant told her that if she did not, he would take her phone. *Id*. She did not lie with the defendant, so he took her phone. *Id*. That night, the defendant crawled into S.P.'s and A.P.'s bedroom and laid on S.P.'s bottom trundle bed with her. *Id*. He gave S.P. her phone, took her pants and underwear off, and took off his own underwear. T 898-99. Then, the defendant was on top of S.P. with his hands by her shoulders while he started "humping" her by making his penis touch her vagina. T 900-01. The defendant's penis penetrated her labia with this humping motion. T 901. Eventually, the defendant stopped and stroked his penis with his hand until he ejaculated onto S.P.'s

bedsheets. T 902. Following this, the defendant dressed himself and left. *Id*. When this happened, A.P. was at a friend's house and her mother was at work. T 902-03.

Sometimes the defendant would use his fingers to touch the outside and "inner, like part" of S.P.'s vagina. T 904. These sexual assaults took place over a period of more than two months. T 919-20. The defendant "made [S.P.] do it" once a week. T 903. The weekly assaults ended when the defendant was arrested. T 903. The last sexual assault occurred two days prior to his arrest. T 910. S.P. described that the defendant entered her bedroom once the lights were off and she was in bed. *Id*. He removed her clothes and his clothes and "started humping [S.P.] until he was done, and then he jerked off, and then he pulled his pants up and told [S.P. she] could go shower." *Id*. She said that his penis penetrated her labia. T 911.

As S.P. grew older, these sexual assaults occurred every other day. T 906. If S.P. told the defendant "no" when he asked to sexually assault her, he would "bribe [her] or take things away from [her]." T 907. For example, he took away S.P.'s phone or prevented her from showering after gymnastics if she said "no." *Id*. The defendant told S.P. that the sexual assaults were "normal" and "happened to everyone," including A.P. and E.B. T 907, 908.

S.P. also recalled a time when she and E.B. wanted ice cream and the defendant told them that he would purchase them ice cream if "someone laid with him that night," which S.P. understood meant "hav[e] sex with [the defendant]." T 909.

When her mother and Sgt. Butts entered her room on April 11, 2019, and asked her about "stuff" occurring between herself and the defendant,

she told them that "stuff" was happening. T 911. She explained that the first person she disclosed to was Det. Butts because she did not think anyone would believe her and did not know how to tell someone. T 912.

S.P. testified that all three girls shared the blankets in their bedroom. T 917. She said that when the defendant was arrested, her bedsheets were purple. T 918-19. S.P. also testified that she began gymnastics when she was four and that her practice occurred one to two days a week. T 892. She also said that as she grew older, she had gymnastics four night a week, either from 4:00 p.m. to 8:00 p.m. or from 5:00 p.m. to 9:00 p.m. and that she had a fifth practice from 3:00 p.m. to 6:00 p.m. T 891-92. She explained that her mother worked nights either Tuesday through Friday night or Saturday through Monday night, depending on what job she had at the time. T 895.

C. Testimony of E.B.

When E.B. testified at trial, she was 17. T 1011. E.B. could not remember how old she was when the defendant started sexually assaulting her, but remembered that the defendant was living in Exeter and that she was in either fourth or fifth grade. T 1043, 1054. The first time the defendant assaulted her, he entered her bedroom and, while she pretended to be asleep, he rubbed her back with his hand, moved his hand down to her buttocks and inner thighs, and then to her vagina. T 1043. Then, he pulled her pants and underwear off and "ha[d] sex with [E.B.]" T 1043-44. She described "sex" as putting his penis in her vagina while he was on top of her. *Id*. Each sexual assault stopped with the defendant "pulling out" and ejaculating on her blanket. T 1049.

E.B. recalled a sexual assault that occurred at the Raymond house when she was six or seven years old. T 1050-51. She said that she was home alone with the defendant and he wanted to play a game. T 1050, 1053. The defendant blindfolded her and told her to lick food off of him to guess what the food item was. T 1051. E.B. tasted chocolate when she did this and realized later that the defendant had placed the chocolate on his penis. T 1051-52. She could see through the blindfold and remembered seeing the defendant's belly button and hips. T 1052. At the time, E.B. did not know what she licked the chocolate sauce off of but knew that it was thicker and longer than a finger. *Id*. Once she learned about penises in health class, she realized that the defendant had made her lick chocolate off of his penis. T 1053.

One time, E.B. tried to "fight back" against the defendant when he tried to sexually assault her. T 1055. She tried to run away from him after the defendant told her to "come here," but he picked her up and tried to take her pants off as she squirmed until she "gave up." *Id*. Once she stopped fighting, the defendant vaginally penetrated her. *Id*. Another time, while E.B. was alone with the defendant on the couch, he asked E.B. to "lay with" him. T 1059. When E.B. said no, the defendant asked her why she did not love him. *Id*. In response, E.B. said "that's not daughter love" and walked away. *Id*. Other times, when she tried to stop or prevent the sexual assaults, the defendant would tell her that she did not "love him because [she] wasn't laying down with him." T 1044.

The bedroom sexual assaults happened every other weekend that E.B. visited the defendant. T 1090. Sometimes she was alone in her bedroom when it happened and, at other times, A.P. and S.P. were asleep in

the bedroom. T 1047. She believed the sexual assaults were normal because they happened so often. T 1048. She said that the sexual assaults continued from fourth or fifth grade through eighth grade. T 1090.

Six or seven months before she told her mother about the defendant, she told her friend that the defendant "ha[d] been raping [her]." T 1070-71. Her friend told E.B. to tell the defendant to stop touching her or the friend would tell E.B.'s mother. T 1071. E.B. said that when she told the defendant this via Snapchat, he stopped assaulting her "for a long time." T 1071, 1073. After E.B. said this to the defendant, but before she told her mother, the defendant asked her to lay with him on his birthday, which E.B. refused. T 1076.

Before she told her mother, E.B. told her boyfriend about the sexual assaults to see if he "had an idea" about how to tell her mother. T 1081. In response, he told E.B. to tell her mother right away, or he would tell her mother. T 1082. Two days later, E.B. told her mother about the defendant sexually assaulting her. T 1083.

The defendant's son, T.B., recalled that, one night in 2019, he left his bedroom to get a glass of water. T 372-73. On his way to the kitchen, he saw A.P. on top of the defendant on the folding couch in the living room. T 373, 376-77. T.B. saw that A.P. and the defendant were naked, the defendant was lying on his back, and A.P. was "on top" of the defendant's "private area . . . having sex." T 376-78. He could not remember what day this happened, but remembered that he had been working on a school project about the American Revolution. T 387-88.

A.P.'s neighbor and high school friend, Samantha Goeddeke-Wilcox, also testified at trial. T 521, 523-24. She testified that the defendant

made "threesome" jokes while she and A.P. sat on the couch. T 532-33. She, the defendant, and A.P. had a joke between them in which the defendant would say "I'm going to toe you," and would "poke at [her] butt with his toe." T 533. The defendant also sent Samantha a handful of pictures of his clothed "crotch." T 557.

E.B.'s friend to whom she disclosed also testified. T 1111, 1116. E.B. first told the friend that the defendant was inappropriately touching E.B. when the two were in sixth or seventh grade. T 1116. The friend told E.B. to tell her mother and to tell the defendant to stop. T 1117. E.B. did not tell her mother at that time, but E.B. told the friend in ninth grade that the defendant was inappropriate with her. T 1119. E.B. looked "ten times more scared and was crying." T 1120. The friend told E.B. to tell E.B.'s mother. *Id*. When E.B. told E.B.'s mother, her mother called the friend and the friend confirmed E.B.'s account. T 1121.

E.B.'s boyfriend also testified. T 1241. When E.B. told him that something happened between her and the defendant, he told her to tell her mother or someone else and that if she did not, he would tell her mother. T 1246-47.

A sexual assault nurse examiner ("SANE") who examined A.P. also testified. T 559. A.P. told the SANE that she was "getting sexually assaulted by [the defendant] . . . for some time." T 583. A.P. told the SANE that the defendant had had vaginal intercourse with her, performed cunnilingus on her, and forced her to perform fellatio on him. T 584. A.P. did not disclose right away because "she was protecting her younger siblings" and that the last time she was assaulted was April 10, 2019. T 583-84.

Dr. Cornelia Gonsalves, a pediatric nurse practitioner, also testified. T 1179. Dr. Gonsalves examined E.B. and S.P. following their CAC interviews. T 1184. E.B. told Dr. Gonsalves that the defendant sexually assaulted her once a month from when she was six years old until she was fourteen years old. T 1212. E.B. said that the defendant inserted his fingers and penis into her vagina put his mouth on her vagina. *Id*. She also told the doctor about licking chocolate off of the defendant's penis. *Id*.

S.P. told her Dr. Gonsalves that the defendant sexually assaulted her every week from the age of nine or ten until a few days before his arrest by digitally penetrating her and touching her breasts. T 1224-26.

D. The police investigation

During their investigation, the Exeter Police Department seized multiple cell phones, including an HTC phone and a Samsung phone belonging to the defendant and one iPhone that was A.P.'s old cell phone. T 431-32, 465-66, 482. Pursuant to a search warrant, Trooper Nadeau performed forensic extractions on these three phones. T 472. On the HTC phone, the trooper found the text from the defendant to A.P. (admitted as part of Exhibit 15) that read, "I'd rather lose you as a lover than lose you completely," "some internet web history logs," and some "thumbnail images of nude female breasts." T 299, 477. The trooper found nothing of evidentiary value on the Samsung phone. T 478-79. Trooper Nadeau was unable to attempt any forensic extraction on the iPhone because it "was dead" and would not hold a charge. T 480-81.

Detective Duane Jacques, who was qualified at trial as an expert in "the field of forensic analysis and digital equipment," testified that he

performed a forensic extraction on the Samsung phone and the HTC phone. T 950, 956. Det. Jacques located Snapchat and phone contacts for the three victims and Snapchat messages during his extraction of the Samsung phone. T 958. He also located images and two email addresses on the Samsung phone. T 959. One of the images was a meme stating "when you finally agree to a threesome and your man giving the guy all the dick" in a Snapchat message sent by the defendant to A.P. T 963-64.

On the HTC phone, the detective found Snapchat messages between the defendant and A.P. T 976. He also found the images that comprised State's exhibit 17 at trial. T 981-86. Two of these images were exposed female breasts. T 981, 983. One image was a nude female in which the "top of the vagina" was visible and on which was typed "Good morning. I love you and miss you, Handsome." T 984. Another image depicted nude female breasts with white lettering in a black bar reading, "you are mine and no one else can fuck me." T 986. A.P. testified that the images in Exhibit 17 were images of herself that she had sent to the defendant. T 282-87.

The detective also found the following images in State's Exhibit 19 at trial: (1) two images of exposed buttocks; (2) one image of exposed female breasts; and (3) one image of an exposed vagina. T 986-89. A.P. testified that the images in Exhibit 19 were images of herself that she had sent to the defendant. T 290-92. All the images in Exhibits 17 and 19 were found as thumbnails on the HTC phone. T 990.

The detective also testified that Trooper Nadeau located a Google search history on the HTC phone from April 2017. T 994. This history contained searches for "how long does your wireless carrier retain texts, call logs?" and "how many years can you look up phone records?" *Id*.

Police also collected A.P.'s, S.P.'s, and the defendant's bedding from Ms. Chevalier following the victims' CAC interviews. T 660-61. Sgt. Tilton obtained a search warrant for the defendant's DNA.T 429-30. A serologist at the New Hampshire State Laboratory testified that the purple sheet collected during the police investigation tested positive for A.P.'s DNA (provided by A.P. during her SANE examination, T 591) and for semen. T 762, 805-06. The semen on the bedsheet belonged to the defendant with a profile "rarer than 1 in 390 billion people." T 836-37.

Detectives also obtained school records confirming that T.B. worked on an American Revolution school assignment in January 2019 – the same time that he observed the defendant sexually assaulting A.P. T 463.

II. The Defendant's Case

The defendant testified at trial. T 1256. From November 2018 to April 2019, he was working from midnight until 1:00 p.m. Tuesday through Saturday and that Ms. Chevalier worked from 6:30 p.m. to 3:00 a.m. Sunday through Thursday. T 1267. When he initially moved in with Ms. Chevalier, however, he changed his work schedule to days so that he could be home with the children at night. T 1304. He also testified that S.P.'s gymnastics practice occurred after school for one hour on Tuesdays, for three hours on Wednesdays and Thursdays, and on Saturday morning. T 1268. A.P. worked Tuesday and Thursday nights and took horseback riding lessons on Wednesdays. T 1268. He usually brought the children to their activities, but sometimes Ms. Chevalier would bring them. *Id*.

The defendant testified that the three girls had cell phones and that he would communicate with and "track" the three of them via Snapchat. T

1270. When his counsel showed him Exhibit 15, which included the message he had sent to A.P. reading, "I'd rather lose you as a lover than lose you completely," the defendant explained that he sent this message to explain to A.P. that "breaking up with somebody doesn't mean you should end your life." T 299, 1273. He claimed that he sent A.P. Exhibit 16A, or the threesome meme, because A.P. "always said [her boyfriend] would always want to be with [the defendant] instead of her." T 1274.

The defendant denied ever making a threesome joke to A.P. and her friend Samantha. T 1275. When asked about the "toeing" of Samantha, the defendant said that one night, he fell asleep on the couch. T 1276. When he awoke, it was after midnight and A.P. was awake sitting on the couch and Samantha was asleep on the couch. *Id*. The defendant poked Samantha with his toe to wake her up, telling her, "I just toed you to go home." *Id*. When asked about E.B. licking chocolate off of his penis, the defendant claimed that E.B. refused to take her grape-flavored medicine, so he blindfolded her, put some chocolate on his finger, and wiped the chocolate on her tongue to mask the taste of the medicine. T 1277.

The defendant acknowledged that by 2019, his relationship with Ms. Chevalier was "not good at all." T 1278. He said that Ms. Chevalier accused him of being a "pedophile" in front of the children and accused him "of doing stuff with the kids and it would really – like you could see it in the kids that they're scared . . . ." T 1278-79.

The defendant admitted to photographing his penis on the HTC phone, but claimed that he took the picture to send to Ms. Chevalier. T 1286. He purchased the HTC phone in 2014 and when he purchased a new Samsung phone in 2017, he kept the HTC phone for the children to use. T

1293. He claimed that he searched on the HTC phone how long phone records are kept because he and Ms. Chevalier were trying to access her brother's phone to determine why he had died by suicide. T 1292-93.

The defendant was "shocked" when he learned of the allegations and felt that "the police were probably after [him] for some reason." T 1294-95. The defendant denied sexually assaulting the three girls and denied receiving, seeing, or asking for naked photographs of A.P. T 1296-97. He denied sending naked photographs of himself to A.P. T 1296.

On cross-examination, the defendant admitted that he was the father figure in all three girls' lives and was a "very involved dad." T 1306-07. He denied that his form of punishment of the children was taking their phones from them. T 1308. The defendant admitted that he joked about "sexual things," but not about threesomes with A.P. and Samantha. T 1325. He also explained that sometimes, he would sleep in T.B.'s bed or S.P.'s bed after work and that the last time he slept in S.P.'s bed was April 4, 2019. T 1336-37. He explained that when he was tired, he "would be sexually aroused" and would "always have an erection" when he was "extremely tired." T 1337-38.

SUMMARY OF THE ARGUMENT

The trial court sustainably exercised its discretion in answering the jury's second question about the definition of reasonable doubt by redirecting them to the trial court's prior definition provided in its jury charge. This Court has cautioned trial courts against providing additional instructions defining the reasonable doubt standard. *State v. Wentworth*, 118 N.H. 832, 839 (1978). Against this case law, the trial court answered the jury's question regarding the reasonable doubt standard by redirecting the jury to its previously provided reasonable doubt jury instruction. An answer different from the trial court's answer in this instance could have run the risk of quantifying reasonable doubt or impermissibly adding to this Court's model reasonable doubt jury instruction, thus injecting error into the case. As such, the trial court sustainably exercised its discretion in answering the jury's question as it did.

The defendant did not adequately preserve his argument that the trial court impermissibly admitted evidence of his pre-arrest silence for appeal. At trial, defense counsel objected to Trooper Nadeau's testimony that the defendant declined to provide a pre-arrest statement, arguing only that this testimony would be hearsay and prejudicial. Defense counsel did not argue that this testimony presented a Fifth Amendment issue. As such, the record regarding the objection contains insufficient facts for this Court to determine whether the defendant unambiguously invoked his Fifth Amendment right to remain silent in response to the trooper's inquiry.

Even if this Court finds that the defendant preserved this argument, it fails on the merits for two reasons. First, the officers' testimony about the

defendant's responses to their requests does not establish an unambiguous invocation of the defendant's Fifth Amendment right to remain silent. Second, while the State did not cross-examine the defendant with his pre-arrest declination, the State impeached the defendant's credibility with that declination during its closing argument. Consequently, the declination was used in a case in which the defendant testified to impeach the defendant.

Finally, if this Court concludes that the trial court erred in allowing the State to elicit testimony regarding the defendant's pre-arrest declination, it should nevertheless find that this error was harmless beyond a reasonable doubt. The defendant's pre-arrest declination came into evidence without objection during Sgt. Bolduc's testimony. T 880. The other evidence of the defendant's guilt was overwhelming and the defendant's pre-arrest declination was inconsequential when reviewed in light of all the evidence at trial. The victims offered direct, credible testimony regarding the 14 AFSA charges and their testimony was corroborated by other trial witnesses, including the defendant's son, who observed the defendant sexually assaulting one of the victims. Likewise, the victims' testimony was also corroborated by other exhibits admitted at trial, including one of the victim's bedsheets, upon which the defendant's semen was found.

Accordingly, this Court should affirm the defendant's convictions below.

ARGUMENT

I. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT ANSWERED THE JURY'S QUESTION REGARDING REASONABLE DOUBT BY DIRECTING IT TO THE PRIOR REASONABLE DOUBT INSTRUCTION.

A. Standard of Review.

The defendant argues that the trial court "failed to adequately answer the [jury] question" because it misinterpreted the jury's second question, causing the trial court to provide a non-responsive answer. DB 24, 26. This argument must fail because the trial court's answer to the second jury question adequately answered the jury's question.

"The response to a jury question is left to the sound discretion of the trial court." *State v. Kelly*, 160 N.H. 190, 195 (2010) (quoting *State v. Poole*, 150 N.H. 299, 301 (2003). Thus, this Court reviews "the trial court's answer to a jury question under the unsustainable exercise of discretion standard." *Kelly*, 160 N.H. at 195. This Court reviews "the trial court's answer to a jury inquiry 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." *State v. Stewart*, 155 N.H. 212, 214 (2007) (citation and quotations omitted)). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *State v. Leveille*, 160 N.H. 630, 631-32 (2010).

"[T]he 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 v. Kleeman*, 158 N.H. 236, 250 (2009) (quotations and citation omitted). "It should address those matters fairly encompassed within the question." *Id*. (quotations and citation omitted). "Even if the supplemental instruction is shown to be a substantial error, [this Court] will only set aside a jury verdict if the error resulted in mistake or partiality." *Id*.

B. The trial court's jury charge, the jury's questions, and the trial court's answers.

On May 20, 2021, the eighth day of trial, the jury began its deliberations following closing arguments and the trial court's instructions. T 1440. During the trial court's instructions prior to deliberation, the trial court defined reasonable doubt for the jury. Specifically, the trial court instructed the jury that:

> [R]easonable 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 upon reason. It is not a frivolous or fanciful doubt, nor is it one that can be easily explained away. Rather, it is such a doubt based upon reason that remains after consideration of all the evidence that the State has offered against it.

T 1426.

The next day, the jury submitted two questions[2] to the trial court, the first of which asked the trial court to define reasonable doubt to "non[-]legal people" and asked the trial court to "somehow quantify reasonable doubt." DA 36. The trial court answered this question by providing the jury with its instruction defining reasonable doubt and told the jury that:

> [t]he 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.

DA 37. The trial court also told the jury that it had been instructed by this Court not to "veer" from the standard instruction regarding reasonable doubt in instructing a jury. *Id*.; *see State v. Wentworth*, 118 N.H. 832, 838-39 (1978) (providing a model jury charge for the reasonable doubt standard and holding that "[this Court] caution[s] [its] trial judges to avoid attempts at further defining reasonable doubt. In many instances, further definition leads only to further complication and needless litigation."). The trial court also clarified for the jury that "there is no number or percentage to be assigned to the concept of 'reasonable doubt.'" DA 37.

Approximately thirty minutes later, the jury asked a third question to the trial court: "If you believe it's more than likely then not [sic] that the Defendant committed accused crimes, is that worthy of a guilty verdict?"

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[2] The second question asked by the jury with the first question was, "[c]an we hear or see C.A.C. interview." DA 36.

DA 38. After input from counsel,[3] the trial court answered this question by stating: "[t]he 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." DA 39. The defendant challenges this answer on appeal.

The defendant objected to the trial court's answer, arguing that the trial court should have provided a yes or no answer because the jury's use of the term "more likely than not" is the definition of the preponderance of the evidence standard, "which is a much lower standard than beyond a reasonable doubt." T 1443. The defendant asked instead that the trial court either answer the jury's question with a no or provide the jury with "the list of legal standards to show that [more likely than not] does not actually rise to the level of beyond a reasonable doubt." *Id*.

The State responded that the trial court did not know what "more likely than not" meant to the jury without asking it what that meant, and that answering the jury's question with a yes or no answer "would change what the Court has already defined reasonable doubt as." T 1444.

In explaining its answer, the trial court said it "felt more comfortable" answering the question as it did and did not "feel comfortable" answering the jury's question with a yes or no. T 1445. The trial court's reasoning for not providing a yes or no answer was to avoid

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[3] The record of counsel's input regarding the trial court's answer to this jury question was memorialized after the question was answered. Prior to answering the jury's question, the trial court met with counsel in chambers and did not record the discussion regarding the trial court's answer. This record was made following the answer to capture the chambers conversation, particularly the defendant's objection to the trial court's answer to the jury's question.

"getting into a semantic discussion with them as to, well, what did you mean by the comment 'more likely than not?'" *Id*. The trial court also acknowledged that reasonable doubt "is a difficult [concept] for people that aren't in the industry, and they do the best they can with the definition that we've given them." T 1446.

The trial court also stated that it believed its definition of reasonable doubt was a fair and legal one and that it had redirected the jury to its original instructions that were "very clear" as to the burden to apply in a criminal trial. *Id*. Last, the trial court stated that if the jury asked a further question that led the trial court to "conclude that I misinterpreted their earlier question or earlier questions, then I will work with counsel to devise an answer that provides them more clarity. But at this point I think I've done what needs to be done to direct them in the right direction." *Id*.

C. The trial court did not err in answering the jury's question.

Here, the trial court's answer was responsive to the jury's question. In reading the jury's two questions together, the trial court sustainably interpreted the jury's "more likely than not" question to be an attempt to quantify the beyond a reasonable doubt standard. In redirecting the jury to the trial court's earlier definition of reasonable doubt, the trial court instructed the jury to apply that standard in reaching a verdict. DA 39. This response not only redirected the jury to the appropriate definition but prevented a back and forth between the trial court and the jury in which the jury attempted to further quantify the beyond a reasonable doubt standard.

Even if this Court finds that the trial court's answer constituted substantial error, this error did not result in a mistake or in partiality. The trial court's answer redirecting the jury to the reasonable doubt instruction did not lower the State's burden to a preponderance of the evidence standard, as the defendant argues in his brief. DB 28. The answer directed the jury to apply the correct reasonable doubt standard in reaching its verdicts. Because this Court "presume[s] that the jury followed the court's instructions," this Court must then presume that the jury applied the appropriate definition of reasonable doubt in reaching its guilty verdicts. *State v. Woodbury*, 172 N.H. 358, 369 (2019).

The trial court's answer to the jury's third question permissibly redirected the jury to the trial court's prior definition of reasonable doubt, ensuring that the trial court did not inadvertently veer from the standard reasonable doubt instruction in answering the jury's question affirmatively or negatively. As such, the trial court sustainably exercised its discretion in providing the answer it did. Accordingly, this Court should affirm the defendant's convictions.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRE-ARREST DECLINATION.

A. The defendant did not adequately preserve his argument regarding the admission of his pre-arrest silence for appeal.

This Court generally does "not consider issues raised on appeal that were not presented to the trial court." *State v. Batista-Silva*, 171 N.H. 818, 822 (2019). This requirement "reflects the general policy that trial forums

should have the opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id*. "The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court." *Id*.

In this case, in response to a question on direct examination asking what he did next, Trooper Nadeau stated, "[a]nd I had asked [the defendant] if he was willing to provide an interview, a statement, regarding what's been going these last few days." T 456. Defense counsel objected on hearsay grounds and asked to approach. *Id*. At sidebar, defense counsel stated that the witness should not testify about the defendant "declining to make a statement because it's prejudicial." *Id*. The State asserted that the defendant's declination is evidence that is more probative than prejudicial and is pre-arrest and pre-*Miranda*. T 456-57. The trial court confirmed its understanding as to what occurred. T 457. Defense counsel then argued that the proposed testimony did not have any probative value. *Id*. The trial court disagreed with that argument and permitted the State to lead the trooper into the testimony. *Id*. Trooper Nadeau then testified that, in response to his inquiry about whether the defendant would speak with them and provide a statement, the defendant "did not want to talk to us. He did – he did not want to provide a statement." T 459. No further objection was posed to this testimony, which replicated itself without objection in Sgt. Bolduc's testimony, T 880, and was referenced without objection in the State's closing, T 1403.

On appeal, the defendant argues that the trial court erred in allowing the State to introduce this testimony in its case-in-chief pursuant to *State v.*

Remick, 149 N.H. 745 (2003). In *Remick*, a case decided under the Fifth Amendment, an officer testified that he approached the defendant, asked him what happened, and the defendant closed his eyes and would not talk to the officer. 149 N.H. at 746. In conducting its analysis, this Court broadly stated 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. This Court then assumed without deciding that the *Remick* defendant's silence was sufficient to invoke the Fifth Amendment. *Id.*

The statement in *Remick* the defendant relies upon must be read consistently with Fifth Amendment law as it has developed since 2003. Specifically, in *State v. Pouliot*, this Court observed that the United States Supreme Court has held that, when a person is not in custody and does not receive *Miranda* warnings, "in order to benefit from the Fifth Amendment privilege against compelled self-incrimination, the person must 'expressly invoke the privilege.'" 174 N.H. 15, 20 (2021) (quoting *Salinas v. Texas*, 570 U.S. 178, 181 (2013)). This Court adopted and applied the "express invocation" standard in *Pouliot* and further found that responses that express discomfort with speaking to the police or are ambiguous as to whether the defendant is invoking his right to remain silent are insufficient to invoke the protection of the Fifth Amendment. *Id.* at 21-23.

In this case, defense counsel below failed to preserve this Fifth Amendment argument. Defense counsel below did not make this Fifth Amendment argument to the trial court, and the trial court therefore never analyzed it. At best, defense counsel argued at sidebar, after raising a hearsay objection, that the admission of the testimony was more prejudicial

than probative, a Rule of Evidence 403-style argument, which the trial court rejected. Because defense counsel did not object to Trooper Nadeau's testimony on the basis that the defendant's pre-arrest declination to make a statement constituted an unambiguous invocation of his right to remain silent, the specifics of that response were never developed for a ruling on that issue. Additionally, the defendant never asserted a Fifth Amendment objection after Trooper Nadeau provided the testimony in question, like defense counsel did in *Remick*, 174 N.H. at 746, so the trial court could make a ruling on that issue and impose an appropriate remedy, *see id.* (trial court denied defendant's motion for a mistrial, but struck the testimony from the record and instructed the jury to disregard it). The defendant also never objected on this basis to Sgt. Bolduc's testimony or when the State mentioned this pre-arrest declination in its closing.

When deciding preservation issues, this Court considers "whether the failure to raise the argument to the trial court results in an insufficiently developed factual or legal record to guide [the Court's] analysis." *Batista-Silva*, 171 N.H. at 823.

By not raising this fact-based Fifth Amendment argument below, defense counsel deprived the trial court of the ability to develop a sufficient factual record regarding whether the defendant unambiguously invoked his right to remain silent to guide this Court's review of that issue on appeal. The trial court's evidentiary ruling, which was grounded in the probative value of the testimony outweighing the prejudicial effect of it, was rooted in Rule 403 and reflected "the context in which evidentiary dispute[] w[as] presented to the court" by defense counsel and the State. *State v. Addison*, 165 N.H. 381, 419 (2013). The trial court did not err in resolving that

dispute as it did. The defendant simply did not preserve the Fifth Amendment argument he advances on appeal in the trial court.

B. The record is insufficient to determine whether the defendant expressly invoked his right to remain silent.

If this Court finds that the defendant preserved this issue for appeal, his argument still fails because the defendant did not, on this record, expressly invoke his Fifth Amendment right to remain silent. "The United States Supreme Court has held that, even when a person is not in custody and does not receive *Miranda* warnings, in order to benefit from the Fifth Amendment privilege against compelled self-incrimination, the person must 'expressly invoke the privilege."' *Pouliot*, 174 N.H. at 20, (quoting *Salinas*, 570 U.S. at 181). This Court further held that "even a pre-*Miranda* invocation of rights must be unambiguous to be effective." *Id*. at 21.

Here, the record is insufficient for this Court to determine whether the defendant unambiguously and expressly invoked his right to remain silent. Trooper Nadeau testified that the defendant "did not want to talk to us. He did – did not want to provide a statement." T 459. Sgt. Bolduc testified that the defendant "declined" a statement and "said he just wanted to gather the paperwork that he wanted to pick up and – and just go." T 880. These statements do not establish an unambiguous invocation of the Fifth Amendment right to remain silent. The defendant's response, as Sgt. Bolduc testified, was that he declined to provide a statement because he "wanted to gather the paperwork that he wanted to pick up and – and just go." T 880. This is, at best, ambiguous and does not expressly invoke the defendant's right to remain silent. *See Neri v. Hornbeak*, 550 F.Supp.2d

1143, 1164-65 (C.D. Cal. May 2, 2008) (holding that the defendant did not expressly invoke her right to remain silent when she told the interrogating officer, "I need to leave.").

Consequently, even if the defendant preserved this argument below, it fails on the merits for want of an unambiguous invocation of the Fifth Amendment right to remain silent.

C. The State used the defendant's pre-arrest silence to impeach his credibility during its closing argument.

If this Court finds the defendant expressly invoked his pre-arrest right to remain silent, his argument still fails because the State used the defendant's pre-arrest declination for impeachment purposes. This Court has 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." *Remick*, 149 N.H. at 747. When a defendant decides to testify at trial, "the interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privileges against self-incrimination." *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (quotations and citation omitted). "Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Id*. As such, "the Fifth Amendment is not violated by the use of pre[-]arrest silence to impeach a criminal defendant's credibility." *Id*.

Here, unlike the defendant in *Remick*, the defendant testified at trial. T 1256-1345. Because he testified, the State "advance[d] the truth-finding function of the criminal trial," *Id*., by cross-examining the defendant. T 1297-1344. While the State did not explicitly impeach the defendant with his pre-arrest declination during his testimony, the State cross-examined the defendant regarding the importance of the trial to the defendant and how he prepared for his trial testimony by reviewing police reports, victim interviews, and witness statements. T 1341-44.

In its closing argument, the State then used the defendant's pre-arrest declination to challenge his credibility. The State noted the defendant's declination of a pre-arrest statement right before it argued that the defendant had the chance to "review[] all the evidence in the case prior to trial," and "listen[] to all the evidence during trial . . . before he testified." T 1403. Thus, the State used the defendant's pre-arrest declination to impeach his credibility during its closing argument by implying that the defendant was only willing to provide statements addressing the victims' allegations against him after thoroughly reviewing all of the State's evidence of his guilt.

Accordingly, because the State used the defendant's pre-arrest declination to impeach the defendant in a proceeding in which the defendant testified in his own defense, that pre-arrest declination was properly admitted into evidence.

D. Any error in admitting the defendant's pre-arrest declination in the State's case-in-chief was harmless.

Even if this Court finds that the trial court erred in allowing the State to admit evidence of the defendant's pre-arrest declination in its case-in-chief, this error was harmless. This Court held in *Remick* that, "[t]he erroneous admission of evidence of a defendant's silence is subject to harmless error analysis." 149 N.H. at 748. "For [this Court] to hold that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict." *Id*. (quotations and citation omitted). If this Court finds that the trial court erred in allowing the State to admit in its case-in-chief evidence of the defendant's pre-arrest declination, this error was harmless given both the overwhelming evidence of the defendant's guilt at trial and the inconsequential nature of the defendant's pre-arrest declination.

"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." *State v. Racette*, ___ N.H. ___, slip op. at 4 (Apr. 26, 2021). "Either factor can be a basis supporting a finding of harmless error beyond a reasonable doubt." *Id*.

Here, there was overwhelming evidence of the defendant's guilt at trial. The three victims offered direct, credible testimony regarding the years' long sexual assaults the defendant committed against them. All three victims testified that the defendant referred to the sexual assaults as "laying with" him and all three testified that they would receive gifts or avoid punishments if they allowed the defendant to sexually assault them. T 257-58; T 897-98; T 1078-80. None of the victims was impeached during cross-

examination with any prior inconsistent statements regarding the charged elements. T 344-57; 922-27; 1091-1108.

Additionally, the defendant's semen was found on one of the victim's bedsheets, confirming the victims' testimony that he would ejaculate next to each victim after he sexually assaulted her in bed. T 836-37. The defendant's son also testified that he observed the defendant sexually assaulting A.P. in the middle of the night by vaginally penetrating her with his penis. T 376-79. Further, Dr. Gonsalves and the SANE nurse both testified that the victims described to them how the defendant sexually assaulted them, which was consistent with the victims' testimony about the assaults at trial. T 583-84, 1212, 1224-26.

Alternatively, the defendant's pre-arrest declination was inconsequential. This minor testimony entered the evidentiary record only twice, T 458-459, 880, and was objected to only once. The defendant's pre-arrest declination was also a minor, isolated portion of the State's case-in-chief. The declination is described in approximately four sentences of record testimony delivered by two separate witnesses during an eight-day jury trial. T 459, 880. Likewise, the State used only three sentences in its closing argument to reference the defendant's pre-arrest declination (T 1380-1409) and told the jury that the defendant had a right to decline to make a statement to police. T 1403; *see State v. Thibedau*, 142 N.H. 325, 330 (1997) (finding harmless error where the State only referenced the disputed evidence in a "small portion" of its closing and that evidence was not "lengthy, comprehensive, or directly linked to a determination of the guilt or innocence of the defendant.").

Moreover, the defendant testified at trial, during which he denied sexually assaulting the victims. T 1296-97. He also testified that the victims were "confused" when they testified that he sexually assaulted them. T 1340-41. He also explained away some of the evidence that the State admitted inculpating him in the AFSAs. T 1270-74, 1337-38. Therefore, because the jury heard the defendant's statements at trial, the defendant's pre-arrest declination did not exist in a vacuum. The jury had the defendant's explanations, which diminished any impact the brief pre-arrest declination testimony may have had.

Thus, even assuming the trial court erred in admitting testimony regarding the defendant's pre-arrest declination to provide a statement, the trial court's error was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the defendant's convictions below.

The State requests a 15-minute oral argument, at which undersigned counsel will appear.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Audriana Mekula, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,354 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

November 9, 2022 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

CERTIFICATE OF SERVICE

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

November 9, 2022 *<u>/s/ Audriana Mekula</u>*
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