THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0058

State of New Hampshire

v.

John S. Cullen

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

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# BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

By Its Attorneys,


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(Oral argument not requested)

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## ISSUE PRESENTED

I. Whether the trial court erred in denying the defendant's motion to dismiss two indictments for aggravated felonious sexual assault on the basis that the evidence was insufficient to convict the defendant on those charges.

## STATEMENT OF THE CASE

In August 2018, the Merrimack County grand jury indicted the defendant, John Cullen, on two counts of pattern aggravated felonious sexual assault (AFSA) and one count of sexual assault. DA at 24-26.[1] At the conclusion of a two-day jury trial, the defendant was convicted of all charges. T2 at 232-233. The court (*Kissinger*, J.) sentenced the defendant to a stand committed sentence of 10-20 years on one of the AFSA convictions and to a concurrent stand committed sentence of 12 months on the sexual assault conviction. DA at 33, 39. On the remaining AFSA conviction, the defendant received a suspended sentence of 10-20 years. DA at 28.

[1] Citations to the record are as follows:
"DA" refers to the addendum attached to the defendant's brief;
"DB" refers to the defendant's brief; and
"T1" and "T2" refer to the transcripts of the two-day jury trial held on June 15-16, 2021.

## STATEMENT OF FACTS

### A. Indictments.

In August 2018, the grand jury indicted the defendant on two counts of pattern AFSA and one count of sexual assault. DA at 24-26. The first indictment alleged that, contrary to RSA 632-A:2, III, the defendant engaged in pattern sexual assault of sexual contact with the victim, J.B., by intentionally directing the victim to touch his penis with her hand on more than one occasion for purposes of sexual arousal or gratification. DA at 24. The indictment also alleged that the pattern sexual assault was committed over a period of two months or more and within a period of five years; that the victim was under the age of 13; that the defendant was not the legal spouse of the victim; and that the defendant committed the offense purposely. *Id*. This indictment is referred to as the "sexual contact indictment" throughout this brief.

The second indictment alleged that, contrary to RSA 632-A:2, III, the defendant engaged in pattern sexual assault of sexual penetration with the victim by inserting his finger into her genital opening on more than one occasion. DA at 25. The indictment also alleged that the defendant committed the pattern sexual assault over a period of two months or more and within a period of five years; that the victim was under the age of 16; that the defendant was not the legal spouse of the victim; and that the defendant committed the offense knowingly. *Id*. This indictment is referred to as the "sexual penetration indictment" throughout this brief.

The third indictment, which alleged that the defendant sexually assaulted the victim contrary to RSA 632-A:4, I(c), *see* DA at 26, is not germane to any of the defendant's arguments on appeal. *See* DB at 4, 15.

**B. Trial.**

The Merrimack County Superior Court conducted a jury trial on June 15 and 16, 2021. *See* T1 at 1; T2 at 163. The defendant represented himself at trial with standby counsel present. *See id.* Trial testimony pertinent to the issues on appeal was given by the victim, the victim's mother, and the defendant.

**1. Victim's Testimony.**

The victim was born on July 5, 2000. T1 at 43, 46. The victim testified that she attended Merrimack Valley High School and Merrimack Valley Middle School. T1 at 44. She testified that she was 11 years old in sixth grade; 12 years old in seventh grade; 13 years old in eighth grade; 14 years old in ninth grade; 15 years old in tenth grade; 16 years old in eleventh grade; and she graduated from high school when she was 17 years old. T1 at 44-45; *see* DB at 8.

The victim testified that the defendant was her mother's boyfriend and lived with the victim and her mother "for a few years" at their home on Corn Hill Road in Webster. T1 at 45, 47. Although "the timeline [was] a little bit fuzzy," the victim estimated that the defendant lived with her and her mother from the time she was 12 until she was 14. T1 at 47. Stated differently, the victim testified that "[she] believe[d]" the defendant lived with her and her mother for "[a]round two years, give or take a few

months" from the time the victim was in "sixth grade into seventh grade and all the way up to around eighth." T1 at 48.

The victim took the bus to school, which typically arrived at 7:30 A.M., and she returned from school between 2:30 P.M. and 3:00 P.M. T1 at 50-51. Her mother and great aunt, who also lived in the house, worked a typical 9 to 5 schedule. T1 at 51. Accordingly, when the victim came home from school in the afternoon, she would either be alone in the house or only she and the defendant would be home. T1 at 51. That was also the case if the victim was on school vacation or summer vacation. T1 at 51.

When the defendant moved in, the victim testified that he was "[f]un at first," T1 at 48, and "it felt sort of like [they were] friends." T1 at 52. The victim never "viewed [the defendant] as a father figure, but at first, [the defendant] was nice to [her.]" T1 at 52. However, the relationship "got progressively more sexual on [the defendant's] end." T1 at 52. The defendant "started getting more touchy feely" and became "more comfortable giving [the victim] hugs." T1 at 52. The victim then recounted the first "instance where [the defendant] told [her] to lie down with him in the master bedroom to watch Netflix and had [her] touch his penis." T1 at 52. "At first, it was over the clothing" and the victim pulled her hand away because she "was worried [she] would get in trouble." T1 at 53. The defendant "laughed it off" and told the victim "not to worry about it." T1 at 53. The victim testified that, "after that point, [the defendant] got comfortable doing that repeatedly." T1 at 53.

Unlike the first instance, the victim testified that subsequent occurrences involved "skin-to-skin contact" and the victim's "hand on [the defendant's] genitals." T1 at 54. The victim testified that the defendant

"seemed to get sexual gratification out of it" because "he became more erect." T1 at 54.

The defendant began having her touch his penis only "a few months" after he moved in. T1 at 53. Once the abuse started, the victim testified that "[a]nytime that [they] were home alone together" the defendant asked the victim to watch Netflix with him and "he would repeat the process of having [her] touch his penis, or he would touch [her] vagina." T1 at 53. The victim explained that the defendant would first touch her "over the clothes, and then he would go under the clothes and touch [her] clitoris" and then "he would go further down and penetrate [her] with his fingers." T1 at 53-54. The frequency of this behavior varied, but happened anywhere from "several [times] a week depending if [she] was on summer vacation, or it could happen once a month if the house was full." T1 at 54. In short, the frequency "depended on other people's schedules" and the "longer people weren't around, the more the activity picked up." T2 at 54.

The sexual assaults began a few months after the defendant moved in and continued "right up until he moved out." T1 at 56. The victim could not recall "the exact date" that the defendant moved out but estimated that she was "between 14 and 15" when he left. T1 at 56, 57. The victim did not recall seeing the defendant again after he moved out, but he contacted her via text message and telephone after he moved out. T1 at 59-60.

The victim read text messages between her and the defendant into evidence. T1 at 60-87. The victim saved and uploaded the text messages to Google Drive for the purpose of "gathering evidence." T1 at 60-62. During that text message exchange, the defendant expressed that he missed "Netflixing" with the victim, T1 at 71, and stated that he "fell in love with

[her] despite [her] age." T1 at 72. The victim asked the defendant if he missed "[a]ll of the sexual shit" and the defendant replied "[o]h, um . . . I thought you never wanted to discuss it?" T1 at 71-72. The defendant asked the victim if she had "regrets," to which the victim replied "Don't you? . . . We had sexual relations when I was super young." T1 at 72. The defendant denied that assertion but responded that the victim was "at the age of curiosity." T1 at 73. The victim replied, "I was like 12," to which the defendant responded, "I was doing weird shit at that age." T1 at 73. Later in the conversation, the defendant told the victim that "into the 19th century, [she] would've been married at the age of 12." T1 at 75. The defendant also expressed that he was worried about "the law" because "[t]hey don't know." T1 at 77. When the victim tried to arrange a time to speak to the defendant on the phone, the defendant stated "I can, but I would like to be clear. I can only say so much over a phone, less on texting. Texting is not private." T1 at 86.

Subsequently, the victim called the defendant from the Webster Police Department at the request of Lieutenant Phillip Mitchell, who had arranged for a one-party phone call. T1 at 15-16, 89-90. On that call, which was submitted into evidence and played for the jury, T1 at 91-94, the defendant "did not admit to" sexually assaulting the victim, but "[h]e alluded to it." T1 at 91.

**2. Nichole LaFrazia's Testimony.**

The victim's mother, Nichole LaFrazia (Nichole), testified that the defendant moved in with her "just a few months" after they met, "[r]ight around 2009 [or] 2010." T1 at 120. Nichole testified that the defendant

moved out of her house "[a]round 2014." T1 at 122. Accordingly, the defendant lived with her from the time the victim was "about 10 [or] 11" up until the victim was "about 14 or so." T1 at 122.

Nichole maintained a full-time job at the Eye Center of Concord during the time the defendant lived with her and worked from 8:30 A.M. to 5:00 P.M. T1 at 122. When the victim got home from school, the defendant "would watch her if he wasn't working." T1 at 122-23. Nichole testified that the defendant was employed "[o]ff and on" during their relationship and he had "a couple of mechanics jobs . . . worked for DIRECTV for a little while and then" worked for a company building playgrounds. T1 at 123. Nichole estimated that the defendant was unemployed for "[l]ess than half" of their relationship. T1 at 123.

**3. Motion to Dismiss.**

After the State rested its case, the defendant made a motion to dismiss, stating that the "time line was never fully established." T2 at 170. The trial court denied the motion. The court explained that the victim "testified that [the defendant] moved into her residence sometime when she was in sixth grade" and that the "acts of sexual abuse started" a few months thereafter and "occurred continuously until [he] left the residence." T2 at 170. The court stated that it had "looked at the evidence" and "checked the dates," and viewing "the evidence in the light most favorable to the State," the court found that the "State ha[d] met its burden with regards to each of the charges." T2 at 170. After his motion to dismiss was denied, the defendant took the stand to testify on his own behalf as the sole witness in his defense. T2 at 172-202.

### 4. Defendant's Testimony.

The defendant testified that he moved in with Nichole and the victim in the fall of 2010 and lived at the residence through at least the end of 2012. T2 at 186. The defendant lost his job as a mechanic shortly after moving in. T2 at 173. The defendant testified that he later obtained a job with Multiband, a subcontractor for DIRECTV, in which he worked "six days a week" and sometimes would not get home "until 8, 9:00 at night." T2 at 173. While working for Multiband, the defendant testified that he also worked as a bouncer on Friday and Saturday nights at "Top Shelf bar . . . in Concord," which left "very little time" for him to be at the house. T2 at 174. The defendant then lost his job with Multiband. T2 at 174.

The defendant testified that the victim's great aunt spent a lot of time with the victim while she was living in the house and, consequently, the victim and defendant "had very little contact with each other" during that time. T2 at 173. He testified that his relationship with the victim's great aunt was tense and that he did not "spend as much time at the house" while the victim's great aunt was there. T2 at 173. Additionally, the defendant testified that the victim spent "most every weekend" at a man named Jeremy's house — Jeremy was Nichole's ex-boyfriend. T2 at 173-74. The defendant acknowledged that he, Nichole, and the victim would often spend "time off . . . watching Netflix." T2 at 174.

The defendant testified that he moved out during the winter of 2012 to tend to his father, who had been hospitalized in Bangor, Maine. T2 at 174-75. While living in Maine, the defendant secured a job with a flooring company. T2 at 176. He testified that he made a trip back to New

Hampshire in the summer of 2013 to take the victim and Nichole shopping. T2 at 176-77. After losing his job with the flooring company, the defendant testified that he moved back in with Nichole for "a month in 2013." T2 at 177. Sometime thereafter, the defendant took a job with "Natural Playgrounds of Concord, New Hampshire," which required him to travel to install playgrounds in various parts of the country. T2 at 177, 179. During the time the defendant worked for Natural Playgrounds, he stayed in contact with the victim and Nichole. T2 at 177.

The defendant then moved to Florida where he worked for an "air-conditioning company" and later for a "home security" company. T2 at 179. The defendant testified that he continued to communicate with Nichole and the victim during that time, "although it was becoming less frequent." T2 at 181. Then, in 2016, the defendant testified that "out of the blue, this started" with "the one-party call" and "some text messages" he received from the victim. T2 at 181. The defendant testified that he "was confused about what was going on" but "[f]elt like [he] was being set up for something" so he tried "to be as vague as possible about everything." T2 at 181-82. The "next thing [he knew], the sheriff's department[]" showed up at his stepmother's house and "it just snowballed from there." T2 at 182.

The defendant admitted to sending the text messages that the victim had read into evidence and that it was his voice on the one-party phone call recording. T2 at 192. Ultimately, however, the defendant testified that he was "not aware of any sexual molestation that happened anywhere, concerning [the victim]." T2 at 183. He testified that he "didn't see anything. [He] didn't hear of anything. And [he] certainly didn't do anything." T2 at 183.

After an hour and twenty minutes of deliberation, the jury returned verdicts of guilty on all three charges. T2 at 231-233. This appeal followed.

## SUMMARY OF THE ARGUMENT

In this sufficiency challenge, the defendant does not contend that the evidence was insufficient to prove that the defendant committed the alleged acts of sexual assault. *See* DB at 15, 19-20. Rather, the defendant asserts that the evidence was insufficient to prove part of the time element required by RSA 632-A:2, III — specifically, that the alleged acts were committed over a period of two months or more. *See* DB at 15, 17 n. 9, 19-20.

The sexual contact indictment required the State to prove that the defendant sexually assaulted the victim by forcing her to touch his penis on more than one occasion over the course of two months or more and within five years before she reached the age of 13. DA at 24. The sexual penetration indictment required the State to prove that the defendant sexually assaulted the victim by penetrating her vagina with his finger on more than once occasion over the course of two months or more and within five years before she reached the age of 16. DA at 25.

The defendant argues that there was insufficient evidence to convict the defendant on the sexual contact indictment because the State failed to prove that the defendant forced the victim to touch his penis on more than one occasion over a period of two months or more before she turned 13 years old. DB at 15. Similarly, the defendant argues that there was insufficient evidence to convict the defendant on the sexual penetration indictment because the State failed to prove that the defendant penetrated the victim's vagina with his finger on more than one occasion over a period of two months or more. *Id*.

The testimony at trial established that the defendant lived with the victim and her mother during the time the victim was in sixth, seventh, and eighth grade — from the time the victim was about 10 years old until she was about 13 years old. The victim testified that the defendant forced her to touch his penis for the first time a few months after he moved in. After that, the victim testified that the defendant would force her to touch his penis, or he would penetrate her vagina with his finger, any time they were in the house alone together right up until he moved out.

Testimony from the victim and her mother established that the victim and defendant were often in the house alone together when the victim got home from school in the afternoon and during the times that the victim was on vacation from school. The victim testified that the defendant would sexually assault her as frequently as multiple times a week during summer vacation. At other periods, when the defendant and victim were alone in the house together less often, the victim testified that the defendant would sexually abuse her as frequently as once a month.

Thus, the testimony at trial, either directly or inferentially, established that the defendant forced the victim to touch his penis or digitally penetrated her vagina repeatedly throughout the time the victim was in sixth, seventh, and eighth grade, during which times she would have been 11, 12, and 13. Accordingly, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Collins*, 168 N.H. 1, 4 (2015).

## ARGUMENT

### I. SUFFICENT RECORD EVIDENCE EXISTED FOR THE JURY TO CONVICT THE DEFENDANT ON BOTH THE SEXUAL CONTACT AND SEXUAL PENETRATION INDICTMENTS.

Under RSA 632-A:2, III, "[a] person is guilty of aggravated felonious sexual assault when such person engages in a patten of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age." *Collins*, 168 N.H. at 4. "Pattern sexual assault" is defined as "committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years." *Id*. (quoting RSA 632-A:1, I-c (emphasis omitted)). RSA 632-A:2, III criminalizes a continuing course of sexual assaults, not isolated instances. *State v. Sleeper*, 150 N.H. 725, 728 (2004). The essential culpable act, the *actus reus*, is the pattern itself, that is, the occurrence of more than one sexual assault over a period of time, and not the specific assaults comprising the pattern. *Id*. (quotation omitted). Thus, both the pattern itself and its temporal requirement constitute elements of the culpable act. *Id*.

When considering a challenge to the sufficiency of the evidence, this Court objectively reviews the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State. *Collins*, 168 N.H. at 4. It is the defendant who bears the burden of demonstrating that the evidence was insufficient to prove guilt. *Id*. In reviewing the evidence, this Court

examines each evidentiary item in the context of all the evidence, not in isolation. *Id*. "Further, the trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom." *Id*.

When a sufficiency challenge is made at the close of the State's case, only the evidence presented to that point in the trial can be examined in deciding the motion. *State v. Hill*, 163 N.H. 394, 395 (2012). However, if the trial court denies the motion and the defendant then offers evidence, this Court reviews "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." *Id*. (quoting *State v. Littlefield*, 152 N.H. 331, 349-50 (2005)). Because a challenge to the sufficiency of the evidence raises a claim of legal error, this Court's standard of review is *de novo*. *Collins*, 168 N.H. at 4.

On appeal, the defendant argues that there was insufficient evidence at trial to convict him on the two pattern AFSA indictments against him. The defendant concedes that "the State did present sufficient evidence as to each indictment that the defendant committed more than one act of sexual assault upon the same victim." DB at 15. However, the defendant contends that the State "failed to establish that the acts relevant to each indictment occurred over a period of 2 months or more." *Id*. Additionally, with respect to the sexual contact indictment only, the defendant avers that the "State failed to establish that the acts occurred when the alleged victim was under 13 years of age." *Id*.

### A. Sufficient Evidence Existed For The Jury To Convict The Defendant On The Sexual Contact Indictment.

The defendant first argues that there was insufficient evidence to convict him of the charge contained in the sexual contact indictment — the indictment alleging that the defendant engaged in pattern sexual assault of sexual contact with the victim by intentionally directing the victim to touch his penis with her hand on more than one occasion while the victim was under the age of 13. DB at 16-19; DA at 24 (indictment). Despite his concession that the state presented sufficient evidence "as to each indictment" that the defendant committed more than one act of sexual assault upon the victim, DB at 15, the defendant contends that the State's evidence was insufficient to prove: (1) more than one sexual assault occurred; (2) the sexual assaults occurred over a period of two months or more;[2] and (3) the victim was under the age of 13 at the time of the sexual assaults. DB at 17.

As to the first of the defendant's three contentions, the victim testified that after the first time the defendant made her touch his penis, "he got comfortable doing that repeatedly." T1 at 53. She testified that "[a]nytime that" she and the defendant "were home alone together . . . he would repeat the process of having [her] touch his penis." T1 at 53. The victim testified that she would often be home alone with the defendant when she got home from school in the afternoon, during school vacations, and during summer vacation. T1 at 51, 54. The victim's testimony was buttressed by Nichole's testimony that the defendant would watch the

[2] The defendant does not argue that there was insufficient evidence to conclude that the sexual assaults occurred within a period of five years. DB at 17 n. 9.

defendant when she got home from school "if he wasn't working" and that the defendant was employed "[o]ff and on" during their relationship. T1 at 122-23. Indeed, the defendant's testimony supports Nichole's assertion that he was employed off and on during the time he lived with the victim and Nichole. T2 at 173-74. Accordingly, the trial testimony reasonably supports the inference that the defendant committed sexual assault against the victim by making her touch his penis on more than one occasion.

As to the second and third of the defendant's contentions, the victim testified that the defendant had her touch his penis for the first time only "a few months" after moving in with the victim and her mother. T1 at 53. The victim testified that she believed the defendant moved in with her and her mother when she was 12, although "the timeline [was] a little bit fuzzy." T1 at 47. The victim also testified that the defendant moved into the house when she was in sixth grade, at which time she would have been 11. T1 at 45, 48. Nichole testified that the defendant moved in "[r]ight around 2009 [or] 2010," at which time the victim would have been 9 or 10. T1 at 120. The defendant testified that he moved in with the victim and Nichole in the fall of 2010, at which time the victim would have been 10. T2 at 186.

Further, the victim testified that the defendant's routine of having her touch his penis continued "[p]retty much right up until he moved out." T1 at 56. The victim testified that she believed the defendant lived with her and her mother until she was 14. T1 at 47. The victim also testified that the defendant lived with her and her mother "all the way up to around eighth [grade]," T1 at 48, at which time she would have been 13. T1 at 45. Nichole testified that the defendant moved out "[a]round 2014." T1 at 122.

Prior to July 5, 2014, the victim would have been 13. The defendant testified that he moved out and went to Maine in the winter of 2012, T2 at 174-75, at which time the victim would have been 12.

Additionally, as previously discussed, the victim testified that the defendant repeated this conduct "[a]nytime that" they were alone together, T1 at 54, and testimony from the victim and Nichole supports the inference that the defendant and victim were often home alone together after school, during school vacations, and during summer vacation. T1 at 51, 122-23. The victim also testified that the defendant lived with her from the time she was in sixth grade until she was in eighth grade. T1 at 48.

Thus, taken in the light most favorable to the State, the testimony at trial supports the conclusion that the defendant moved in with the victim and Nichole when the victim was 10 and that he made the victim touch his penis a few months thereafter. *See* T1 at 45, 48, 120; T2 at 186. The testimony also supports the conclusion that the defendant continued to force the victim to touch his penis while she was 11 and 12, right up until he moved out when she was 13. *See* T1 at 45, 56, 122; T2 at 174-75. Any conflict in the testimony as to when the defendant moved in or out was for the jury to resolve, and this Court will defer to the findings of the jury unless no reasonable person could have come to the same conclusion. *State v. Ericson*, 159 N.H. 379, 386 (2009).

In summary, taken in the light most favorable to the State, the evidence proved that the defendant made the victim touch his penis repeatedly whenever he and the victim were alone together over the course of two to four years. The testimony also proved that the defendant made the victim touch his penis during the school year, during school vacations,

and during summer vacation, throughout sixth, seventh, and eighth grade. Since the school year, school vacations, and summer vacation occur during different, although sometimes overlapping, months throughout the year, it can be reasonably inferred that the defendant forced the victim to touch his penis on more than one occasion over a period of two months or more. Moreover, since the victim was 11 in sixth grade and 12[3] in seventh grade, T1 at 45, it can be also inferred that the defendant forced the victim to touch his penis on more than one occasion over a period of two months or more before the victim turned 13. *See Collins*, 168 N.H. at 4 (stating that "the trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom.")

Accordingly, the testimony at trial, taken together and drawing all reasonable inferences from it in the light most favorable to the State, permits a rational juror to conclude that the defendant committed sexual assault against the victim by forcing her to touch his penis on more than one occasion over a period of two months or more before the victim turned 13 years old.

The defendant's reliance on this Court's decision in *State v. Racette*, ___ N.H. ___ (decided April 26, 2022) is misplaced. DB at 18. In *Racette*, this Court held that there was insufficient evidence of a pattern of sexual intercourse where the victim testified that "[s]ometimes [the defendant's] pee pee would touch, he'd try to . . . put it in my vagina." *Racette*, __ N.H.

[3] The text messages the victim read into evidence further support the conclusion that the sexual assaults continued to occur while the victim was 12. *See* T1 at 73, 75.

__, slip op. at 8. The Court explained that there was no other testimony "about when or how often such attempted intercourse occurred during the defendant's four to five month residence at the apartment." *Id*. Even construing the word "sometimes" in the light most favorable to the State, the victim's testimony did not "demonstrate the frequency of the conduct" or "establish a temporal connection between discrete acts of attempted sexual intercourse." *Id*.

In this case, the victim testified that the defendant forced her to touch his penis a few months after he moved in and continued to do so right up until he moved out. She testified that this happened anytime the defendant and the victim were home alone together. Testimony from the victim and Nichole established that the victim and defendant were often home alone together when the victim got home from school and when she was on vacation from school. Further, the victim's testimony permitted the inference that the sexual assault went on from the time she was in sixth grade until she was in eighth grade. Thus, unlike *Racette*, this testimony proved the frequency of the conduct and established a temporal connection between discreet acts of the defendant forcing the victim to touch his penis. Accordingly, *Racette* is not controlling in this case and the defendant's reliance upon it is unavailing.

### B. Sufficient Evidence Existed For The Jury To Convict The Defendant On The Sexual Penetration Indictment.

The defendant next argues that there was insufficient evidence to convict him of the charge contained in the sexual penetration indictment — the indictment alleging that the defendant engaged in pattern sexual assault

of sexual penetration with the victim by inserting his finger into her genital opening on more than one occasion before the victim was 16. DB at 19-20; DA at 25 (indictment). The defendant concedes that the victim's testimony "established that multiple instances of sexual penetration occurred before the alleged victim reached the age of 16." DB at 20. However, the defendant contends that there was no evidence to establish "that the pattern of sexual penetration occurred over a period of 2 months or more." *Id*.

The victim testified that "[a]nytime" she was "home alone" with the defendant, he would have her "touch his penis, or he would touch [her] vagina." T1 at 53. The defendant touched her over her clothes before going underneath her clothes and touching her clitoris, and "then he would go further down and penetrate [her] with his fingers." T1 at 54. When asked how frequently that would occur, the victim said that it varied, but it could happen "several [times] a week depending if [she] was on summer vacation, or it could happen once a month if the house was full." T1 at 54. The victim explained that the "longer people weren't around, the more the activity picked up." T1 at 54.

As discussed in the previous section of this brief, testimony established that the victim and the defendant were often alone in the house together when the victim returned home from school or was on vacation from school during the time the victim was in sixth, seventh, and eighth grade. Thus, viewed in the light most favorable to the State, the victim's testimony that the defendant forced her to touch his penis, or that he touched and penetrated her vagina, "[a]nytime" they were "home alone" proved that the defendant touched her vagina on more than one occasion over a period of two months or more.

The victim's testimony regarding the frequency with which the defendant touched her vagina supports the same conclusion. The victim's statement that the defendant touched her vagina "once a month if the house was full" proved that the defendant touched the victim's vagina on more than one occasion over the course of two months or more. Her use of the phrase "once a month" proved that the conduct happened at least every month and that testimony, taken in the light most favorable to the State, was sufficient to satisfy the State's burden. Additionally, the victim's testimony that the defendant touched her vagina more frequently during summer vacation than times in which the defendant and victim would be home alone less often supports the inference that the defendant touched the victim's vagina during the months of summer vacation and during months in which the victim was not on summer vacation.

Accordingly, drawing all inferences from the evidence at trial in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to conclude that the defendant sexually assaulted the victim by penetrating her vagina with his finger on more than one occasion over a period of two months or more, and within a period of five years,[4] before the victim reached the age of 16.

[4] The defendant does not appear to contest that the acts of penetration occurred within a period of five years, nor could he. There is no support in the record for concluding that the defendant lived with the victim and her mother for five years or more, and all acts of sexual assault were alleged to have occurred while the defendant lived with the victim.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court hold that there was sufficient evidence for the jury to convict the defendant on both AFSA indictments and affirm the judgment below.

The State does not request oral argument. However, should this Court schedule this case for oral argument, Sam Gonyea will present on behalf of the State.

Respectfully Submitted,

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July 29, 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 5,923 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.

July 29, 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.

July 29, 2022 *<u>/s/ Sam M. Gonyea</u>*
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