THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0429

State of New Hampshire

v.

David Tufano

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(No oral argument requested)

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II. Did the trial court unsustainably exercise its discretion by ruling that evidence of the defendant's prior acts of trapping cats was admissible under *N.H. R. Ev.* 404(b).

STATEMENT OF THE CASE

The defendant, David Tufano, was charged with cruelty to animals in the Strafford County Superior Court for conduct that occurred on May 26, 2019. D App. at 1.[1] The complaint alleged that the defendant "negligently beat, tortured, or in another manner mistreated an animal, to wit a cat, by trapping the cat, placing the trap in a containe[r], and adding water to said container[.]" D App. at 1. There was no dispute at trial that the defendant secured the cat in a trap, placed the trap into a fifty-gallon Sterilite container, and added water to the container by spraying the cat with a hose. T2 at 199, 205, 212, 218, 253; D App. at 28.

Prior to trial, the defendant filed a motion *in limine* to impeach one of the State's witnesses on cross-examination by introducing evidence of two prior convictions — one from 1973 for theft by unauthorized taking, and one from 1999 for unsworn falsification. D App. at 20. The State filed an objection. D App. at 22-24. The State argued that the 1973 conviction was inadmissible because it was forty-seven years old and did not involve a crime of dishonesty. D App. at 22-23. Regarding the 1999 conviction, the State argued that it was inadmissible because it was twenty years old, the witness had nothing on her criminal record since that conviction, and its

[1] References to the record are as follows:
"DB" refers to the defendant's brief;
"D App." refers to the Appendix to the defendant's brief;
"D Add." refers to the Addendum to the defendant's brief;
"T-MH" refers to the transcript of the June 21, 2021 motion hearing;
"T1" refers to the transcript of Day 1 of the jury trial on June 23, 2021;
"T2" refers to the transcript of Day 2 of the jury trial on June 24, 2021; and
"TV" refers to the transcript of the verdict on June 25, 2021.

prejudicial effect substantially outweighed its probative value given the circumstances surrounding the conviction. D App. at 23-24.

The trial court (*Houran*, J.) denied the defendant's motion to admit the 1973 conviction and ordered a hearing on the admissibility of the 1999 conviction. D App. at 26-27. The court (*Ruoff*, J.) conducted a hearing and issued an order on June 21, 2021 denying the defendant's motion because the conviction was more than ten years old and its prejudicial effect substantially outweighed its probative value. D App. at 28-29; T-MH at 1.

The defendant also filed a motion *in limine* to exclude evidence that he attempted to trap cats in the past. D App. at 2-3. The State filed an objection and argued that the evidence was admissible to show intent, knowledge, and provide context. D App. at 4-9. The trial court (*Houran*, J.) adopted the analyses and conclusions set out in the State's objection and ruled that the evidence was admissible. D App. at 11-12. A year later, the defendant filed a motion for reconsideration, and the State again objected. D App. at 13-17, 18-19. The trial court (*Ruoff*, J.) denied the motion because it was untimely and the defendant failed to show that the prior order misapprehended any facts or misapplied any law. D App. at 28-29.

After a two-day jury trial, the jury convicted the defendant of cruelty to animals in violation of RSA 644:8. TV at 3. The trial court (*Ruoff*, J.) entered a conviction for a class B misdemeanor and imposed a $1,000 fine. D Add. at 47-49. This appeal followed.

STATEMENT OF FACTS

A. State's Case At Trial

The State called four witnesses at trial in the following order — Richard Roberge, John Williams, Sharron Barry, and Somersworth Police officer Nicole Lefebvre. T1 at 53, 107, 132; T2 at 167. Roberge, Williams, and Barry each lived at the same mobile home park as the defendant, Colonial Village in Somersworth. T1, 53, 108, 133, 183. Those witnesses, and Officer Lefebvre, testified to the following facts.

First, the State called Richard Roberge ("Roberge"). T1 at 53. Roberge could see the defendant's home from his property — Roberge's yard and trailer faced the back of the defendant's trailer. T1 at 54-55. On May 26, 2019, Roberge heard a very loud, deep, guttural moan while he was doing yardwork. T1 at 55. Roberge could discern that the noise was coming from across the street at the defendant's home but, never having heard such a sound, he followed the noise to determine what was making it. T1 at 56. As he made his way to the defendant's home, Roberge saw a plastic container that was "[b]asically . . . filled up with water" and the defendant with a hose in his hand. T1 at 56. Roberge was "right on top" of the container when he "looked inside and there was a Havahart trap with a cat in it." T1 at 56-57.

When Roberge "saw the cat" and "saw [the defendant] holding the trap under water," he raised his voice and told the defendant to "get the effing trap out of the bucket." T1 at 58-59. The defendant obliged and Roberge told him to open the trap, which the defendant did, and "the cat just took off." T1 at 58. The cat did not appear injured in any way, but was

"sopping" wet when it ran away. T1 at 59-60. Roberge recalled that the cat was black and may have had some white markings. T1 at 59.

Despite the fact that the cat "ran fine" when it was released, the defendant told Roberge that "he hit the cat [with his car] and he thought the cat was dying" and "he wanted to put it out of its misery." T1 at 62. As Roberge left to return to his property, the defendant followed him saying "[I'm] not a bad person." T1 at 81. Roberge testified that what he witnessed "wasn't a pretty sight," it made him "very upset," and he would "never forget what [he] saw." T1 at 59, 66. However, because Roberge believed that everyone "deserves . . . a second chance," he did not report the incident until Sharon Barry informed him that the defendant "had a history of being hostile towards cats" and trying to trap cats. T1 at 60-61. "Other neighbors" had also told Roberge that the incident "really should be reported." *See* T1 at 60-61, 88-89. Thus, Roberge came to believe that the defendant "already had his warning" and went to the police to report the incident on May 30. T1 at 61.

Next, the State called John Williams ("Williams"), who lived the next block over from Roberge. T1 at 108. On May 26, 2019, Williams was in his truck on his way to Home Depot when he "caught a glimpse of the Defendant with a cage" and "he was grabbing for a cat." T1 at 108. Williams then saw the "soaking wet" cat run across the street away from the defendant's house "as fast as it could." T1 at 108-109, 126. The defendant was pulling the cat out of the trap when Williams first saw him, and it caught Williams's attention because "it was just something you don't see." T1 at 109.

Like Roberge, Williams testified that the cat was black, and he recalled it wearing a pink collar. T1 at 110. Also like Roberge, Williams testified that the cat did not appear injured and had no difficulty moving as it ran away. T1 at 111. When Williams got out of his truck to see what was going on, Roberge was returning to his property with the defendant in tow and Williams heard the defendant say, "I thought the cat was injured. It was hurt and I was trying to put it out of its misery. It was hurt bad." T1 at 111-12.

The State's third witness was Sharon Barry ("Barry"), who lived across the street from the defendant. T at 132-33. Barry, who was also doing yardwork on May 26, 2019, heard a lot of yelling coming from the direction of the defendant's trailer. T1 at 133-35. She did not see any part of the incident aside from having watched the defendant follow Roberge back to his trailer. T1 at 133-34, 137. Barry did not investigate the shouting, but learned what happened by speaking to Roberge about it the next day, which was the first time the two had met. T1 at 135, 137.

After Roberge told her the story, Barry told him of an incident in September 2018 in which she and the defendant had an argument over the defendant setting a Havahart trap to catch cats coming onto his property and bothering birds at his birdfeeder. T1 at 142, 144. That incident resulted in the defendant calling the police to have Barry removed from his property and the defendant agreeing to remove the trap. T1 at 145, 157. At the conclusion of Barry's testimony, the court issued a limiting instruction to the jury and explained that the defendant's prior use of a trap to catch cats was admissible only to show the defendant's familiarity with how the

trap works; his intent regarding the use of the trap; and to explain the genesis of Roberge's report to the police. T1 at 160-61.

The State's final witness was Officer Lefebvre, the officer to whom Roberge reported the crime on May 30. T2 at 167-68. In investigating the incident, Officer Lefebvre spoke to Roberge, Williams, and Barry. T2 at 168, 169, 171. Officer Lefebvre also spoke to the defendant on June 2, 2019. T2 at 169. During her testimony, Officer Lefebvre confirmed the September 2018 dispute between Barry and the defendant. T2 at 170.

B. Defendant's Case At Trial

The defendant testified as the sole witness in his defense. T2 at 178. He claimed that the cats in the neighborhood got up on vehicles and scratched them, went to the bathroom in the cars if the windows were left open, damaged the house and yard, and attacked the birds at his bird feeder. T2 at 184-85. The defendant set up a trap to catch stray cats coming onto his property and this led to the dispute with Barry in September 2018. T2 at 187.

According to the defendant, on May 26, 2019, the defendant saw a cat run out from the pine trees towards the front of his vehicle as he drove away from his mailbox, but he did not see the cat reemerge. T2 at 195. Despite not feeling anything under his wheels, the defendant pulled over to check for the cat and saw it on the ground lying "near the grass." T2 at 195-96. The cat was not moving and its eyes were closed, but the cat was breathing. T2 at 196-97. Unsure of what to do, the defendant went into his shed, grabbed a Haveahart trap, and placed the cat inside. T2 at 197-98. At that point, the cat was "very still" but "had opened his eyes." T2 at 202.

The defendant went inside to get a can of tuna fish to feed the cat and grabbed a Sterilite container in case he had to transport the cat somewhere. T2 at 203, 204-05. If that were necessary, the defendant did not want the trap on the seats of his car because it was sitting in the dirt, had sharp edges, and had an animal inside of it. T2 at 205. While he was inside, the defendant claimed that he called Cocheco Valley Humane Society, but received no answer. T2 at 205-06.

Once outside, the defendant lifted the trap door to feed the cat the tuna fish and the cat "lunged at [him] and it bit [his] hand." T2 at 206. The defendant went back inside to clean off the cuts he sustained from the bite and from scraping his hand on the trap. T2 at 208-09. When the defendant returned, the "cat was moving a lot more." T2 at 210. The defendant went back inside to clean his hand off again. T2 at 212. Upon yet another return outside, the cat "was moving around a lot better," and it "was agitated," hissing and meowing as it paced back and forth in the trap. T2 at 210, 212-13. At this point, the defendant was "a little bit more satisfied . . . that [the cat was] not injured" and he "started thinking more along just taking it out and letting it go and seeing what it did." T2 at 212. The defendant testified that the trap was already inside the Sterilite container at this time. T2 at 213.

The defendant then tried to remove the trap from the Sterilite container but was unable to do so because the container kept coming up with the trap. T2 at 213-14. In one attempt to remove the trap, the "cat went after [the defendant's] fingers again." T2 at 217. That is when the defendant "decided to just get the hose and try and spray it down . . . while [he] was trying to pull [the trap] out of the bin." T2 at 217. The defendant

claimed to have put the hose on "fog pattern" so the water would spray as "a mist" rather than a "stream." T2 at 218-19. The cat immediately tried to get away from the water. T2 at 219. The cat was hissing and groaning and the defendant knew the cat "was unhappy when [the defendant] was hitting him with the water," but the defendant kept going in an effort to keep "him away from me" while the defendant tried to pull the trap up out of the container. T2 at 219, 256. That is when Roberge came up behind the defendant. T2 at 220.

The defendant testified that he tried to explain to Roberge what was going on, but Roberge yelled at him and would not listen. T2 at 220. The defendant started to "really get irritated" such that he "turned back around and [ ] kicked the Sterilite container." T2 at 221-22. The container fell onto its side and the trap started to come out. T2 at 222. The defendant then pulled the trap out of the container, opened the trap door, and "the cat ran out." T2 at 222. The defendant testified that the cat was black with some white markings and was soaking wet when it ran off. T2 at 222, 260. The defendant also testified that when Roberge arrived there was "just a little bit of residual water in the bottom" of the container. T2 at 223.

When the defendant finished testifying, the State recalled Officer Lefebvre to rebut certain testimony given by the defendant. T2 at 271. Officer Lefebvre testified that the defendant told her three times that he sprayed the cat with water "in an attempt to calm it down," which the defendant denied in his testimony. T2 at 267-68, 271-72. Officer Lefebvre also testified that when she asked to defendant how much water was in the container, he made a hand gesture that she estimated to be about four inches. T2 at 272. During the defendant's testimony, he agreed that he

responded to Officer Lefebvre's question with a hand gesture, but also told her "there was a residual amount of water" in the container. T2 at 264.

C. Pre-Trial Motions *In Limine*

Prior to trial, the defendant filed a motion *in limine* to impeach Barry on cross-examination using two criminal convictions — a 1973 conviction for theft by unauthorized taking and a 1999 conviction for unsworn falsification. D App. at 20. The defendant's motion offered no analysis as to why these convictions should be admitted. D App. at 20.

The State objected. D App. at 22-25. The State argued that the 1973 conviction was inadmissible to impeach Barry under *N.H. R. Ev.* 609 because it was forty-seven years old and it was not a crime of dishonesty. D App. at 22-23. The State conceded that the 1999 conviction for unsworn falsification was a crime of dishonesty and satisfied *N.H. R. Ev.* 609(a)(2). D App. at 23. However, because the conviction was twenty years old, its admissibility required an analysis under *N.H. R. Ev.* 609(b)(1). D App. at 23. The State argued that the conviction's probative value was substantially outweighed by its prejudicial effect because the circumstances of the conviction involved a domestic assault that Barry reported to police and later recanted after receiving pressure to do so from her partner and his family. D App. at 24. If asked at trial, Barry would have maintained that her original report to police was true and her recantation was not. D App. at 24. Additionally, Barry had no convictions since her 1999 conviction. D App. at 24. Accordingly, the State argued that the probative value of the conviction for impeachment purposes was substantially outweighed by its prejudicial effect. D App. at 24.

The trial court (*Houran*, J.) denied the defendant's motion as it related to the 1973 conviction for the reasons advanced by the State and ordered a hearing on the motion as it related to the 1999 conviction. D App. at 26-27. After a hearing, the court (*Ruoff*, J.) denied the defendant's motion to admit Barry's 1999 conviction because the conviction was more than ten years old and, "given the circumstances around the crime, its probative value [did] not substantially outweigh its prejudicial effect." D App. at 28. The court explained that the circumstances surrounding the conviction would require, to some extent, the State to prove the truth of the assault to rebut the evidence of the conviction. D App. at 28-29. Given the convictions lack of probative value, "and that this kind of recantation-scenario in domestic violence cases is quite common," the court found that "its admission would prove confusing and prejudicial." D App. at 29.

The defendant also filed a motion *in limine* to prohibit Barry from testifying to the defendant's prior act of attempting to trap cats in September 2018. D App. at 2-3. The defendant argued that this evidence was "unproven, irrelevant, and immaterial" and that whatever probative value the evidence might have was "outweighed by the unfair prejudice" created by it. D App. at 3. Thus, the defendant contended that the evidence was inadmissible under *N.H. R. Ev.* 401, 402, 403, and 404.

The State objected and argued that evidence of the defendant's prior cat trapping was admissible under *N.H. R. Ev.* 404(b). D. App. at 4-9. The State argued that the evidence was relevant to show the defendant's intent in using the trap, to prove his knowledge of how the trap worked, and to provide context for the defendant's conduct. D App. at 8. Further, the State observed that there was no dispute that the defendant committed the

prior acts and that the defendant's knowledge of how to release cats from the trap safely was highly probative to rebut the defendant's version of events. The State pointed out that a limiting instruction from the court could minimize any risk of prejudice. D App. at 8-9.

The trial court (*Houran*, J.) stated that it was "rare that this court is sufficiently in agreement with the position asserted in the pleading of a party in any case, criminal or civil." D App. at 11. However, the State's objection was one such exception. D App. at 12. Thus, the court adopted the analyses and conclusions in the State's objection and denied the defendant's motion. D App. at 12. The court (*Ruoff*, J.) denied the defendant's motion for reconsideration. D App. at 28.

The defendant's arguments on appeal are both rooted in the rulings on the motions *in limine* described above.

SUMMARY OF THE ARGUMENT

The trial court did not unsustainably exercise its discretion by denying the defendant's motion to impeach Barry using prior convictions or admitting evidence of the defendant's prior act of attempting to trap cats.

Under *N.H. R. Ev.* 609(b), evidence of prior convictions that are at least ten years old, even convictions involving crimes of dishonesty, are admissible for the purpose of impeaching a witness only if the conviction's probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. The ten-year limitation contained in Rule 609(b) is the result of a considered judgment that the probative value of evidence of convictions more than ten years old is, in most cases, outweighed by its prejudicial effect. *State v. Hickey*, 129 N.H. 53, 57 (1986). Barry's 1999 conviction for unsworn falsification was the result of a domestic violence report she filed against her partner and later recanted after receiving pressure to do so from her partner and his family. If asked at trial, Barry would have maintained that her original report was true, not her recantation. Given the sheer age of the conviction and its potential to confuse the issues by creating a trial within a trial, the court did not unsustainably exercise its discretion by concluding that its prejudicial effect substantially outweighed its probative value.

Under *N.H. R. Ev.* 404(b), evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," but may be admitted "for other purposes," including to show intent or knowledge, or to give context. *See N.H. R. Ev.* 404(b); *State v. Davidson*, 163 N.H. 462, 470 (2012). In this

case, the State had to prove that the defendant acted negligently — that his conduct grossly deviated from that of a reasonable person in the same situation creating a substantial risk of the cat being mistreated. The defendant argued that his conduct was borne out of compassion for the cat. Thus, for the jury to adequately evaluate whether the State had met its burden of proof, it was important to provide the jury with the context supplied by the defendant's intent in attempting to trap cats on a prior occasion and his knowledge of the traps functionality.

Even if the trial court erred in one or both of its evidentiary rulings, the error was harmless beyond a reasonable doubt. *See State v. Racette*, ___ N.H. ___, slip op. at 4 (decided April 26, 2022). The testimony of Roberge, Williams, and the defendant himself indisputably established that the defendant placed the cat in a trap, placed the trap in a plastic container, and then sprayed the cat with water using a hose. That testimony alone is overwhelming evidence that the defendant's conduct grossly deviated from that of a reasonable person and created a substantial risk that the cat would be mistreated. Moreover, Barry's testimony only served to explain how the incident was brought to the attention of the police and to undercut the defendant's argument that he acted out of compassion. Neither purpose was central to the case because it was irrelevant how the police became involved and, since no *mens rea* needed to be proven, it made no difference whether the defendant acted out of compassion or malice.

Accordingly, although Barry's testimony provided helpful context, it was cumulative of the State's overwhelming evidence of guilt. Therefore, this Court should affirm the trial court's evidentiary rulings.

ARGUMENT

I. THE TRIAL COURT DID NOT UNSUSTAINABLY EXERCISE ITS DISCRETION IN ITS EVIDENTIARY RULINGS.

This Court reviews challenges to the trial court's evidentiary rulings under an unsustainable exercise of discretion standard. *State v. Colbath*, 171 N.H. 626, 632 (2019). For the defendant to prevail under this standard, he must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case. *Id*. In applying this standard, the Court determines only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. *Id*. This Court's task is not to determine whether it would have found differently, but is only to determine whether a reasonable person could have reached the same decision as the trial court based on the evidence before it. *Id*. at 632-33.

The trial court did not unsustainably exercise its discretion in the evidentiary rulings challenged by the defendant for the reasons that follow.

A. The Trial Court Properly Denied The Defendant's Motion To Impeach Barry Using A 1999 Conviction For Unsworn Falsification.

N.H. R. Ev. 609(a)(2) provides that evidence of a criminal conviction offered to attack a witness's character for truthfulness "must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement." However, if the conviction is ten years old or older, evidence of the conviction is admissible only if: (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial

effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it. *See N.H. R. Ev.* 609(b). Trial courts have broad discretion to fix the limits of proper areas of cross-examination, including attacks upon a witness's credibility. *State v. McGill*, 153 N.H. 813, 817 (2006).

In this case, the trial court had to determine whether the probative value of Barry's 1999 conviction for unsworn falsification substantially outweighed its prejudicial effect because the conviction was twenty years old. Factors to be considered in balancing a conviction's probative value against its prejudicial effect include the impeachment value of the prior conviction, the date of the conviction and the witness's subsequent history, the degree of similarity between the past crime and any conduct of the witness currently at issue, the importance of the witness's testimony, and the centrality of the credibility issue. *State v. Deschenes*, 156 N.H. 71, 76-77 (2007). While similar factors are used when conducting the balancing tests established by Rules 403 and 609, those two tests strike different balances, and the Rule 609 test is the more exclusionary. *See id* at 77.

As to the first factor, the impeachment value of Barry's 1999 conviction was minimal because it was two decades old and was entered under questionable, but not uncommon, circumstances. Barry represented to the State that the conviction stemmed from a domestic violence incident. D App. at 24. Barry had been in an abusive relationship in which she called the Somersworth Police Department on numerous occasions. *Id*. On one such occasion, she reported that her partner assaulted her. *Id*. After receiving pressure from her partner and his family, she recanted her earlier statement to police. *Id*. Subsequently, Barry was charged with unsworn

falsification for her recantation and pled *nolo contendere*. *Id*. Barry maintains that her original statement to the police about the assault was true and her recantation was not, and would have testified to that effect if asked about the conviction at trial. *Id*; D App. at 29.

The trial court acknowledged that "this kind of recantation-scenario in domestic violence cases is quite common." D App. at 29. Experience and authority reveals that disputing the court's observation would be an exercise in futility. *See* Scavarelli, *Prac. Guide Evidence New Hampshire*, § 9.3.1 (2nd Ed. 2021) ("It is not unusual for adult and child victims of domestic violence and sexual abuse to recant, deny, hide, minimize, or withdraw accusations"); *see also* Russel D. Covey, *Recantations and The Perjury Sword*, 79 Alb. L. Rev. 861, 874 (2016) ("Nowhere does the use of the perjury sword seem more problematic than in domestic violence cases, where recantation by abuse victims is more the norm than the exception."). The often-intimate nature and dynamics of domestic violence cases inherently raises thorny credibility questions when a reporting victim recants their allegations.

Accordingly, the trial court astutely recognized that rebuttal of the defendant's impeachment effort would require, to some extent, the State to prove the truth of the original assault. D App. at 29. Thus, introduction of Barry's 1999 conviction carried a significant risk of creating a trial of the 1999 assault allegation within the defendant's trial for animal cruelty. Under such circumstances, the court acted within its discretion in concluding that admission of the conviction to impeach Barry "would prove confusing and prejudicial." D App. at 29.

The defendant mischaracterizes the State's argument and the court's ruling in contending that the underpinnings for each of them were, "in essence, [that] Barry was innocent . . . and wrongly convicted." DB at 32, 33. The State advanced no such argument and the court made no such finding. Rather, the State argued that, in light of the age of the conviction and the questionable circumstances under which it was entered, the probative value of the conviction was substantially outweighed by its prejudicial effect, and the court agreed. *See* D App. at 23-24, 29.

The defendant invites this Court to take this case as an "opportunity . . . to clarify that when courts employ the Rule 609 balancing test" that it is appropriate to examine the impeachment value of the conviction, but not to "conduct a collateral proceeding to determine whether the prior conviction was wrongfully entered." DB at 33-34. This Court need not, and should not, accept the defendant's invitation. As evidenced by the court's ruling here, trial judges are keenly aware of the risk of creating trials within trials when admitting evidence of prior convictions for impeachment purposes and they know how to exercise their discretion in excluding such evidence when that risk outweighs the impeachment value of the conviction.

The defendant's argument that this factor weighs in his favor because "a false recantation is itself highly probative of witness credibility" is unavailing. DB at 35. As a general matter, the defendant's contention is true and, consequently, its sentiment has been codified in *N.H. R. Ev.* 609(a)(2). However, the defendant ignores that this seemingly transparent truth becomes increasingly opaque as a conviction, including a conviction for a crime of dishonesty, ages. *See N.H. R. Ev.* 609(b).

The ten-year limitation contained in Rule 609(b) is the result of a considered judgment that the probative value of evidence of convictions more than ten years old is, in most cases, outweighed by its prejudicial effect. *Hickey*, 129 N.H. at 57. Under *N.H. R. Ev.* 609(b), it is intended that convictions over ten years old will be admitted very rarely and only in exceptional circumstances. *Id*. at 58. Thus, "[t]here is a rebuttable presumption that the prejudicial effect of evidence of a conviction over ten years old outweighs its probative value." *Id*. The defendant has offered no persuasive reason to conclude that he has overcome this rebuttable presumption.

As to the second factor — the date of the conviction and the witness's subsequent history — the defendant concedes, as he must, that the age of the conviction weighs in favor of excluding the evidence. DB at 37. The defendant observes, however, that Barry's subsequent history was not developed in the record and appears to invite this Court to infer that, because Barry had not had the conviction annulled, she must have subsequent convictions. DB at 38. Seeking to cut off any contrary inference, the defendant argues that "it would not be appropriate" for this Court to "read from [the record's] silence that [Barry] had no further convictions after 1999." DB at 38.

As an initial matter, "[t]he party offering evidence generally bears the burden of demonstrating its admissibility." *State v. Caswell*, 146 N.H. 243, 245 (2001) (citation omitted). The defendant sought to offer Barry's 1999 conviction as evidence for impeachment purposes, and providing the court with any subsequent convictions that Barry might have had would have went to the admissibility of the evidence. Accordingly, it was the

defendant's burden to develop the record on this point if he wished to do so. Beyond that, however, the State explained in its objection to the defendant's motion that Barry pled *nolo contedere* to the unsworn falsification charge "as evidenced in her criminal history." D App. at 24. The State went on to affirmatively state, without any objection from the defendant, that "Ms. Barry has nothing since that conviction on her criminal record." *Id*. Thus, it is reasonable to infer from the record that the State reviewed Barry's criminal history and that it contained no convictions subsequent to the unsworn falsification conviction in 1999.

The next factor to consider is the degree of similarity between the past crime and any conduct of the witness currently at issue. The defendant contends that this factor weighs in his favor by broadly asserting that Barry had a propensity for maliciously submitting false reports to the police, or causing such reports to be submitted. DB 38-39. He argues that the past crime involves Barry's intimate partner being arrested on the basis of a false statement, and the conduct currently at issue involves Barry "influenc[ing] Roberge to report and perhaps exaggerate" an allegation of animal cruelty against the defendant. DB at 38-39. Viewed properly, however, the past crime and Barry's current conduct are not similar.

The past crime was recanting an allegation of domestic assault Barry made to police. The current conduct involves Barry telling Roberge about her experience with the defendant from September 2018. Barry's story, along with "other neighbors" telling Roberge that the incident "really should be reported," caused Roberge to revisit his initial decision not to report the defendant to the police for what occurred on May 26, 2019. *See* T1 at 60-61, 88-89. There is little similarity between Barry recanting her

allegation of domestic violence, and joining her neighbors to encourage a fellow neighbor to report an act of animal cruelty and then becoming a witness in the trial that followed. Further, there is no evidence that Barry encouraged Roberge to report something that was not true or to exaggerate what he witnessed.

The final factor to consider is the importance of the witness's testimony and the centrality of the credibility issue. This factor weighs in the State's favor because Barry's testimony was mostly corroborative and her testimony was not substantially in dispute. *See* D. App. at 29. The defendant argues that Barry was an important witness because "she was the one who escalated the situation to the level of police involvement" and a "reasonable jury could have concluded that, but for Barry, there never would have been police involvement or an arrest in the matter." DB at 39. The defendant's argument fails for at least two reasons.

First, Roberge himself shut down this line of argument when the defendant sought to pursue it at trial. When trial counsel for the defendant asked if Roberge went to the police because of his conversation with Barry, Roberge stated "No, not just -- not just her, conversation with her . . . [other] neighbors said that it really should be reported." Second, even if a reasonable jury could conclude that, but for Barry, there never would have been police involvement or an arrest in this matter, that conclusion would be wholly irrelevant. The fact of the matter is that there was an arrest in this case and, under RSA 644:8, III(b), the State had to prove that the defendant negligently beat, tortured, mutilated or in any other manner mistreated an animal. An attack on the "but for" chain of causation that

lead to the animal cruelty being reported to the police is not a defense to the crime charged.

Accordingly, none of the factors weighs in favor of admitting Barry's 1999 conviction for impeachment purposes. However, even if the trial court could have reasonably ruled in the defendant's favor, that is not the test. *See Deschenes*, 156 N.H. at 79. When both the State's and the defendant's positions are both logical and reasonable, "deciding which one to adopt is a quintessential exercise of judicial discretion." *Id*. Therefore, the trial court did not unsustainably exercise its discretion.

B. The Trial Court Properly Denied The Defendant's Motion To Prohibit Barry From Testifying To The Defendant's Prior Act Of Cat Trapping.

Under *N.H. R. Ev.* 404(b), evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, such evidence may be admissible "for other purposes," including to show intent or knowledge, or to give context. *See N.H. R. Ev.* 404(b); *Davidson*, 163 N.H. at 470 (acknowledging that this Court has "indicated that context may be among [the] other purposes" for which admission of other acts evidence is permitted). Before evidence of other bad acts may be admitted at trial, the State must demonstrate that: (1) such evidence is relevant for a purpose other than proving the defendant's character or disposition; (2) clear proof establishes that the defendant committed the other bad acts; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. *Colbath*, 171 N.H. at 633. On

appeal, the defendant challenges the trial court's ruling on the first and third prongs of this test. DB at 19.

To satisfy the first prong of the Rule 404(b) analysis, the other bad act evidence must have some direct bearing on an issue actually in dispute and have a clear connection to the evidentiary purpose for which it is offered. *Id*. The State argued in the trial court that the defendant's prior act of cat trapping was relevant to show the defendant's intent when he trapped the cat in this case, the defendant's knowledge of how to use the trap, and to provide context for the jury. D App. at 7-8. The trial court adopted the State's analyses and conclusions in its ruling on the issue. D App. at 12.

The central facts of this case were never in dispute — the defendant admitted that he caused the cat to be in the Havahart trap, he placed the trap into a Sterilite container, and he sprayed the cat with water from the hose, thereby adding water to the container. *See* T2 at 197-98, 213, 217-19, 223. That was the conduct alleged in the complaint. D Add. at 46. Thus, the jury's only task was to determine whether the defendant's conduct constituted "negligently beat[ing], tortur[ing], or in another manner mistreat[ing] an animal." D Add. at 46; *see* RSA 644:8, III(b). The jury was instructed that, in a criminal case, "[a] person acts negligently with respect to a material element of a [crime] when he fails to become aware of a substantial and unjustifiable risk that the material element will exist or result from misconduct." T2 at 316. The jury was further instructed that "[t]he risk must be of such a nature and degree that [the] failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the same situation." *Id*.

Thus, the primary dispute in this case was whether the defendant's conduct created a substantial risk of the cat being mistreated that he failed to appreciate such that his conduct grossly deviated from that of a reasonable person in the same situation. The defendant's intent in trapping the cat and his knowledge of the trap was relevant to that dispute.

The defendant told the police that he placed the cat in the trap because he intended to bring it to Cocheco Valley Humane Society. D App. at 7. However, the State contended that the evidence would show that the cat was in good physical condition. *Id*. Thus, there was a reasonable inference to be drawn, not dependent on the defendant's character or propensity, that the defendant's intent in placing the cat in the trap was not to take it to the humane society because it was injured, but his intent was to remove it from his property. D App. at 7-8. The defendant testified that he had the cat in the trap for twenty minutes or half-an-hour. T2 at 223. Whether it is reasonable to keep an injured cat in a trap for that length of time while arranging for its transport to a humane society is likely to be viewed differently by a jury than keeping a healthy cat in a trap for the same period simply to move it off one's property. It was important for the jury to understand the defendant's intention for placing the cat in the trap when evaluating whether his conduct grossly deviated from the conduct of a reasonable person in the same situation. Accordingly, the court's pretrial ruling was supported by the testimony provided at trial.

The defendant's knowledge of the trap was also important for the jury's evaluation of the case. For example, the defendant was familiar with the functionality of the trap's spring-loaded door and the fact that the door would quickly close if it were opened but the trap was not set. T2 at 206-

07. Nevertheless, when he tried to feed the cat tuna fish, he chose not to set the trap to keep the door open. T2 at 250-51. He did this despite the fact that the cat was alert and moving at this point. T2 at 251. Thus, at a prime opportunity to open the door to the trap, back away from it, and see if the cat was well enough to leave on its own, the defendant chose not to disable the spring-loaded door, causing it to close automatically when he let go of the trap and thereby keeping the cat inside. *Id*.

As another example, the defendant was familiar with the size and dimensions of the trap, but still placed it in a container of similar dimensions causing the trap to be stuck inside the container. T2 at 198-99, 211-14. The defendant told the jury that when the trap was stuck, he got the hose and sprayed the cat and trap with water. T2 at 217. It was relevant for the jury to know that the defendant had prior knowledge of the trap when evaluating whether his conduct grossly deviated from that of a reasonable person in the same situation by creating and failing to become aware of a substantial risk of mistreating the cat.

Relatedly, the evidence was relevant to give the jury the context necessary to rebut the defendant's defense. *See Davidson*, 163 N.H. at 470; *State v. Mendola*, 160 N.H. 550, 558 (2010) (prior act evidence can be relevant to rebut the defendant's defense). The defense, in essence, was that "the only gross deviation . . . in this case is [the defendant's] . . . compassion that he showed to that animal when he didn't have to." T2 at 296. The defendant argued to the jury that he did not trap the cat for the same purpose he had on prior occasions, *id*, and that his actions were merely "compassion efforts to aid the stray cat." T2 at 301. The defendant's intent in trapping cats on prior occasions and his knowledge of

the trap provided context for the jury to evaluate his defense against the claims alleged by the State. The context provided by the prior acts evidence in this case was not "merely a synonym for propensity." *Davidson*, 163 N.H. at 471.

The defendant's prior act of cat trapping was relevant for the non-propensity purposes of the defendant's intent in trapping the cat, knowledge of the trap, and to provide context for the jury, all of which went to the primary dispute in this case — whether the defendant's conduct grossly deviated from that of a reasonable person in the same situation. Accordingly, the first prong of the 404(b) test was satisfied.

The third prong of the test is satisfied if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. *Colbath*, 171 N.H. at 633. Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. *Colbath*, 171 N.H. at 636.

Unfair prejudice is not mere detriment to a defendant from the tendency of the evidence to prove guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. *Id*. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged. *Id*. Among the factors this Court considers in weighing the admissibility of the evidence are: (1) whether the evidence would have a great emotional impact upon a jury; (2) its potential for

appealing to a juror's sense of resentment or outrage; and (3) the extent to which the issue upon which it is offered is established by other evidence, stipulation, or inference. *Id*.

A trial court can diminish or eliminate the danger of unfair prejudice by issuing a limiting instruction to the jury. *Id*. The trial court is in the best position to gauge the potential prejudicial impact of particular testimony, and to determine what steps, if any, are necessary to diminish or eliminate the potential prejudice. *Id*. Thus, this Court affords considerable deference to the trial court's balancing of prejudicial impact and probative worth. *Id*.

The defendant's prior act of attempting to trap cats would not have had any greater emotional impact upon the jury than the undisputed facts of the crime charged. *See State v. Dow*, 168 N.H. 492, 501 (2016); *State v. Howe*, 159 N.H. 366, 378 (2009). The jury was going to hear evidence of the defendant placing a cat in a trap, placing the trap in a container, and then spraying the cat with a hose causing the container to fill up with water. The fact that the defendant on a prior occasion attempted to keep stray cats off his property by setting a Havahart trap, which, unlike foothold or snare traps, is designed for humane trapping and releasing of animals, pales in comparison to the facts of this case in terms of emotional impact.

For the same reason, the prior act evidence did not carry a great risk of appealing to the jury's sense of resentment or outrage. There is nothing inherently outrageous or emotionally provocative about humanely trapping and releasing animals that one does not want on their property. Further, the prior act evidence was not that the defendant had, in fact, trapped cats on prior occasions, but rather that he had set a trap for that purpose.

Additionally, the only other evidence establishing the issue upon which the evidence was offered — whether the defendant's conduct grossly deviated from that of a reasonable person — was the undisputed facts as testified to by Roberge, Williams, and the defendant. As previously discussed, evidence of the defendant's prior cat trapping was highly probative of his intent in trapping the cat and his knowledge of the trap, which provided the context necessary for the State to rebut the defendant's argument that he merely placed the cat in the trap to transport it to the humane society in an act of compassion.

Moreover, the trial court, who was in the best position to gauge the potential prejudicial impact of Barry's testimony and to determine what steps, if any, were necessary to diminish or eliminate the potential prejudice, *see Colbath*, 171 N.H. at 636, gave a limiting instruction. The trial court carefully instructed the jury that the evidence could be used only to show the defendant's familiarity with the trap and how it closes, his intent in trapping the cat in this instance versus the prior instance, and for context. T1 at 160-61. The limiting instruction properly addressed the potential prejudice and this Court presumes that the jury follows the instructions given by the trial court. *See State v. Clark*, 174 N.H. 586, 594 (2021).

Accordingly, the trial court did not unsustainably exercise its discretion by admitting the defendant's prior act of attempting to trap cats.

II. ANY ERROR COMMITTED BY THE TRIAL COURT IN ITS EVIDENTIARY RULINGS WAS HARMLESS BEYOND A REASONABLE DOUBT.

To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict. *State v. Racette*, ___ N.H. ___, slip op. at 4 (decided April 26, 2022). This standard applies to both erroneous admission and exclusion of evidence. *Id*. 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. *Id*. This Court reviews these factors to determine whether an error affected a verdict. *Id*. Either factor can be a basis for supporting a finding of harmless error beyond a reasonable doubt. *Id*.

In this case, the evidence that the defendant negligently mistreated or tortured the cat in violation of RSA 644:8, III(b), was overwhelming. Based upon the testimony of Roberge and Williams, the jury reasonably could have found that the defendant attempted to drown the cat in the Sterilite container while it was in the trap. Based upon the testimony of Roberge, Williams, and the defendant himself, the jury would *have* to find, at a minimum, that the defendant sprayed the cat with a hose while it was stuck in a trap that the defendant placed inside a plastic container. Both findings clearly constitute mistreatment of the cat and conduct that grossly deviates from what a reasonable person would do in the same situation.

Barry's testimony about the defendant's prior act of cat trapping helped to undermine the defendant's argument that his conduct was borne

out of compassion for the cat. However, even if Barry was impeached with her 1999 conviction, or even if she was not called as a witness at all, the facts before the jury still would have been that the defendant placed the cat in a trap, put the trap into a plastic container, and then sprayed the cat with a hose. Since there was no *mens rea* to this crime, whether the defendant acted out of compassion or malice would have made no difference. Thus, even if the court prohibited Barry from testifying to the defendant's prior act of cat trapping and permitted the defendant to impeach her with the 1999 unsworn falsification conviction, the jury still would have had substantial evidence of the defendant's guilt before it.

The testimony provided by Roberge, Williams, and the defendant provided the jury with overwhelming evidence to conclude that the defendant negligently mistreated the cat. Barry's testimony was that she did not witness the events of May 26, 2019. Accordingly, Barry's testimony was cumulative in relation to the State's evidence of guilt introduced through the testimony of Roberge and Williams.

Moreover, the defendant testified and did not contest the State's evidence, but merely offered an alternative explanation. His testimony may be used to assess his guilt. *See State v. Tabaldi*, 165 N.H. 306, 314 (2013) ("Even though a defendant is not required to present a case, if he chooses to do so, he takes the chance that evidence presented in his case may assist in proving the State's case"). Since he chose to testify, he placed his credibility at issued and the jury apparently resolved that issue against him. *See State v. Carr*, 167 N.H. 264, 275 (2015) ("Credibility determinations are within the sole province of the jury and will be upheld on appeal unless no rational trier of fact could have reached the same conclusion.").

Therefore, even if the trial court erred in either or both of its evidentiary rulings, the court's rulings should be affirmed because any error was harmless beyond a reasonable doubt.

CONCLUSION

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

The State does not request oral argument in this matter. However, if this Court decides to schedule an oral argument, Sam Gonyea will present on behalf of the State.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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May 13, 2022

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CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,692 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.

May 13, 2022 */s/ Sam M. Gonyea*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Theodore Lothstein, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

May 13, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea