THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0106

State of New Hampshire

v.

Charles A. Paul

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument requested)

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ISSUES PRESENTED

I. Whether the trial court erred in admitting the defendant's prior convictions pursuant to Rule of Evidence 609.

II. Whether the trial court erred by failing to disclose records following its *in camera* review.

STATEMENT OF THE CASE

In June 2019, the Rockingham County grand jury indicted the defendant with three felony counts of first-degree assault and one felony count of felon in possession of a deadly weapon. DA[1] 5-8. In September 2019, the Rockingham County grand jury indicted the defendant with one felony count of attempted murder. *Id*. at 4. Following a five-day trial in December 2021, the jury convicted the defendant on all charges. V 2-3.

On February 17, 2022, the trial court (*Honigberg*, J.) sentenced the defendant on the attempted murder conviction to forty-five years to life in prison, stand committed. DA 104. On the felon in possession conviction, the defendant was sentenced to seven-and-a-half years to fifteen years in prison all suspended for twenty years from release. DA 107.

This appeal followed.

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[1] Citations to the record are as follows:
"AD_" refers to the defendant's appealed decision appendix to his brief and page number;
"DA_" refers to the defendant's appendix to his brief and page number;
"DB_" refers to the defendant's brief and page number;
"SA_" refers to the State's appendix to the brief and page number;
"T_" refers to the trial transcript and page number; and
"V_" refers to the verdict transcript and page number.

STATEMENT OF FACTS

A. The State's Case at Trial.

On February 7, 2019, the victim was living in a garage apartment with her parents in Northwood, New Hampshire. T 178. In early February 2019, the victim's parents were away on a two-week vacation, so the victim was staying in her parents' second-floor bedroom. T 180. Prior to her parents leaving for their trip, her parents allowed the victim to have someone stay with her due to her "fears about being alone." T 184. The victim told her parents after they had left that the defendant was staying with her. T 185. The victim's parents believed that the defendant was the victim's "acquaintance or a friend." T 185-86. The defendant had also done some housework for the victim's parents. T 227.

In February 2019, the victim had known the defendant for about a year. T 227. She explained that she asked him to stay with her while her parents were gone because he would be "mature" and would not "pressure [someone] into anything that they don't want to do." T 228. The defendant was 53 and the victim was 28. T 226, 228. While the defendant was staying with the victim, he was sleeping either on the first floor or in a bedroom across from the victim's parents' bedroom. T 230. While he stayed with the victim, the two drank beer and used marijuana. T 232. They did not recreationally use the victim's medications. *Id*. During cross-examination, the victim said that the defendant had used LSD weeks prior to February 2019, and she had used LSD six months prior February 2019. T 250.

Between 2012 and 2019, the victim was diagnosed with bipolar disorder, post-traumatic stress disorder, depression, psychosis, and

schizophrenia. T 182, 224. The victim had been hospitalized twice due to her mental health condition, once between 2012 and 2014 and again in 2016. T 182-83. In 2016, the victim had also reported to one of her providers that dollar bills she received at her job had messages on them that said she was going to die. T 255, 258. In 2017, the victim told a provider that "entities were distracting her when [she] tried to write with a pen by causing noise through the pen." T 264. In 2019, the victim was prescribed clonazepam for anxiety, viibryd for depression, and prazosin for night terrors. T 225. The victim also explained on cross-examination that she recently began seeing a new psychiatrist who was reevaluating her diagnoses. T 266.

In 2019, the victim's mental health was "better than [it] had been." T 187. The victim was working at a local cinema and was excited about a potential promotion to assistant manager. *Id*. One of the victim's managers said that he did not observe anything concerning about her behavior at work and there were no issues that were reported to him. T 284-86. One of the victim's coworkers also testified that she was "always a good employee," who got along "very well" with the staff. T 300-03. He also remembered working with the victim on February 6, 2019, and did not remember the victim's behavior being "out of the ordinary" that day. T 301.

The victim's father explained that when the victim was not doing well, she was "argumentative" and might "verbally attack" someone, but it was "not necessarily a physical-type thing." T 188. She was more anxious and fearful when she was not doing well and had believed in the past that people "out west" were "channeling" people in New Hampshire to harm

her. T 210. He also explained that he and his wife would not have left for vacation if the victim was not doing well. T 191.

On February 6, 2019, prior to the victim's assault, her father said that he spoke to her on the phone. T 191. She was coherent, upbeat, and did not appear on the phone to be experiencing any delusions or paranoia. T 191-93. He also said that he or his wife spoke to the victim almost every day while they were on vacation. T 215. During these phone calls, the victim did not mention anyone "being out to get her." *Id*.

The victim testified that she could not remember much about February 6, 2019, but did remember that nothing "out of the ordinary" happened between her and the defendant during the day. T 239. She remembered that they made a "late-night snack" and went to bed. T 239-40. She did not remember where the defendant went to bed and did not remember fighting with him before going to bed. T 243-44. Then, during the night on February 6, 2019, she remembered waking up in her parent's bed unable to breathe. T 240. She remembered that she "blacked out" and woke up on a stretcher. *Id*. When she woke up, she smelled rain hitting asphalt. *Id*.

The next memory the victim recalled was fighting with her surgeon, Dr. Patel, because she was in "fight mode." T 242. The victim explained that she was in this mode because she "had just been stabbed, and [she] was fighting." T 242. She then said that her next memory was waking up in the hospital intubated and writing on a whiteboard. T 243. A nurse had given her a whiteboard and asked her to write if she remembered anything from her attack. *Id*. The victim said that when she woke up in the hospital, she

was in pain and felt like she had been "stabbed multiple times," and "like a freight train hit [her] kind of." *Id*.

At approximately 4:10 a.m. on February 7, 2019, Northwood Police Officer Daniel Gilon responded to the victim's home after being dispatched there for a 911 call that a woman had been stabbed in the neck by the caller. T 311-13, 315. When the officer arrived on scene, the caller, later identified as the defendant, led him to the victim. T 313-14. When Officer Gilon found her, she was lying on the floor "with an excessive amount of blood on her." T 313. Officer Gilon also remembered the victim telling him that she was cold, that her neck was hurt, and that she could not breathe. T 320. Officer Gilon remembered seeing a knife under a chair in the foyer when he arrived. T 320-21.

When EMTs arrived on scene, they observed the victim lying on her right side about three feet inside the residence near the main door. T 40. She was moaning when they found her and was not responsive. *Id*. The paramedics saw three "puncture wounds on her neck" and saw "copious amounts of blood throughout her clothing." T 40-41. They transported the victim to Concord Hospital. T 41.

Once at the hospital, the victim was admitted to the critical trauma room as a level I trauma patient. T 42, 54-55. The attending surgeon, Dr. Patel, observed a one-centimeter stab wound on the right side of the victim's neck and "two other cuts on the left side," both of which were three centimeters. T 55-56, 62. One of the cuts on the left side was on the front of the victim's neck and the other cut was towards the back of her neck. T 56-57. The victim told Dr. Patel that someone stabbed her and that she had ingested alcohol and marijuana prior to being stabbed. T 60-61.

While the victim was hospitalized, she began "bleed[ing] significantly" from her left neck wound. T 68. Doctors operated on the victim and discovered that her "internal jugular vein . . . was cut in two pieces." T 72. They also discovered that her carotid artery was bruised, that some of her thyroid cartilage was chipped off, and that she had a one-and-one-half to two centimeter laceration to her esophagus. T 74, 81. Following this surgery, Dr. Patel more thoroughly examined her right neck wound and determined that this wound was so deep that she could feel the victim's vertebrae by sticking a Q-tip into the wound. T 76-77. Dr. Patel explained that all three wounds would have taken a "significant amount of force" to cause. T 81-82.

Following her surgery on February 7, the victim was on a breathing tube for eleven days. T 85-86. Following its removal, doctors inserted a feeding tube because she could not swallow on her own due to her injuries. T 86. She also suffered from leaks in her esophagus as it healed and multiple infections, including fungal infections. T 89. Following her surgery, a nurse photographed the victim's neck injuries as well as bruising on the victim's right side of her body, including her forearm, wrist, hand, thigh, knee, and lower leg and bruising on the victim's left side of her body, including her upper, middle, and lower arm, hand, and knee. 104-15.

On March 1, 2019, the victim was discharged with a feeding tube and an esophageal leak. T 89-90. The victim had numerous complications following her discharge, including a severe infection in her chest cavity that required her to be admitted to the hospital for a few weeks. T 197. She also required a feeding tube in her stomach for two-and-a-half years. T 245.

On February 7, after the victim left in the ambulance, Officer Gilon and another officer briefly searched the victim's home to make sure no one else was inside. T 321-22. During this search, Officer Gilon observed blood at the bottom of the stairs, at the top of the stairs, and in an upstairs bathroom. T 322-23. He also noticed that one of the bedrooms had been "ransacked." T 323.

After this search, Northwood Police Lieutenant Shane Wells arrived on scene. T 325. He read the defendant his *Miranda* rights and then asked him some questions. T 325, 363. This conversation was recorded on Officer Gilon's body-worn camera and parts of the conversation were admitted at trial as a full exhibit. T 363-64. During this conversation, the defendant told the lieutenant that when he could not find his cell phone, he "flew into a rage," woke up the victim to help him look for his cell phone, and that when she woke up, she lunged at him and he "flipped out." T 520-21. Then, Lieutenant Wells entered the victim's home, exited the victim's home, and spoke to the defendant again. T 365-66. This conversation was also recorded on a body-worn camera and admitted at trial as an exhibit. *Id*.

Following this conversation, Lieutenant Wells told Officer Gilon to arrest the defendant. T 366. During the booking process, Officer Gilon observed what appeared to be blood on the defendant's hands, under his fingernails, and on the defendant's work boots. T 369, 371. He also observed a scratch on the defendant's nose. T 371. After the booking process, the officer placed the defendant back in the police cruiser. T 378 While he was in the cruiser, the defendant was angry and told the officer that he was going to prison for a "long time," that he was "going to jail because [the victim] fed him drugs," and that he would "kill himself and

just save us the time." T 378, 382-83. The defendant did not tell the officer at any point during their interactions that the victim had a knife. T 385.

Following his arrest, New Hampshire State Police Detective Alexander Davis and Lieutenant Wells interviewed the defendant at approximately 7:30 p.m. on February 7, 2019. T 453. This interview was recorded and played for the jury. T 455; SA 3-62. During this interview, the defendant told the detective that the victim "would never hurt him." T 458. He also told the detective that he attacked the victim because he had used drugs and that he had "no reason in the world to hurt her." *Id.*; SA 45. During this interview, the defendant denied bringing the victim into the upstairs bathroom, denied losing his cell phone, and denied that he woke the victim up to help him look for his cell phone. SA 22, 30-32. He also did not tell the detective that the victim hit him, punched him, threatened him, or had a knife. T 457. The defendant also did not tell the detective that he felt threatened by the victim or feared for his life. *Id.*

The Northwood police and the state police's major crime unit investigated and processed the crime scene. During this process, the state police seized two knives as evidence. T 122. One knife had a wooden handle and was found in the first-floor foyer and the other was a black folding knife found on a dresser in an upstairs bedroom. T 124-28. The black folding knife belonged to the victim's father. T 203-04. The victim's father did not recognize the knife with the wooden handle. T 204-05. This knife had a reddish-brown substance on the blade. T 132.

The New Hampshire State Forensic Lab tested the two knives and determined that only the knife with the wooden handle had "deposits of blood-like matter on both sides of the blade." T 156. The lab also

determined that the victim's blood was on the knife and on a blue rug that was swabbed by detectives. T 153, 156-57.

Paul Kish, who was certified at trial as an expert in blood spatter evidence and analysis, explained that it was significant to him that blood was located on both sides of the blade because that would only occur if blood were poured over top of the blade, or if something covered in blood grabbed on to the blade, or if the blade went into "something that's getting blood on both sides." T 397, 405.

Kish also testified that the blood staining on the floor at the foot of the victim's parents' bed was a "blood pool" caused by "heavy bleeding." T 430-31. Kish concluded that the victim was "on the floor in this location while bleeding, obviously, relatively heavily from her injuries." T 431. He also concluded that there were blood spatter stains on the comforter, the sheets, and the bed pillows that originated from a location near the blood pool at the foot of the bed. T 431-32. Kish also concluded that the bloodstain evidence established that the victim was moved from the upstairs bedroom to the upstairs bathroom, down the stairs, and into the foyer where she was found by police. T 433.

B. The Defendant's Case at Trial.

The defendant testified that he is a convicted felon and was convicted of escape. T 481. He said that he met the victim eight months to a year prior to February 7, 2019. T 482. Once they were friends, they would spend weekends at each other's houses. *Id*. He knew during their friendship that the victim was on a conditional release from New Hampshire Hospital and was on medications. T 483-84.

During the two weeks leading up to February 7, the defendant said that the victim invited him to stay at her parents' home with her so that she would not be alone. T 484. At night, he would either sleep with the victim in her apartment attached to the garage, in the bedroom with the victim, or on the couch. *Id*. The two also drank alcohol and used marijuana together. T 485.

On February 6, 2019, after the victim returned home from work around 5:00 p.m., the two went to a convenience store, purchased a six pack of beer, and returned to the victim's home where they shared the beer. T 486-87. When the beer was gone, the defendant walked to a nearby store and purchased a second six pack of beer. T 488. When he returned, the two continued drinking and used marijuana. T 488. The defendant denied taking any medications at this time and denied that the victim forced him to take medication. T 489. He said that he lied to the police about this fact to "protect [the victim]" from getting in trouble or returning to the New Hampshire State Hospital. T 489-90.

The defendant explained that while the two were "hanging out," the victim "shaved a spot off [the defendant's] beard with a knife." T 490. He said that the victim used the knife with the wooden handle that was in evidence to shave his beard. T 514-15. He also claimed that this did not concern him because he thought that it was funny. T 515. The defendant then decided to shave off his beard, so he and the victim went to the bathroom and the victim provided him with an electric clipper to shave his beard. T 491. While he was shaving, the victim told the defendant that she was going to take a nap in her parents' bedroom. T 492. After he finished shaving, the defendant went downstairs to use his computer. *Id*. At some

point, the defendant realized that he was missing his cell phone, so he decided to look for it upstairs in the victim's parents' bedroom. T 493-94.

When he entered this bedroom, he woke the victim up by shaking her feet. *Id*. When he did this, he claimed that the victim "lunged up out of the bed and she had a knife in her hand." *Id*. The defendant "got behind" the victim and struggled with her for the knife. T 495. The defendant claimed that as they struggled, they "fell backwards onto each other" in front of the bed and the victim "got wounded." *Id*. The knife also fell onto the floor and the defendant found it and picked it up, despite the bedroom being dimly lit. T 495, 520. Then, the defendant claimed that the victim ran into him, and he stabbed her to "stop her from attacking [him]." T 496. He also said that the "black folding box cutter" in evidence was on the bureau in the bedroom. *Id*. He claimed that he saw the victim look at this box cutter prior to stabbing her, and when he saw her look at it, he believed that she would lunge for the box cutter. T 508. Based on this belief, the defendant stabbed the victim. *Id*.

After the defendant stabbed the victim "a couple times," she "collapsed onto the floor." T 496. The defendant said that he grabbed a towel from the bathroom and wrapped up the victim's neck to stop it from bleeding. T 496-97. He also claimed that when he grabbed the towel, he "wiped the knife [] closed it, and put it in [his] back pocket." T 497. Then, the defendant looked around for a cell phone to call 911, but did not find one in the victim's parents' bedroom. *Id*. The defendant claimed that he planned to carry the victim to her car and drive her to get help, but she was too heavy for him to carry. T 498. Instead, the defendant placed the victim on a rug and dragged her to the front of the home. *Id*.

The defendant claimed that once downstairs, he found a cell phone when he was looking for the victim's car keys. T 499. Because he found a cell phone, he called 911 instead of driving the victim somewhere to get help. *Id*. When police arrived, the defendant told them that he had stabbed the victim. T 500. The defendant explained that he told the police that he was "high on drugs" when he stabbed the victim to "protect" her. T 504-05. He also explained that when he spoke to a trooper 12 hours later, he told the trooper that the victim "stuffed pills down his throat," that the victim lunged at him, and that he stabbed her. T 506, 513. He did not tell the trooper that the victim had a knife. *Id*. He also did not tell the trooper or the police on scene that the victim shaved off part of his beard with a knife. T 515.

C. The State's Motion in Limine Regarding Rule 609.

On November 28, 2021, the State filed a motion *in limine* seeking to impeach the defendant at trial with a 1987 aggravated felonious sexual assault conviction (AFSA), a 1994 felony attempted escape conviction, and a 2010 AFSA conviction. DA 89-90. Pursuant to Rule 609, a criminal defendant's character for truthfulness can be attacked during his testimony with convictions punishable by more than one year of incarceration "if the probative value outweighs [the] prejudicial effect to the defendant." *N.H. R. Evid.* 609(a)(1)(B). If more than ten years have passed since the defendant's conviction or release from confinement, then the convictions are only admissible if their "probative value, supported by specific facts and circumstances, substantially outweighs [the] prejudicial effect," and if the proponent gives the adverse party "reasonable written notice of the intent to

use" the convictions. *Id*. at 609(b)(1), (2). Here, the State argued that the defendant's convictions were admissible even if they fell outside of the ten-year period because their probative value substantially outweighed their prejudicial effect. DA 89.

On December 1, 2021, the defendant objected to this motion, arguing that the State had not established that the probative value of the convictions substantially outweighed their prejudicial effect. DA 91-93. The defendant contended that the State's reasoning, that the convictions allowed the jury to "get the full picture of who [the defendant] is as a person," was not a compelling reason to admit the convictions. DA 93. The defendant also argued that the 2010 AFSA conviction was actually a 1987 conviction. DA 91. The defendant explained that in 1987, the defendant was convicted of two AFSAs and on one, the defendant was sentenced to suspended prison time and on the other, he was sentenced to stand committed prison time. *Id*. Then, in 2010, the suspended prison sentence on one of the AFSA convictions was imposed due to a violation of a condition of that sentence. DA 92. As such, this conviction should also be considered well outside the ten-year period provided in Rule 609. *Id*.

On December 6, 2021, the State filed a supplemental to its Rule 609 motion *in limine*. DA 95-98. The State withdrew its request to impeach the defendant with his 1987 stand committed AFSA conviction, but argued that it had compelling reasons to impeach the defendant with the initially suspended AFSA conviction and the attempted escape conviction. DA 95.

Regarding the suspended AFSA conviction, the State explained that the defendant was sentenced to seven-and one-half years to fifteen years all suspended for five years from his release on his stand committed AFSA

charge. *Id*. He was released from prison in April 2008 and in 2010, three-and one-half years to seven years of his suspended sentence was imposed because the defendant violated the terms of his sentence by committing two new crimes; felon in possession of a deadly weapon in August 2008 and failure to report certain information as a sexual offender in October 2008. *Id*. The defendant was released from incarceration in August 2014. *Id*.

Regarding the attempted escape conviction, the defendant was initially sentenced to three-and one-half years to seven years all suspended for five years, consecutive to the five-year suspension period in the AFSA conviction. DA 96. This suspended term was imposed in full concurrent to the imposed AFSA sentence due to the two new crimes listed above in August and October 2008. *Id*. While this sentence ran concurrently with the AFSA imposed sentence, he was not released from incarceration on this sentence until June 2016, according to the State. *Id*.

The State argued that because the suspended sentences on the AFSA and attempted escape convictions were imposed, these convictions fell within the ten-year time period in Rule 609 because he was released from confinement on both within ten years of the trial date. DA 97. The State contended that these convictions were admissible because they were more probative than prejudicial. *Id*. The State also argued that, even if the trial court found that the convictions fell outside the ten-year period, their probative value was substantially outweighed by their prejudicial effect because "credibility is a central issue in this case" given the defendant's intent to raise self-defense at trial. DA 97-98.

The State also argued that the two convictions showed the defendant's repeated contempt for the law and thus were relevant to the

defendant's credibility. *See State v. Deschenes*, 156 N.H. 71, 77 (2007) (quotations and citation omitted) (holding that the "jury should be informed what sort of person is asking them to take his word, and lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey.").

On December 12, 2021, the second day of trial, the defendant filed a supplemental objection to the State's motion, arguing that the convictions' probative value did not substantially outweigh their prejudice due to their remoteness and their nature. DA 100-102. The defendant contended that the AFSA conviction was overly prejudicial because it was "emotionally charged" and would cause the jury to infer that the defendant was "sexually motivated" when he attacked the victim. DA 102. The defendant also argued that the attempted escape conviction was overly prejudicial because it implied to the jury that the defendant had been previously incarcerated, which would arouse the jury's "sense of horror and fear." *Id*. Alternatively, the defendant asked that if the trial court admitted the two convictions, that the trial court only allow the State to refer to the convictions as felonies and not to the specific charge. *Id*.

On December 13, 2021, the third day of trial, the parties discussed the State's motion *in limine* regarding impeaching the defendant with his prior criminal convictions. T 345. The State clarified that it intended to impeach the defendant by asking him about two prior felony convictions. T 347. In doing so, the State would not refer to the defendant's AFSA conviction by name, but intended to name the defendant's attempted escape conviction, given its probative value, if the trial court permitted it to do so. *Id*.

In response, the defendant argued that the probative value of naming the attempted escape conviction was "greatly diminished" given the amount of time that had passed since the defendant's conviction. T 348.

The trial court said that it would allow the State to impeach the defendant with both felony convictions generally, but wanted the State's response to the defendant's argument regarding naming the attempted escape conviction. T 349. The State argued that naming this conviction was more probative than prejudicial because it would speak to the defendant's credibility regarding whether he would be willing to "ma[k]e up a story to protect his friend" that resulted in the defendant being incarcerated, given his desire to avoid it. T 349-50.

Following argument, the trial court ruled that the State could impeach the defendant with both felony convictions because they fell within the 10-year time period. T 352. In holding this, the trial court interpreted the ten-year time period to run from either the date of conviction or "completion of the sentence," whichever is later. *Id*. The trial court also ruled that the State could not name the AFSA conviction, but could "describe" the attempted escape conviction because it "reflect[ed] a disregard for the law, a disregard for the norms of society." *Id*. The trial court also issued a written order on December 13 consistent with its oral one. AD 3.

During the defendant's direct, he testified that he was a convicted felon and had been convicted of escape. T 481. During the defendant's cross-examination, the defendant agreed with the State that he was convicted of attempted escape in 1994 when he ran across the courthouse parking lot while he was in official custody. T 530-31.

D. The Defendant's In Camera Review Motions.

On November 14, 2019, the defendant filed a motion for *in camera* review of the [redacted] DA 11-14. The State only objected to the defendant's motion regarding [redacted] DA 17-18. The State assented to the other two requests. *Id*. The trial court (*Delker*, J.) granted the assented-to requests and denied the defendant's request to review [redacted] because the defendant had not established that it was reasonably probable that these records contained information relevant and material to the defendant's defense. DA 20-23.

On February 11, 2020, the defendant filed a supplemental motion for *in camera* review asking the trial court [redacted]. DA 29. The trial court (*Honigberg*, J.) granted this motion on May 27, 2020. AD 6.

On February 25, 2020, the trial court released records to both parties following its *in camera* review of the records it received pursuant to the defendant's December 2019 motion. AD 4-5.

On April 23, 2020, the defendant filed a second motion for *in camera* review of the [redacted]

[redacted]. DA 33-37. The State did not file a written objection. The trial court granted this motion on May 27, 2020. AD 6.

On June 11, 2020, the defendant filed a supplemental to his second motion for *in camera* review that [redacted] DA 51-73. [redacted] DA 52.

In March 2021, the trial court issued an order releasing certain [redacted] records to the parties following its completed *in camera* review of over 10,000 pages [redacted]. AD 7-8.

On May 13, 2021, the State and the defendant filed a joint motion for *in camera* review of the [redacted]. DA 84-85. The trial court granted this motion, DA 84, and reviewed over 700 pages of records. AD 9. The trial court released the records it deemed relevant and material following that review on June 17, 2021. AD 9-10.

SUMMARY OF THE ARGUMENT

This Court should interpret "confinement" in Rule 609(b) to mean any restraint or restriction on a defendant's liberty imposed as a result of a conviction**,** meaning that the ten-year time period would not begin until a defendant completes the terms of his sentence. This is an issue of first impression in New Hampshire. This interpretation aligns with the plain and ordinary meaning of the word "confine" in Rule 609(b) and aligns with this Court's principles underlying the use of convictions to impeach defendants when they testify at trial. Specifically, that the jury should be informed about "what sort of person is asking them to take his [or her] word." *State v. Duke*, 100 N.H. 292, 293 (1956).

Under this proposed interpretation, the trial court sustainably allowed the State to impeach the defendant with his felony convictions pursuant to Rule 609(a)(1)(B) because the ten-year time period had not passed. If this Court adopts a different interpretation and holds that the ten-year time period was met as to the defendant's convictions, the defendant's appeal still fails because the probative value of those convictions substantially outweighed their prejudicial effect in this case. *N.H. R. Evid.* 609(b). Here, due to the defendant's self-defense claim, his substantially different accounts of the victim's attack, and the victim's lack of memory of her attack, the defendant's credibility was a central issue at trial. Given this, the probative value of the convictions, referred to as a felony conviction and an attempted escape conviction, substantially outweighed their prejudicial effect.

If this Court finds that these convictions were admitted in error, this error was harmless beyond a reasonable doubt given both the overwhelming evidence of the defendant's guilt at trial and the minimal time spent by the State on impeaching the defendant with these convictions at trial.

Regarding the defendant's challenge to the trial court's *in camera* review of records, the defendant has not met his burden of establishing reversible error. The defendant only speculates that the trial court "may have erred," DB 33, in releasing some of the records to the parties and not other records. He does not assert what additional records required release, nor does he assert how the trial court's failure to release more records prejudiced him at trial.

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

ARGUMENT

I. THE TRIAL COURT SUSTAINABLY ADMITTED THE DEFENDANT'S PRIOR CONVICTIONS UNDER RULE OF EVIDENCE 609.

A. Standard of Review.

"To admit or exclude evidence is within the discretion of the trial court." *State v. Brown*, 175 N.H. 64, 66 (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 [her] case." *Id*.

When this Court reviews a trial court's interpretation of a rule of evidence, or any other issue of law, this Court reviews the trial court's interpretation *de novo*. *State v. Munroe*, 173 N.H. 469, 427 (2020). "When interpreting a rule of evidence [this Court] will first look to the plain meaning of the words." *State v. Long*, 161 N.H. 364, 367 (2011). "Where the language is ambiguous, or where more than one reasonable interpretation exists, [this Court] will look to the rule's history to aid in [its] interpretation, consistent with New Hampshire Rule of Evidence 102." *Id*. This Court "construe[s] rules in their entirety, not piecemeal." *Id*. The Rules of Evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." *N.H. R. Evid.* 102.

B. This Court Should Hold That, Under Rule 609(b), "Confinement" Means Any Restraint or Restriction on a Defendant's Liberty Imposed as a Result of a Conviction.

Pursuant to Rule 609, if a criminal defendant has a criminal conviction punishable by death or by imprisonment for more than one year, the conviction "must be admitted . . . if the probative value of the evidence outweighs its prejudicial effect to that defendant" if the defendant testifies. *N.H. R. Evid.* 609(a)(1)(B). "[I]f more than ten years have passed since the witness's conviction or release from confinement for it, whichever is later[,] [e]vidence 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 written notice of the intent to use it so that the party has a fair opportunity to contest its use." *Id*. at 609(b)(1)-(2).

This appeal presents an issue of first impression in New Hampshire. This Court has yet to interpret "confinement" in the context of Rule 609(b). The State asks that this Court interpret the term "confinement" in Rule 609(b) in accordance with its plain meaning. "Confinement" means "the state of being confined." *Webster's Third New International Dictionary* 476 (2002). "Confine" means to "restrain within limits [or] restrain from exceeding boundaries." *Id*. Under New Hampshire law, a criminal defendant may be confined following conviction in various ways that may shift over the time of his sentence, including through traditional incarceration, the imposition of parole or probation conditions, the imposition of other conditions while living in the community, or the imposition of a suspended or deferred sentence. *See generally* RSA 651:2.

All of these constitute different methods and levels of confinement by the government, such that a defendant's "release from confinement" does not occur until all of these restrictions and conditions on one's liberty have expired. Once that occurs, the defendant has been "released from confinement" within the meaning of Rule 609(b).

If the body responsible for adopting the New Hampshire rules of evidence intended to limit the confinement requirement in Rule 609(b) only to incarceration, or in some other manner narrower than the term's plain meaning, that body would have presumably done so. *See State v. Long*, 161 N.H. at 367 ("When interpreting a rule of evidence, [this Court] first look[s] to the plain meaning of the words."); *cf. State v. Williams*, 174 N.H. 635, 640 (2021) (explaining that this Court will not "add language that the legislature did not see fit to include").

This plain meaning interpretation is supported by this Court's prior opinions regarding a sentencing court's ability to issue and enforce suspended and deferred sentences. When a sentencing court issues a suspended or deferred sentence, the sentencing court maintains the authority and the discretion to impose that sentence at a later date. *Stapleford v. Perrin*, 122 N.H. 1083, 1087 (1982). This Court has held that "when the court retains the power to impose incarceration at a later time, the defendant has been afforded liberty, *albeit conditional*, which may not be revoked without due process." *Id*. at 1088 (emphasis added). In other words, a defendant subject to a suspended or deferred sentence remains restrained during his release on a suspended or deferred sentence. A defendant also remains restrained when he is released on probation or parole, regardless of his incarceration status, because he still must comply

with certain conditions and faces the potential of incarceration, or the imposition of a further restraint on his liberty, if he violates any of the terms of his conditional release. As such, a defendant is still confined when released on a suspended or deferred sentence, or when released on probation or parole. *See State v. Gibbs*, 157 N.H. 538, 541 (2008) (holding that a suspended sentence is "sufficiently similar" to probation or parole and holding that release from incarceration on probation or parole is "a privilege afforded to the defendant, rather than a right to which he is entitled.").

This Court should therefore hold that "release from confinement" in Rule 609(b) occurs when all restrictions and conditions imposed on a defendant's liberty as a result of a specific conviction have expired. Only then is the defendant "released" from the "confinement" the court has imposed upon him and that it deemed sufficient to rehabilitate him.

Other jurisdictions have adopted different interpretations of "release from confinement" in Rule 609(b). In *United States v. Gray*, the Fourth Circuit held that the ten-year time frame in Rule 609 was not applicable to the defendant's seventeen-year-old bank robbery conviction because his parole was revoked and he was therefore confined on the original conviction within ten years of the trial in which the State intended to use the robbery conviction to impeach him. 852 F.2d 136, 139 (4th Cir. 1988). Likewise, in *United States v. Lapteff*, the Fourth Circuit held that the imposition of a prison sentence due to a violation of supervised release, like incarceration following a probation or parole violation, "constitute[d] confinement for the original conviction within the meaning of Rule 609(b)." 160 Fed. Appx. 298, 304 (4th Cir. 2005).

In *United States v. McClintock*, the Ninth Circuit held that if a defendant is confined on "substantive probation violations that implicate the original dishonest activity," this constitutes confinement "for the original offense within the meaning of 609(b)." 748 F.2d 1278, 1289 (9th Cir. 1984). In holding that confinement on a subsequent probation or parole violation constitutes confinement in the Rule 609(b) context, however, the Ninth Circuit ruled that incarcerations following a subsequent violation only constitutes confinement for the original offense when the violation "so directly tracked the original crime," that it may have implicated the "same, initial type of dishonesty." *Id*. at 1288. As such, if the violation "directly track[s] the original crime," then the 10-year time period in Rule 609(b) begins running from release on this subsequent incarceration. *Id*. at 1288-89.

In *United States v. Brewer*, the Eastern District of Tennessee held that "reconfinement pursuant to a parole violation is 'confinement imposed for [the original] conviction,' and therefore the release date from the second confinement is the one used in computing time under Rule 609(b)." 451 F. Supp. 50, 53 (E.D. Tenn. 1978).

The Pennsylvania Superior Court has also held that "the crucial date for impeachment purposes is not when a defendant was initially paroled for an offense but when a defendant was last imprisoned for an offense." *Commonwealth v. Jackson*, 385 Pa. Super. 401, 409 (Pa. Super. Ct. 1989). The Pennsylvania Superior Court further held that the "probative value of the conviction has not eroded simply because the defendant was paroled over a decade before trial. If a defendant is recommitted as a parole violator, he has twice breached society's trust, once when he committed the

original crime and again when he violated the terms of parole." *Id*. Thus, "[t]he parole violation tends to indicate that the defendant was never successfully rehabilitated following his commission of the offense that cast doubt on his willingness to tell the truth." *Id*.

These jurisdictions' interpretations of "confinement" differ from the State's proposed interpretation in that they appear to interpret confinement to mean solely incarceration and then struggle to apply the rule when a defendant is reincarcerated for violating a parole or probation condition. The State urges this Court not to adopt these approaches because they do not comport with the plain meaning of the word "confinement" and lead to illogical and absurd results. While incarceration is a form of confinement, it is not the only method by which a court may confine a defendant. Restrictions and conditions on a defendant's liberty, while permitting the defendant to live in the community, constitute a form of governmental confinement.

Moreover, limiting the interpretation of the phrase "release from confinement" to only "release from incarceration" leads to absurd results. For example, this interpretation would require the ten-year period to continuously restart each time a defendant is incarcerated on a violation of his conditions of release, while allowing another defendant, who is not incarcerated but still subject to release conditions, to start and complete the ten-year period in Rule 609(b) before he completes his sentence. This could lead to a trial court applying Rule 609(b)'s balancing test to defendants still serving their sentence subject to sentence conditions, but who are not incarcerated, and applying Rule 609(a)'s balancing test to defendants who are not confined by any sentence terms, but who were incarcerated for

violating a condition of their 20-year sentence one year before it expired. This result is absurd and illogical, is difficult to administer, and does not seem like the result the drafters of Rule 609 intended. By its plain terms, Rule 609 intends for its different balancing tests to apply based on the passage of ten years from the completion of a defendant's sentence, which results in his "release from confinement," not based on whether or when a defendant is incarcerated over the lifecycle of his sentence.

If this Court interprets "confinement" according to its plain meaning, any restraint on a defendant's liberty through incarceration, parole or probation conditions, other conditions, or a suspended or a deferred sentence, then the probative value of the two convictions at issue in this case must outweigh their prejudicial effect on the defendant. *N.H. R. Evid.* 609(a)(1)(B). The trial court sustainably exercised its discretion in finding that the defendant's convictions outweighed their prejudicial effect. AD 3; T 349, 352. Indeed, the defendant does not challenge on appeal that the trial court's finding under this balancing test was an unsustainable exercise of discretion.

If this Court adopts a different interpretation and holds that the trial court should have applied the balancing test in Rule 609(b) to the State's use of the defendant's convictions at trial, this Court should find that the trial court reached the correct result in admitting the convictions for impeachment purposes, for the wrong reason. *See Catalano v. Windham*, 133 N.H. 504, 508 (1990) ("[W]hen a trial court reaches the correct result, but on mistaken ground, this court will sustain the decision if there are valid alternative grounds to support it." (quotations and citation omitted)).

Pursuant to Rule 609(b), if more than ten years have passed since a defendant's conviction or release from confinement occurred, the State can impeach the defendant with the conviction if its probative value, "supported by specific facts and circumstances, substantially outweighs its prejudicial effect." *N.H. R. Evid.* 609(b)(1). Here, the defendant's felony conviction, as it was referred to at trial, and attempted escape conviction, were substantially probative because of the defendant's self-defense claim.

To adequately assert his self-defense claim at trial, the defendant was required to put on some evidence, more than a mere scintilla, of self-defense at trial. *State v. Cavanaugh*, 174 N.H. 1, 7-8 (2020). To do so, the defendant testified about what occurred the night of the victim's attack. Because the defendant and the victim were the only witnesses to the attack, and the victim remembered very little about the attack, the jury's judgment of the defendant's credibility was integral to the case. Likewise, because the defendant's trial testimony regarding the victim's attack differed completely from his statement to the police immediately following the victim's attack, and because the defendant explained this difference due to his desire to protect the victim, it was also integral for the jury to weigh the defendant's credibility regarding his reason for his changed statement. Thus, the defendant's credibility was a central issue in the case. As such, the defendant's two felony convictions were probative of the defendant's credibility and substantially outweighed any prejudicial effect.

Neither conviction's use was overly prejudicial to the defendant. One of the convictions was only referred to as a felony conviction, diminishing any emotional response the jury may have had to hearing the name of this conviction. While the attempted escape conviction was

specifically referred to, this conviction and the basis for it, running across a courthouse parking lot while in official custody, did not arouse the jury's emotions, fear, or outrage, especially given that the jury had just listened to the defendant testify on direct examination about repeatedly stabbing the victim in the neck.

C. Any Error in Admitting the Defendant's Convictions was Harmless Beyond a Reasonable Doubt.

If this Court determines that the trial court erred in admitting the defendant's convictions for impeachment, any error was harmless beyond a reasonable doubt. "An error may be harmless beyond a reasonable doubt if: (1) the other evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight; or (2) the evidence that was improperly admitted or excluded is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *State v. Racette*, 175 N.H. 132, 137 (2022). "Either factor can be a basis supporting a finding of harmless error beyond a reasonable doubt." *Id*.

Here, there was overwhelming evidence of the defendant's guilt at trial given the testimony and exhibits elicited at trial. Additionally, the testimony regarding the defendant's convictions was minimal when reviewed in light of all of the other impeachment and substantive evidence at trial.

At trial, the State elicited detailed testimony regarding the victim's injuries and her treatment plan. The victim's emergency room surgeon, Dr. Patel, testified that the victim had three stab wounds on her neck. T 55-56, 62. The stabbing cut the victim's jugular vein in two, lacerated her

esophagus, and chipped her thyroid cartilage. T 72-81. These injuries and their treatment corroborated Dr. Patel's testimony that these wounds took a "significant amount of force" to cause. T 81-82. While the victim did not remember much about her attack, she told Dr. Patel that someone stabbed her and that she had woken up in her parents' bed unable to breathe, corroborating that she was attacked in her parents' bedroom where she had gone to sleep. T 243-44. Likewise, the defendant's interviews with police following the attack were played at trial during which the defendant admitted to trying to kill his "best friend." T 528. He also admitted to stabbing the victim with a knife in the neck. T 495-96. As such, there was overwhelming evidence establishing the elements of the charges brought against the defendant.

There was also overwhelming evidence disproving the defendant's claim of self-defense. Testimony established that in the weeks leading up to the victim's attack, she was not suffering from any paranoia, delusions, or any significant side effects from either her mental health diagnoses or her medications. T 187. Her parents felt that the victim was doing well enough that they could leave the victim in New Hampshire while they vacationed in Florida. T 191. The victim's coworkers and parents also confirmed that the day before her attack, her behavior was normal and was not concerning to them. T 191-93, 301. This cut against the defendant's testimony that the victim tried to attack him prior to the defendant stabbing her.

The defendant's testimony at trial also differed substantially from his statement to the police in the hours following the attack, which the jury could use as evidence of the defendant's consciousness of guilt. *See State v. Bean*, 153 N.H. 380, 387 (2006) (holding that a jury could have found the

defendant's "inconsistent and evasive answers [] evidence of the defendant's consciousness of guilt."); *State v. Thorp*, 86 N.H. 501, 507 (1934) ("A falsehood uttered to avoid suspicion is relevant to show consciousness of guilt.").

Following the attack, the defendant did not tell police that the victim threatened him or attacked him with a knife or any other weapon. T 385, 457. Instead, he said that the victim forced him to ingest some of her prescription medicine and then "lunged" at him, causing him to stab her to protect himself. T 506, 513.

Conversely, at trial, the defendant claimed that he woke the victim up to help him find his phone. T 494. He claimed that when she woke up, she lunged at him with a knife, they struggled for the knife, they fell "onto each other" onto the floor, causing the victim to drop the knife, which the defendant picked up in the dimly lit room, and stabbed the victim "a couple times" as she ran into him. T 494-96, 520. The defendant claimed that he stabbed her because he saw her look at a box cutter on a bureau in the bedroom. T 496. He also claimed that his story to police was a lie orchestrated to protect the victim from returning to New Hampshire Hospital. T 508.

Given that the defendant's trial testimony differed so substantially from his interviews with police, the jury did not have to accept all of his trial testimony, or his police interviews, as true. *See In the Matter of Geraghty*, 169 N.H. 404, 416 (2016) (quotation and citation omitted) (holding that a jury "may accept or reject, in whole or in part, the testimony of any witness or party, and is not required to believe even uncontroverted evidence.").

The State also attacked the defendant's credibility with his inconsistent statements. T 509-33. During his cross-examination, the defendant admitted that he lied to the police multiple times. T 524-26. The State also established that portions of the defendant's trial testimony were simply unbelievable, such as the defendant's ability to find a knife in a dark room that had fallen on the floor. T 519-20. The State also established that the defendant had a motive to lie about the victim's attack not to protect the victim, but to protect himself from going to prison. T 522-23. As such, the defendant's testimony was both unreliable and incredible.

Additionally, the two convictions were offered as impeachment evidence and comprised only five questions, or half a transcript page, of the State's 25-page cross-examination. Moreover, the State did not mention the defendant's prior convictions in its closing. *see State v. Thibedau*, 142 N.H. 325, 330 (1997) (finding harmless error where the State only referenced the disputed evidence in a "small portion" of its closing and that evidence was not "lengthy, comprehensive, or directly linked to a determination of the guilt or innocence of the defendant.").

Accordingly, the Court should affirm the defendant's convictions because if the trial court erred in admitting the defendant's convictions at trial, this error was harmless beyond a reasonable doubt.

II. THE DEFENDANT HAS NOT MET HIS BURDEN ON APPEAL OF ESTABLISHING THAT THE TRIAL COURT ERRED.

The defendant argues on appeal that the trial court "may have erred" by failing to disclose additional [redacted] records following its *in camera* review. DB 33. In asserting that the trial court "may have erred," however, the defendant fails to argue with any specificity how the trial court erred in failing to disclose additional records following its review. As such, the defendant has failed to demonstrate reversible error on this issue.

As the appealing party, the defendant has the burden of demonstrating reversible error. *Gallo v. Traina*, 166 N.H. 737, 740 (2014). This Court reviews "a trial court's ruling on the management of discovery to determine whether its decision is sustainable." *State v. Girard*, 173 N.H. 619, 627 (2020). "When a defendant argues that a trial court's ruling is unsustainable, the defendant must demonstrate that the ruling was clearly unreasonable or untenable to the prejudice of his case." *Id*.

The defendant asserts that the trial court "may have erred" in not releasing records following an *in camera* review. DB 33. He has not, however, asserted any specific allegations that the trial court erred in not releasing additional records, nor has he asserted that the trial court's decision to release some records and not others was "clearly unreasonable or untenable to the prejudice of his case." *Girard*, 173 N.H. at 627. "[T]he requirement that the defendant show actual prejudice has been called a 'heavy burden.'" *State v. Knickerbocker*, 152 N.H. 467, 470 (2005) (citation omitted). "The defendant must show 'actual prejudice that is

definite and not speculative." *Id*. (citation omitted). "[A] showing of mere potential or possible trial prejudice does not suffice. Moreover, the prejudice must be substantial." *Id*. (quotations and citations omitted).

Here, the defendant has only speculated that the trial court erred. This is not sufficient to meet his burden of establishing on appeal that the trial court's decision to release some records and not others was reversible error or prejudiced his case at trial. Accordingly, this Court should affirm the defendant's convictions.

If this Court reviews the transferred *in camera* review documents and determines that the trial court erred in not releasing certain records, this Court should remand this case to the trial court and order it to release the additional records to the parties. Then, the trial court should order a new trial only if it finds that its error in failing to release the additional records was harmless beyond a reasonable doubt.

CONCLUSION

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

The State requests a 15-minute oral argument delivered by Audriana Mekula, Esq.

Respectfully Submitted,

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May 30, 2023

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CERTIFICATE OF COMPLIANCE

I, Audriana Mekula, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,491 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 30, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

CERTIFICATE OF SERVICE

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

May 30, 2023 */s/ Audriana Mekula*
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