REDACTED

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0464

State of New Hampshire

v.

Justin Lamontagne

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument requested)

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STATEMENT OF THE CASE

In May 2021, a Sullivan County grand jury indicted the defendant, Justin Lamontagne, on four counts of non-consensual dissemination of private sexual images in violation of RSA 644:9-a and on one count of attempted aggravated felonious sexual assault (AFSA) in violation of RSA 631-A:2(d). D App. at 3-7.[1] The indictments for non-consensual dissemination of private sexual images alleged that the defendant disseminated a video of the victim, A.C., in which the victim was identifiable and her intimate parts were exposed, to four different people without the victim's consent and with the intent to harass the victim. *Id*. at 3-6. The attempted AFSA indictment alleged that the defendant took a substantial step toward committing AFSA by retaining a copy of a private sexual video depicting the victim and threatened to release the video unless the victim engaged in sexual activity with him. *Id*. at 7.

The defendant stood trial on August 3, 4, and 5, 2021. *See* T1 at 1; T2 at 181; T3 at 327. At the conclusion of trial, the jury found the defendant guilty on all four counts of dissemination of private sexual images and not guilty on the single count of attempted AFSA. T3 at 330-31. The trial court (*Tucker*, J.) sentenced the defendant to three concurrent stand-committed terms of one year and three months to three years. D App.

[1] Citations to the record are as follows:
"DB" refers to the defendant's brief;
"DA" refers to the addendum attached to the defendant's brief;
"D App." refers to the appendix filed with the defendant's brief;
"SA" refers to the appendix filed with the State's brief;
"H" refers to the pre-trial motion hearing held on June 17, 2021; and
"T1," "T2," and "T3" refers to the consecutively-paginated transcripts of the three-day trial held August 3-5, 2021.

at 34-42. On the remaining conviction, the defendant was sentenced to a consecutive suspended term of three and a half to seven years. *Id*. at 43-45.

STATEMENT OF FACTS

A. Background

The victim and the defendant dated for about three years beginning when the victim was 19 and the defendant was 27 or 28. *See* T1 at 65-66; T2 at 220. Shortly after they began dating, the victim moved in with the defendant and his brother in Cornish. T1 at 66. After that, the couple moved to a residence in Claremont together where the victim lived with the defendant for about two- and one-half years. T1 at 66-67. The victim and defendant were in the "honeymoon phase" of their relationship and they "loved each other at that point." T1 at 67. As things progressed, however, the relationship began to change. *Id*. "Things got more intense. Gaslighting, belittling, more arguments." *Id*.

The victim and defendant broke up in February 2019 and the victim spent a few nights with a friend in Newport. T1 at 68. Following that, the victim moved back into the Claremont residence with the defendant for a month or two. T1 at 69. The victim and defendant continued to be intimate and discuss their relationship, sometimes in "anger." T1 at 69. This informal relationship between the victim and defendant went on until July 2019, although the victim began dating another man, Kyle Roberts, in June of 2019. T1 at 69-70. The defendant learned of the victim's relationship with Kyle in June. T2 at 223. The victim and defendant "[t]echnically" broke up on June 25, though they continued to communicate with each other. T2 at 224-25.

On July 15, 2019, the defendant "confronted" the victim via Facebook Messenger with an image he saw on the internet [redacted]

[redacted]. T2 at 226; [redacted] The victim immediately denied that it was her in the image, but the exchange "prompted [a] discussion about" how the victim and defendant could improve their "sexual relationship." T2 at 225-26. The victim and defendant discussed, among other things, having sex outside, involving other women in their sex life, and making a video of the two of them having sex. T1 at 147; T2 at 226; D App. at 33.

On July 21, 2019, the victim went to the defendant's apartment "for what [she] believed to be the last time so that [she] could pick up a piece of mail" and any other belongings she still had "at the apartment." T1 at 71. The victim gave the defendant "either a hug or a kiss good-bye," but the defendant held onto her and asked if they could "have sex one more time." T1 at 71. The victim agreed, and the two "decided that [they] would make a video of it." T1 at 71. The victim believed it would be the last time she and the defendant had sex and that the video they made would not be shared with anybody. T1 at 71.

"As time went on," the defendant began threatening to "release the video" if the victim did not "follow his rules," such as "going over to hang out or to have sex with him." T1 at 72. The defendant often made these threats in Facebook messages he sent to the victim between July 21 and August 3, which the victim read into evidence at trial. T1 at 74-135; SA at 3-38. The defendant threatened to send the video to the victim's boyfriend Kyle as well as "all of his and [her] friends." T1 at 89-90; SA at 9.

The victim grew tired of the threats and eventually told the defendant that she was "not a yo-yo" and she was not going to be "yanked

in any direction because [the defendant had] leverage on [her]." T1 at 133; SA at 36. The victim told the defendant that the situation had "gone far enough and [she was] not playing this anymore." T1 at 133; SA at 36. On August 4, 2019, the defendant made good on his threats by sending the video to four people. T1 at 161, 171; T2 at 187, 281.

Two of the recipients, and one recipient's girlfriend who also saw the video, testified at trial. T1 at 157, 160, 164, 167, 169, 172. Each of the people who testified to receiving or viewing the video also testified that they worked with, and were friends with, the victim. T1 at 157-58, 166, 170-71. Along with the video, all recipients received a similar message, which read "[m]ake sure Kyle Roberts gets this. He should have thought twice before he touched my girl." T1 at 161, 172; T2 at 197, 199-200.

The victim testified that she would not have willingly shown the video to the recipients of the defendant's messages. T1 at 137. Knowing that her coworkers and friends had seen her naked body in that context made her feel "[h]umiliated, embarrassed, [and] distraught." T1 at 137. The victim reported the incident to police the day after the defendant disseminated the video. T2 at 183.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. Trial

As the State expected, the victim testified that she agreed to have sex with the defendant and create the video. T1 at 71, 142-43, 154. The victim explained that she and the defendant agreed that the video would not be shared with anybody, and she never agreed to the video being disseminated. T1 at 71-72. "[N]o one was to see the video, no ifs, ands, or buts. No one else was to see it." T1 at 154. After the video had been created, the defendant added "stipulations . . . onto the video" to which the victim never agreed. T1 at 155. Those conditions included: (1) that the victim would break up with her boyfriend; (2) that the victim would go to therapy for her depression; and (3) that the victim would go see the defendant once a week. T1 at 154-55. The defendant disseminated the video when the victim stopped complying with those conditions. T1 at 155-56.

According to the defendant, he and the victim entered an agreement before the video was created. T2 at 227. The defendant testified that the terms of the agreement were that the victim "was going to get help for her mental health," she "was going to break up with Kyle," and she "was going to give [the defendant] updates on that progress." T2 at 233. The defendant believed that if the victim "didn't hold up some of these things,

then [he] could send out the video." T2 at 227. His purpose for disseminating the video was to "tell the truth, to tell [his] side of it." T2 at 230. The defendant testified that he "absolutely" believed he had the victim's permission to disseminate the video because "it was part of [their] agreement." T2 at 230.

Both parties testified to the conversation leading to the creation of the video. *See* T1 at 147-48; T2 at 226-27. The victim agreed that she and the defendant had discussed sexual activities they might be interested in exploring, such as having sex outside and making a video of the two of them having sex, among other things. T1 at 147-48. When the defendant was asked what prompted the conversation discussing ways to improve the relationship between him and the victim, the defendant replied that he "found something and [he] confronted [the victim] about it in the middle of July, which prompted the discussion about [their] sexual relationship." T2 at 226. He and the victim "discussed bringing in other people. Women, specifically" and they "discussed making a video together" amongst other "avenues and experimenting." T2 at 226.

After trial, the jury returned guilty verdicts on all four counts of dissemination of private sexual images. T3 at 330-331. The jury returned a verdict of not guilty on the single count of attempted AFSA. T3 at 331. This appeal followed.

SUMMARY OF THE ARGUMENT

[redacted] "Each decision to consent is a new act, a choice made on the circumstances prevailing in the present, not governed by the past." *State v. Higgins*, 149 N.H. 290, 297-98 (2003)). The fact that an individual previously consented to sexual activity with another person does not make it more probable that the individual consented to the same sexual activity with a different person on a different occasion. *See id*.; *Mazzaglia*, 169 N.H. at 494. [redacted] The standards contained in RSA 644:9-a, II(b)-(c) simply do not call for an inquiry into the defendant's subjective beliefs. Subparagraph (b) employs a "reasonable person" standard and subparagraph (c) uses the language "[k]nows or should have known." RSA 644:9-a, II(b)-(c). Both subparagraphs clearly adopt objective standards. Further, consent is analyzed under an objective standard.

[redacted] The State was required to prove that the defendant committed the proscribed act "[p]urposely, and with the intent to harass, intimidate, threaten, or coerce" the victim. RSA 644:9-a, II(a). Subparagraphs II(b) and II(c), upon which the defendant relies, relate to the circumstances in which the act (*i.e.* the *actus reus*) of disseminating a

sexual image is culpable. [redacted]

Finally, even if the court erred [redacted], the error was harmless beyond a reasonable doubt. *See State v. Racette*, ___ N.H. ___, slip op. at 4 (decided April 26, 2022). The defendant testified to sending the video to four people. The two recipients who testified said that they were coworkers and friends of the victim. The victim testified that she was humiliated when she learned that they saw the video. Further, the victim ardently testified that she never consented to the video's dissemination and there was no agreement between her and the defendant that would allow the defendant to disseminate the video.

Additionally, the defendant testified at length about an agreement between him and the victim that allowed him to disseminate the video if the victim breached the terms of the agreement. The defendant also testified that the victim's breach of the agreement supplied the basis for his belief that he had the victim's consent to disseminate the video. [redacted]

ARGUMENT

I. THE TRIAL COUR SUSTAINABLY EXERCISED ITS DISCRETION IN EXCLUDING TESTIMONY ABOUT [redacted].

The decision to admit or exclude evidence is within the discretion of the trial court. *State v. Brown*, __ N.H. __, slip op. at 3 (decided March 30, 2022). In determining whether a ruling is a proper exercise of judicial discretion, this Court considers whether the record establishes an objective basis sufficient to sustain the discretionary decision made. *Id*. To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id*. Because this case requires this Court to review the trial court's pretrial ruling, this Court limits its review to the proffers presented to the court at the pretrial motion hearing. *Id*. To the extent that this appeal requires this Court to interpret the provisions of RSA 644:9-a, the Court's standard of review is *de novo*. *State v. Beattie*, 173 N.H. 716, 720 (2020).

[redacted] To be admissible at trial, evidence must be relevant; that is, it must have a tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence. *Mazzaglia*, 169 N.H. at 493 (quotation omitted).

As in *Mazzaglia*, the defendant contends that *N.H. R. Ev.* 412 does not apply in this case because [redacted]; *Mazzaglia*, 169 N.H. at 492. [redacted] it is reasonable for this Court to assume, without deciding, that Rule 412 does not apply, as the Court did in *Mazzaglia*. *Mazzaglia*, 169 N.H. at 493. That is the least noteworthy of the numerous parallels between this case and *Mazzaglia*.

In *Mazzaglia*, the defendant contended that the victim died during consensual sexual intercourse that involved bondage. *Id*. at 490. Before trial, the defendant moved to introduce evidence that the victim "had previously expressed interest in bondage-related sexual activities." *Id*. at 491. The defendant did not seek to introduce specific instances of prior sexual conduct, only "the victim's alleged 'openness' to bondage-related sexual activities." *Id*. The defendant argued that the evidence was relevant because it undermined a significant obstacle to his theory — "the jury's . . . presumption that the victim had 'ordinary attitudes about sexual practices' and 'would have no interest in engaging in [bondage-related sexual] techniques under any circumstances.'" *Id*. at 493. Thus, the defendant argued that the "relevance of the challenged evidence . . . 'lay in its capacity to neutralize' the presumption that the victim 'was a normal person' who would not consent to bondage-related sexual activities." *Id*.

Even assuming the inapplicability of Rule 412, this Court held that evidence of the victim's interest in bondage-related sexual activities was irrelevant because "[c]onsent to sexual conduct with one person in no way implies consent to such activity with another. Each decision to consent is a new act, a choice made on the circumstances prevailing in the present, not governed by the past." *Id*. at 494 (quoting *State v. Higgins*, 149 N.H. 290, 297-98 (2003)). Like the defendant in *Higgins*, the defendant in *Mazzaglia* sought "to introduce the challenged evidence to show that the sexual encounter at issue was consensual." *Id*. at 494. However, just "as the propensity evidence in *Higgins* was not relevant" to show consent, the evidence in *Mazzaglia* was also irrelevant to show consent. *Id*. The "fact that the victim allegedly previously expressed to prior partners an interest in bondage-related sexual activity does not make it more probable that she consented to her encounter with the defendant and his girlfriend." *Id*.

This case is nearly on point with *Mazzaglia*. [redacted]

On appeal, the defendant seeks to distance himself from this propensity line of reasoning by asserting [redacted], but rather to show his own "mental operations." DB at 22-24. Immediately thereafter, however, the defendant elaborates on exactly which of the defendant's "mental operations" were relevant, and he is inevitably returned to the propensity argument: [redacted]

In fact, on appeal, the defendant further embraces the arguments made in *Mazzaglia* by arguing that the defendant was prejudiced by the exclusion of [redacted] Thus, using the same propensity reasoning that was rejected in *Mazzaglia* and *Higgins*, the defendant sought to "neutralize" the same "presumption" as the defendant in *Mazzaglia* — that the victim "was a normal person" who would be mortified by the defendant's dissemination of the charged video to her coworkers and friends. *Mazzaglia*, 169 N.H. at 493-94.

This Court's opinions in *Mazzaglia* and *Higgins* control in this case and make clear that the defendant's analysis of consent is mistaken. "Each decision to consent is a new act, a choice made on the circumstances

prevailing in the present, not governed by the past." *Higgins*, 149 N.H. at 297. [redacted] has no bearing on whether she consented to the defendant's dissemination of the charged video. *See id*. at 297-98. [redacted] is irrelevant to whether she consented to the defendant dissemination of the charged video. *See Mazzaglia*, 169 N.H. at 494.

[redacted] was relevant because the State had to prove that the defendant obtained the charged video "under circumstances in which a reasonable person would know" that the victim intended the video to remain private, and that the defendant knew "or should have known that" the victim "ha[d] not consented to the dissemination." RSA 644:9-a, II(b)-(c); H at 12; DB at 20-21. [redacted] The defendant

[2] [redacted]

maintains this argument on appeal, arguing that "if [the defendant] believed, even wrongly, that [the victim] consented to the dissemination, he did not commit the charged crimes." DB at 21. Again, the defendant's consent analysis is mistaken, as is his reading of RSA 644:9-a, II.

First, the only sensible method of analyzing consent is by objectively considering the words and conduct of the person with the authority to give consent. "The issue of consent involves the victim's objective manifestations of her unwillingness to engage in the conduct and thus concerns the victim's demonstrative and verbal conduct." *State v. Foss*, 148 N.H. 209, 213 (2002). If "the victim objectively communicates lack of consent and the defendant subjectively fails to receive the message, he is guilty." *State v. Ayer*, 136 N.H. 191, 196 (1992). "The appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent." *Id*. The defendant has cited no authority for the proposition that consent is to be analyzed according to the defendant's subjective beliefs, and this Court's opinions analyzing consent in various contexts hold to the contrary. *See e.g., Foss*, 148 N.H. at 213 (consent in sexual assault context analyzed objectively); *State v. Sawyer*, 145 N.H. 704, 707-08 (2001) (defendant's consent for police to enter a dwelling analyzed objectively); *Fischer v. Hooper*, 143 N.H. 585, 597 (1999) (trial court's instruction in invasion of privacy suit that "[c]onsent may be express or it may be implied from the conduct of the person under all the surrounding circumstances" fairly covered the issue of consent).

Thus, whether the defendant obtained the video under circumstances in which a reasonable person would know that the victim intended the video to remain private is an objective inquiry focused on the

demonstrative and verbal conduct of the victim. The same is true of whether the defendant knew or should have known that the victim did not consent to the video's dissemination. Indeed, the language "reasonable person would know," RSA 644:9-a, II(b), and "[k]nows or should have known," RSA 644:9-a, II(c), both call for objective inquiries. *Cf. State v. Porelle*, 149 N.H. 420, 422, 425 (2003) (statute including the language "under circumstances that would cause a reasonable person to fear for his safety" measured "defendant's actions by an objective standard"); *State v. Leaf*, 137 N.H. 97, 99 (1993) (statutes "operative words is 'reasonable,' which is determined by an objective standard. A belief which is unreasonable, even though honest, will not support the defense."); *State v. Ebinger*, 135 N.H. 264, 265 (1992) (whether a defendant failed to become aware of a "substantial and unjustifiable risk" is determined by an objective test, not by reference to the defendant's subjective perception). Accordingly, the defendant's purely subjective belief as to whether the victim consented to his dissemination of the charged video was irrelevant. [redacted] was relevant to the *mens rea* that the State was required to prove to obtain a conviction, *see* DB at 18, 21-22, 23-24, the defendant misreads the statute. The *mens rea* of the crime is stated in subparagraph II(a) — the State must prove that the defendant committed the proscribed act "[p]urposely, and with the intent to harass, intimidate, threaten, or coerce the depicted person." RSA 644:9-a, II(a). Subparagraphs II(b) and II(c), upon which the defendant relies, speak to the circumstances in which the act (*i.e.* the *actus reus*) of disseminating a sexual image is culpable.

Thus, under a proper reading of the statute, an individual could purposely disseminate a sexual image of another person with the intent to harass them without running afoul of the statute if the person depicted consented to the image's dissemination. This is true not because the culpable mental state described in the statute is absent, but because the *action* of disseminating the image with the consent of the person depicted is not culpable under the statute. That is, the consent of the victim bears not on the culpability of the defendant's mental state, but rather upon the criminality of the defendant's conduct. Accordingly, the major premise of the defendant's argument — [redacted] — is founded upon a misreading of the statute. [redacted] had no bearing on whether the defendant purposely disseminated the charged video with the intent to harass the victim. *See* RSA 644:9-a, II(a).

[redacted] *See Mazzaglia*, 169 N.H. at 494. [redacted]

[redacted]. The court's decision should be affirmed even if the trial court's ruling rested upon grounds other than those articulated by the State in its objection, at the motion hearing, and in

this brief. *See State v. Dion*, 164 N.H. 544, 552 (2013) ("[W]here the trial court reaches the correct result on mistaken grounds, [this Court] will affirm if valid alternative grounds support the decision.")

II. EVEN IF THE TRIAL COURT ERRED IN EXCLUDING [redacted], THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Even if the trial court erred in its evidentiary ruling, the error was harmless beyond a reasonable doubt. *See State v. Racette*, ___ N.H. ___, slip op. at 4 (decided April 26, 2022). To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict. *Id*. 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*.

As to the first factor, the evidence of the defendant's guilt was overwhelming. The defendant himself said that he purposely disseminated the video and agreed that the video depicted the victim's naked body. T2 at 281, 285. *See State v. Hill*, 163 N.H. 394, 395 (2012) (stating that this Court will review "the entire trial record because, even though the 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.") Two recipients and the girlfriend of one of the recipient's, all of whom worked with and were friends with the victim, testified to receiving the video. T1 at 157-58, 166, 170-71. The victim testified that having her coworkers and friends see her body in that manner made her feel "[h]umiliated, embarrassed, [and] distraught." T1 at 137.

On the issue of consent, the victim repeatedly testified that she never consented to the dissemination of the charged video and that she and the defendant agreed at the time the video was created that it would never be shared with anyone. T1 at 71-72, 138-39, 154. The victim emphatically denied that she and the defendant had any agreement that would permit him to disseminate the video if the agreement were breached. T1 at 71-72, 84, 90-91, 138-39, 150, 154-155. That the defendant knew or should have known that the victim did not consent to his dissemination of the video was bolstered by the Facebook messages read into evidence by the victim and entered as an exhibit. T1 at 81-136; SA at 3-38.

Accordingly, there was significant evidence that the defendant purposely disseminated the video with the intent to harass the victim. *See* RSA 644:9-a, II(a). Additionally, significant evidence established that the victim intended for the video to remain private from the time it was made and at all times thereafter. *See* RSA 644:9-a, II(b)-(c). Therefore, the evidence of the defendant's guilt was overwhelming and [redacted]

Second, [redacted] would have been cumulative evidence of the defendant's assertion that the victim consented to his

dissemination of the video.[3] The defendant testified at length about an agreement that he maintained existed between him and the victim which would permit him to disseminate the video if the victim breached the terms of the agreement. T2 at 227-38, 241-43, 248, 262-64. The defendant testified that the alleged agreement was the basis for his belief that he had the victim's consent to disseminate the video. T2 at 230, 270. Thus, to the extent that [redacted] as evidence that the defendant reasonably believed that the victim consented to the dissemination of the video, it would have been cumulative. Moreover, in relation to the strength of the evidence previously described, [redacted].

Accordingly, even if the trial court erred in [redacted] the court's error was harmless beyond a reasonable doubt and the court's ruling should be affirmed.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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[3] The defendant agrees that he was permitted to introduce evidence about the Facebook exchange leading up to the creation of the video, [redacted] DB at 16 n. 5. Accordingly, the defendant's argument on appeal focuses narrowly on [redacted]. *Id.*

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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 7,033 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.

August 16, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

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

August 16, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea