THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0557

State of New Hampshire

v.

Nestor Roman

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
NORTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUE PRESENTED

I. Whether the trial court committed reversable error when it ruled the defendant opened the door to testimony about the likelihood of certain physical injuries being present on a child victim of sexual assault.

STATEMENT OF CASE

In 2019, the defendant, Nestor Roman, was indicted on two counts of aggravated felonious sexual assault (AFSA). Def. Add. at 44-45.[1] He was indicted on additional counts of AFSA in 2021 after the victim reported additional acts of abuse she had not previously disclosed. Def. Add. 46-51; Def. App. at 3

Prior to the scheduled June 2022 trial date, the trial court (Delker, J.) entered an order prohibiting a Sexual Assault Nurse Examiner (SANE) from testifying because the State failed to timely add her to its list of witnesses. Def. App. at 3-6. However, the trial subsequently allowed the nurse to testify at trial as an expert witness under the opening-the-door doctrine. T2 at 273. The jury ultimately found Roman guilty of one count of AFSA for engaging in a pattern of sexual assault, two counts of attempted AFSA, and two counts of sexual assault. JV at 446-52. He was sentenced to 25 years to life imprisonment on the pattern conviction, to run consecutive to a sentence of 10 to 25 years on one of the attempted AFSA convictions. S at 38-30. Roman received a suspended sentence of 10 to 20

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[1] Citations to the record are as follows:
"H" refers to the transcript of the hearing on the State's motion in limine, which took place on June 13, 2022.
"T1" refers to the transcript of the first day of trial, which took place on June 21, 2022.
"T2" refers to the transcript of the second day of trial, which took place on June 22, 2022.
"T3" refers to the transcript of the third day of trial, which took place on June 23, 2022.
"JV" refers to the transcript of the jury verdict, which occurred on June 24, 2022.
"S" refers to the transcript of the sentencing hearing, which took place on September 8, 2022.
"Def. Add." refers to the addendum to the defendant's brief.
"Def. Appx." refers to the appendix to the defendant's brief.
"Con. Appx." refers to the confidential appendix to defendant's brief.

years on the other attempted AFSA conviction and a sentence of 12 months for each count of sexual assault. *Id.*

STATEMENT OF FACTS

A. The Victim's Disclosures

The victim in this case, J.J., is Roman's teenaged granddaughter. T at 64. On June 25, 2019, Roman came to J.J.'s home, ostensibly to give her gift cards for her birthday. T1 at 69-70. He then entered J.J.'s room while she was playing a video game and proceeded to grab her breasts and rub his hand over her inner thigh. *Id*. J.J. pushed Roman away, and he told her he was sorry before returning to his own home. T1 at 71. J.J. was only 15 years old. T1 at 67. It was not the first time she had been sexually abused by her grandfather. T1 at 72. Roman had been raping her since she was in elementary school. *Id*.

"Sick and tired of being silent," J.J. called her mother, L.R. (Roman's daughter), at work and told her she had been sexually assaulted by Roman. T1 at 72. L.R. immediately drove home and arrived to find J.J. crying hysterically. T1 at 152-53. The two then drove to Roman's house, and L.R. confronted her father about J.J.'s allegations. T1 at 72. Roman "froze" and repeatedly told L.R. he was "sorry." T1 at 154-55. L.R. asked him if it was the first time he had done anything to J.J., and Roman said "no." T1 at 155. He then retrieved a handgun from his room and began to load it. T1 at 157. L.R. snatched the pistol from Roman's hand, telling him, "You're not going to get away that easy." T at 158.

After confronting Roman, L.R. drove J.J. to the police station to file a report. T1 at 160. They met with Officer Anthony Battistelli, who was

assigned to take their initial statement. T2 at 219. While they were speaking with Officer Battistelli, Roman arrived at the police station to turn himself in. T1 at 160. Officer Battistelli asked him why he was at the station, and Roman answered that "he did something wrong." T2 at 221.

J.J. was then interviewed at the Child Advocacy Center (CAC), where she disclosed another incident of abuse that occurred in November of 2018. T1 at 72-75. In this incident, J.J. and her siblings were staying with Roman while her mother was on a cruise. *Id.* One day while she was lying in bed, Roman entered the room and squeezed her breast with one hand while the other reached under her pants and rubbed her near her vagina. *Id.* As a result of these disclosures, Roman was indicted on two counts of aggravated felonious sexual assault. (AFSA). Def. Add. at 44-45.

Shortly before the trial was set to commence, J.J. woke her mother one night and told her the 2019 and 2018 incidents did not encompass Roman's entire history of abuse. T1. at 92-95. She then told her mother about the rapes that began when she was in elementary school. *Id.* As a result, Roman's trial was continued, another interview at CAC was scheduled, and J.J. underwent a Child Advocacy Protection Program (CAPP) exam. T2 at 241-42. Roman was subsequently indicted on additional counts of AFSA. Def. Add. 46-51.

B. The State's Motion in Limine

Twelve days before the scheduled trial date, the State filed an amended witness list that included Cornelia Gonsalves, the nurse who performed J.J.'s CAAP exam. Def. Appx. at 3. Nurse Gonsalves had not been included in the State's previous list of witnesses. *Id*. Roman filed a

motion to exclude Nurse Gonsalves's testimony, arguing her addition to the witness list was untimely *Id*. The State then filed a motion in limine to permit Nurse Gonsalves to testify, pursuant to New Hampshire Rule of Evidence 803(4), about statements J.J. made during the CAPP exam. *Id*. The trial court held a hearing on the motion, and Roman argued that such testimony would amount to "back door vouching" that was contrary to the holding in *State v. Marden*, 172 N.H. 258 (2019).[2] H at 10. He also contended that he would have deposed Nurse Gonsalves if the State had made a timely amendment to its witness list. H at 13.

The trial court ultimately decided to grant Roman's motion to exclude Nurse Gonsalves based on the State's untimely disclosure. Def. Appx. at 3. As it explained:

> The defendant argued that he relied on the fact that the SANE nurse was not on the witness list in preparing for trial and would have moved to depose the SANE nurse if he had known the State would seek to admit the alleged victim's statements. The State conceded that it would not seek to introduce any medical or expert testimony from the witness because she was not disclosed as an expert witness. Nonetheless, the defendant made a credible argument that if the alleged victim's statements are admitted, defense counsel would be forced to decide whether to explore medical observations of the SANE nurse

[2] In *Marden*, this Court held that it was unfairly prejudicial to permit a witness, who was recognized as an expert, to testify to a sexual assault complaint's specific behavior because it could have allowed the jury to infer that the witness was giving an expert opinion that the complainant was assaulted. 172 N.H. at 265-66.

> on cross-examination. The SANE nurse observed no physical signs of sexual abuse on her examination. This is a legitimate area of inquiry on cross-examination. If the defendant cross-examines the witness on this issue it may, in turn, open the door to otherwise inadmissible expert testimony relating to the SANE nurse's medical observations and the reasons she did not observe signs of trauma.
>
> Neither the Court nor the defendant should be required to scramble to resolve the substantive issues raised by the State's late disclosure of the SANE nurse. This would require additional litigation regarding the deposition request, an order from the Court, and, if granted, additional time and attention spent on preparing for the witness's testimony. At this late stage of the litigation, this kind of last minute litigation is an unnecessary distraction from the ability of the defendant to prepare for trial. In the context of this case, the defense was entitled to rely on the fact that the SANE was not on the witness list while preparing his trial strategy.

Id.

C. The Trial

At the trial, J.J., L.R., and Officer Battistelli testified to the above facts. J.J. further explained that, when she was in elementary and middle school, Roman would frequently touch her breasts. T1 at 87. He would also her rub vagina, sometimes over her clothes, sometimes under her clothes. *Id.* J.J. also described in detail three specific instances in which Roman forced her to engage in sexual intercourse. T1 at 81-92. All three incidents

occurred when she was either in fifth or sixth grade. *Id.* As J.J. described these years, "whenever he [got] the chance, he would – he would rape me." T1 at 87.

The State also called Guy Kozowyk, the detective assigned to the case, and asked him to explain the steps in his investigation. Detective Kozowyk testified that he reviewed Officer Battistelli's initial report, interviewed L.R., and watched both of J.J.'s CAC interviews. T2 at 230-41.

The State then asked Detective Kozowyk if he collected any medical records and he answered in the affirmative. T2 at 242. He then explained that the police request a CAPP exam whenever a child discloses a sexual experience. *Id.* Although Detective Kozowyk stated that he received medical records from J.J.'s CAPP exam, he did not recount the findings in that exam. *Id.*

Nevertheless, Roman pressed Detective Kozowyk on the results of the CAPP exam on cross-examination:

> Q [Defense counsel] And you know that from reviewing those medical records, there was no finding of anything significant. There was no injuries, or tears or anything like that.
>
> A [Detective Kozowyk] There was no injuries documented; however, that's -- injuries being documented wouldn't be -- necessarily a sign of – it's not –
>
> Q That's not my question. My question –
>
> A – it's not always obvious that -- that there'd be injuries present for signs of sex.
>
> Q That's not my question.

A Okay.

Q I'll repeat it.

A Sure.

Q My question was, you read the medical records and there was no signs of any injuries. I'm not asking the significance of it. I'm asking that there were no signs of any injuries, and you –

A There was no sign of any injuries, correct.

Q And there was no sign of any swelling, correct?

A There was no sign of any injuries.

Q Okay. And the -- also, you know from reading those records that the medical people examined the hymen, correct?

A The –

Q The hymenal edge; that's what they examined?

A -- yeah, they – you've read the report the same as I have. Yeah, they would have examined that.

Q And in that report, they said there was no gaping or visible lesions or sores within the folds of her genital area, correct?

A Yes, that would have been what was documented.

> Q And they basically found no signs of trauma. That's from the record.

T2 at TR 245-46.

The State then approached the bench and asserted defense counsel had opened the door for Nurse Gonsalves to testify. T2 at 246. Roman responded that the State opened the door by asking Detective Kozowyk if he had collected medical records. T2 at 237. He contended he had to inquire into the results of the CAAP exam because "everybody assumes when there's medical records something happened. That there's something bad; that there's injuries." *Id.*

The State responded that it asked Detective Kozowyk if he collected medical records to show the thoroughness of the police's investigation but did not inquire into the content of the records. T2 at 252-53. It further argued that Detective Kozowyk's answer provided no reason for the jury to believe the medical records contained anything incriminating because he was clear a CAPP exam is sought in every investigation involving sexual abuse of a child. T2 at 252-53. The State contended that Nurse Gonsalves should be allowed to testify that J.J.'s intact hymen and lack of injuries were not inconsistent with her being sexually assaulted. T2 at 254.

The trial court ruled that the State did not open the door to any inadmissible evidence by introducing testimony that there had been a CAPP examination and the evidence was relevant "for the jury to evaluate whether the police considered all and pursued all possible investigative avenues." T2 at 269. The trial court further found that Roman introduced hearsay by asking Detective Kozowyk about the specific findings in the CAPP exam. T2 at 273. It also concluded that these questions sought expert testimony on

issues on which Detective Kozowyk was not competent to testify. *Id.* As a result, the trial court ruled that Nurse Gonsalves could testify, based on her experience, on the likelihood of specific types of injuries being present on a child who had been sexually abused. T2 at 270-71. It further ruled that Roman could depose Nurse Gonsalves the next morning prior to her testimony. T2 at 273. The trial court rejected Roman's argument that he did not have sufficient time to prepare for the deposition, noting that her 11-page report had been disclosed to the defense prior to trial. *Id.*

The next day, the State called Nurse Gonsalves, who testified that she had been a nurse practitioner for 39 years and had been with the Child Advocacy Protection Program for six years. T3 at 282-83. Nurse Gonsalves was also familiar with a peer-reviewed, ongoing study in which 1,000 children, who were suspected victims of sexual abuse, had been examined and only two percent had physical evidence of abuse. T3 at 297. After the defense conducted voir dire into Nurse Gonsalves's qualifications, she was recognized as an expert in the area of child abuse and maltreatment. T2 at 288-303.

She then testified that physical signs of abuse were not present in the majority of the exams she performed, and these results were consistent with the medical literature. T3 at 308. Nurse Gonsalves further explained that an intact hymen did not reveal whether sexual penetration had occurred, and sexual penetration was less likely to cause vaginal tearing or injury in a child or teenager because of their greater elasticity. T3 at 310. However, Nurse Gonsalves's acknowledged on cross-examination that a lack of physical injuries in a patient was also consistent with a finding that no sexual penetration or abuse had occurred. T3 at 312.

Roman testified in his own defense and denied ever telling L.R. he was sorry. T3 at 367-69. However, he was impeached when the State showed him a statement in which he admitted to telling L.R. he was sorry. T3 at 379-80. Roman alleged that he did not mean to tell Officer Battistelli that he did something wrong. T3 at 371. Instead, he claimed that he meant to tell Officer Battistelli that he was at the police station because his daughter had accused him of doing something wrong. *Id.* Roman did not deny possessing a pistol the day L.R. confronted him about J.J.'s allegations. T3 at 371-74. However, he claimed he had his gun out only because he had decided to give it to his friend Pedro. T3 at 371-74. According to Roman, it was a coincidence that he decided to give Pedro his gun on the same day he was accused of sexual assault. T3 at 380-81.

D. The Verdict

After hearing all the evidence, the jury found Roman guilty of one count of AFSA for engaging in a pattern of sexual assault of a victim under 16, two counts of attempted AFSA for placing his hand on J.J.'s inner thigh adjacent to her genitalia in 2019 and 2018, and two counts of sexual assault for touching J.J.'s breast in 2019 and 2018. JV at 446-52; Def. Add. 52-69. The jury deadlocked on the charges alleging Roman knowingly engaged in sexual penetration of a victim under 13 and acquitted Roman on the AFSA charges alleging he knowingly touched J.J.'s genitalia when she was under 13 and knowingly inserted his penis in her genital opening sometime between August 1, 2019, and June 30, 2019. JV at 446-52.

Roman was sentenced to 25 to life on the pattern conviction, to run consecutive to a 10 to 20 year sentence on the two attempted AFSA

convictions. S at 38-39. Finally, Roman was sentenced to 12 months for the two sexual assaults. *Id.*

SUMMARY OF THE ARGUMENT

Roman introduced inadmissible hearsay by questioning Detective Kozowyk about the findings in the CAPP exam that Nurse Gonsalves conducted. Even if this hearsay was somehow admissible, it was misleading and unfairly prejudicial to the State's case because the jury could have believed certain types of injuries should have been present in a victim of sexual abuse. Under these circumstances, the trial court appropriately allowed Nurse Gonsalves to testify about the likelihood of certain injuries being present in a child victim of sexual abuse because the opening-the-door doctrine permits a party to counter the prejudice caused by the introduction of inadmissible or misleading evidence. Roman's argument that the State was the party that opened the door is unavailing because the State's direct examination of Detective Kozowyk did not introduce any inadmissible, suppressed, or misleading evidence.

Further, Roman was not unfairly prejudiced by the trial court's decision to allow Nurse Gonsalves to testify as an expert following the second day of trial. This Court has already permitted similar expert testimony without a *Daubert* hearing. Roman also had a sufficient opportunity to cross-examine Nurse Gonsalves on her opinions because he received her report prior to trial, deposed her before she testified, and explored her credentials on voir dire. Roman did not preserve any argument that he needed his own expert to rebut Nurse Gonsalves's opinions. Even if he had, such an expert was unnecessary in light of her testimony on cross-

examination that a lack of physical injuries in a patient was also consistent with a finding that no sexual penetration or abuse had occurred.

Finally, the totality of the circumstances show that Nurse Gonsalves's testimony was harmless in the context of the overall trial. Nurse Gonsalves's testimony was relevant only to charges upon which the jury either deadlocked or voted to acquit. JV 446-52. Conversely, the evidence on the charges Roman was convicted of was overwhelming. Further, Nurse Gonsalves's testimony concerned a proposition that is well-settled and widely accepted, *infra.* 18-19, and Detective Kozowyk had already offered similar, albeit unqualified, testimony that Roman did not object to or strike from the record. T2 at 245-46.

ARGUMENT

Roman's sole argument on appeal is that the trial court erred when it ruled that his cross-examination of Detective Kozowyk opened-the-door to Nurse Gonsalves's testimony. In his view, it was the State that opened the door by eliciting inadmissible evidence and his cross-examination of Detective Kozowyk was the only way to counter a misleading advantage created by the prosecution. Def. Br. 19-31. Roman also argues that the trial court erred in allowing a "late-disclosed expert" even if it correctly applied the opening-the-door doctrine. Roman's arguments lack merit. *Id.* at 32-39.

I. Permitting Nurse's Gonsalves's Testimony Was Not an Unstainable Exercise of Discretion.

A. Standard of Review

Because the trial court is in the best position to gauge the prejudicial impact of testimony, its ruling on whether the defendant opened the door will not be disturbed on appeal absent an unsustainable exercise of discretion. *State v. Carlson*, 146 N.H. 52, 56 (2001). To prevail under this standard, the defendant must show the trial court's ruling was "clearly untenable or unreasonable to the prejudice of his case." *Id.* at 57.

B. The Trial Court Reasonably Found That Cross-Examining Detective Kozowyk on The Findings in J.J.'s CAPP Exam Opened The Door to Nurse Gonsalves's Testimony.

"The opening-the-door doctrine allows a party to use previously suppressed or otherwise inadmissible evidence to counter a misleading advantage created by the opponent." *Carlson*, 146 N.H. at 56. "This rule prevents a defendant from successfully excluding inadmissible evidence favorable to the State and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context." *State v. MacRae*, 141 N.H. 106, 114 (1996) (quotation omitted).

The phrase "opening-the-door" comprises two doctrines, "curative admissibility" and "specific contradiction." *State v. Nightingale*, 160 N.H. 569, 579 (2010). Curative admissibility is implicated "when inadmissible prejudicial evidence has been erroneously admitted, and the opponent seeks to introduce testimony to counter the prejudice." *Id.* Specific

contradiction is applicable "when one party has introduced admissible evidence that creates a misleading advantage and the opponent is then allowed to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage." *Id.*

Roman does not dispute the trial court's finding that he introduced hearsay by questioning Detective Kozowyk about Nurse Gonsalves's findings from J.J.'s CAPP exam. This testimony also introduced J.J.'s lack of injuries into evidence—the precise issue the trial court sought to avoid by entering an order prohibiting Nurse Gonsalves from testifying. Def. Appx. at 3. Thus, Roman intentionally solicited inadmissible and previously excluded evidence. Even if this testimony was somehow admissible, it would have been misleading if unrebutted because the jury could have concluded that J.J.'s lack of injuries proved she had not experienced sexual penetration and was lying about being abused. As a result, the door was opened under either the curative admissibility or specific contradiction doctrines to testimony that the results of J.J.'s CAPP exam were not inconsistent with her testimony that she had been raped.[3]

Still, Roman contends that such rebuttal testimony was unnecessary because the potential prejudice had already been cured by Detective Kozowyk's testimony that a lack of injuries did not rule out assault. Def. Br. at 34-25. However, this argument ignores the fact that Detective Kozowyk was neither qualified to give such an opinion nor a neutral

[3] Although the trial court stated that only the curative admissibility doctrine applied, T at 263, the trial court may be affirmed when it reaches the correct result, even for mistaken reasons, if "valid, alternative grounds support the decision" *State v. Dion*, 164 N.H. 544, 552 (2013).

witness. Instead, both this Court and courts in other jurisdictions have held that the proper way to explain a sexual assault victim's lack of injuries is through expert testimony. *See*, *e.g.*, *Commonwealth v. Alvarez*, 103 N.E.3d 1202, 1216 (Mass. 2018); *Alvarez-Madrigal v. State*, 71 N.E.3d 887, 893 (Ind. Ct. App. 2017); *State v. Pelletier*, 149 N.H. 243, 250-52 (2003); *Commonwealth v. Minerd*, 753 A.2d 225, 231 (Pa. 2000).

As the Massachusetts Supreme Court explained in *Alvarez*, "a medical expert may be able to assist the jury by informing them that the absence of evidence of physical injury does not necessarily lead to the medical conclusion that the child was not abused . . . because the jury may be under the mistaken understanding that certain types of sexual abuse always or nearly always causes physical injury or scarring in the victim." 103 N.E.3d at 1216 (internal quotation marks and punctuation omitted). The Pennsylvania Superior Court has even specifically held that a defendant who referenced the victim's "intact hymen" during opening statements opened the door to testimony from a physician explaining the ability for a sexual assault victim to have an intact hymen. *Commonwealth v. Sumo Dukulah,* 168 A.3d 297 (Pa. Super. Ct. 2017) (non-precedential decision). Under the circumstances of this case, introducing expert testimony about the likelihood of physical injuries being present in a child who had been sexually abused was the proper way to place the findings in J.J.'s CAPP exam in proper context. Permitting Nurse Gonsalves's testimony was not an unsustainable exercise of discretion.

C. The State Did Not Open The Door to The Results of The CAPP Exam.

Trying to avoid the application of the opening-the-door doctrine, Roman argues that it was the State that opened the door. Specifically, he claims that Detective Kozowyk's testimony that J.J. underwent a CAPP exam introduced evidence that was excluded prior to trial; therefore, the State opened the door to cross-examination about J.J.'s lack of physical injuries under both the curative admissibility and specific contradiction doctrines. Def. Br. at 22. Under this reasoning, he contends the State should not have been permitted to call Nurse Gonsalves in response because "the *State* opened the door to discussing the examination's findings, allowing the defendant to provide complete, accurate, and undisputed evidence as to the examination's findings, and the State cannot thereafter benefit from its circumvention of the court's pretrial ruling." *Id.* at 23 (emphasis in original). This argument lacks merit.

The trial court did not, as Roman asserts, "exclude *any* discussion of the medical records." *Id.* (emphasis original). The trial court's order prohibited the State from calling Nurse Gonsalves as a witness. Def. Appx. at 3. It did not exclude any reference that J.J. underwent a CAPP exam. The State did not even specifically ask about a CAPP exam. It merely asked Detective Kozowyk if he collected medical records and he explained, without objection, that J.J. was referred for a CAPP exam. T2 at 242. Once Roman raised the defense that the State's case relied on the accusations of a witness who should not be considered credible, the thoroughness of the investigation was relevant to show the police reviewed and considered all available evidence. Regardless, no pretrial ruling or rule of evidence

prohibited Detective Kozowyk from stating he collected medical records or explaining that J.J. underwent a CAPP exam. Because the State never introduced inadmissible or previously excluded evidence, it could not have opened the door to testimony about J.J.'s lack of physical injuries under the curative admissibility doctrine.

The specific contradiction doctrine also did not justify Roman's cross-examination of Detective Kozowyk. On this front, Roman complains that any invocation of medical records forced him to "either correct the misimpression that the medical records obtained in the course of an investigation that resulted in criminal charges must involve inculpatory findings and be subject to the opening-the-door argument the State would subsequently raise, or leave the jury with the misleading impression." Def. Br. at 24. This argument does not hold water.

The jury was instructed it could not speculate and had to "decide the case only on the evidence that's properly admitted during the course of the trial." T1 at 14. This instruction specifically prohibited the jury from inferring the then undisclosed findings in the medical records had any relevance to Roman's guilt. A jury is presumed to follow the trial court's instructions. *State v. Labrie*, 171 N.H. 475, 489 (2018).

Further, Roman does not provide any reason in law or logic to suspect a reasonable juror would conclude that the State, which bore the burden of proof, had not elicited certain proof because it was inculpatory. The reasonable conclusion is that the State did not ask about the specific findings in the medical records because they did not contain any information that supported its case. Nothing about the State's direct

examination of Detective Kozowyk made it necessary for Roman to elicit testimony concerning the specific findings in J.J.'s CAPP exam.

Even if the State's direct examination made it necessary to clarify that these medical records did not influence the State's decision to indict on additional charges, Roman could have achieved this by simply asking Detective Kozowyk to affirm there was nothing incriminating in the medical records he reviewed. He did not need to go further and solicit the testimony that J.J.'s hymen and the folds of her genital area showed no signs of swelling, sores, lesions, trauma, or injuries. "The fact that the door has been opened does not, by itself, permit all evidence to pass through. The doctrine is to *prevent* prejudice and is not to be subverted into a rule for *injection* of prejudice." *State v. Trempe*, 140 N.H. 95, 99 (1995) (emphasis in original). Roman had no legal grounds to expect he could intentionally elicit testimony about the victim's lack of physical injuries without the State offering evidence that the absence of such proof was not inconsistent with J.J.'s accusations.

D. Roman Was Not Unfairly Prejudiced by The Trial Court's Decision to Allow Nurse Gonsalves to Testify as an Expert Following The Second Day of Trial.

Roman also argues the admission of Nurse Gonsalves testimony was an unsustainable exercise of discretion even if the State did not open the door to his cross examination of Detective Kozowyk. He specifically complains that:

> The defense was deprived of the opportunity to prepare for and address a *Daubert* challenge. The defense was deprived of the opportunity to

> review Gonsalves credentials, opinions, and bases therefore with an expert of its own. The defense was deprived of the opportunity to offer an expert of its own to rebut Gonsalves's testimony, specifically her astonishing suggestions (as characterized by the State) that a lack of injuries is actually consistent with sexual assault.

Def. Br. 38-39.

This argument presumes a defendant can elicit inadmissible and prejudicial testimony and avoid the consequences by claiming an insufficient opportunity to prepare for the State's rebuttal evidence. Because the purpose of the opening-the-door doctrine is to prevent a party from "selectively introducing pieces of [inadmissible] evidence for his own advantage," *MacRae*, 141 N.H. at 114, this argument should be summarily rejected. Even if the Court were inclined to address the substance of this argument, Roman's claims that he did not receive a fair opportunity to challenge Nurse Gonsalves's testimony lack merit.

Regarding Roman's suggestion that the trial court should have conducted a *Daubert* hearing, this Court has already held that such a hearing is not required before an expert can testify that a lack of physical injuries is not inconsistent with sexual abuse. *See State v. Pelletier*, 149 N.H. 243, 251-52 (2003). Roman's claim that he did not have a sufficient opportunity to challenge Nurse Gonsalves's credentials and the basis for her opinions is also unavailing. He possessed her report prior to trial and was given an opportunity to depose her and explore her qualifications on voir dire before she offered expert testimony. T2 at 273, T3 at 288-303. Any suggestion that Roman was surprised by the substance of Nurse

Gonsalves's testimony is also without merit. Her report noted that one way of establishing sexual abuse is through "diagnostic ano-genital exam findings," which was found "in 3-5% of all substantiated sexual abuse cases." Con. Appx. at 56. This observation was completely consistent with her testimony at trial. Notably, Roman does not explain how he would have cross-examined Nurse Gonsalves differently if he had additional time to prepare for her deposition.

Roman's contention that he did not have an opportunity to procure an expert to rebut Nurse Gonsalves also does not warrant a new trial. As a threshold matter, Roman never argued before the trial court that his inability to obtain an expert of his own provided a basis to exclude Nurse Gonsalves's testimony. As a result, this argument is not preserved for appellate review. *State v. Blackmer*, 149 N.H. 47, 48 (2003) ("[W]e will not review any issue that the defendant did not raise before the trial court.") Regardless, Roman did not need his own expert in light of Nurse Gonsalves testimony on cross-examination that a lack of physical injuries was also consistent with a finding that no sexual abuse of penetration occurred.

To the extent that Roman is arguing that he could have called an "expert" to testify that a child who experienced sexual penetration must have a broken hymen or some other sign of physical trauma, he has not shown that such testimony would have been the "product of reliable principles and methods"-a prerequisite for admission under N.H. R. Ev. 702. Allowing such "expert" testimony would be against the weight of medical opinion and legal authority. *See, e.g.*, *Teoume-Lessane v. United States*, 931 A.2d 478, 484 (D.C. Ct. App. 2007) (The expert "testified that

recent research in the field of sexual examinations has established that such assaults often leave no visible injuries."); *Commonwealth v. Healy*, 783 N.E.2d 428, 436 (Mass. 2003) ("There is a wide range of sexual activity, up to and including many forms of sexual assault, that leaves neither sperm nor signs of injury to sexual organs."); *People v. Gutierrez*, 209 Cal. App. 4th 646, (Cal. Ct. App. 2012) ("The absence of trauma or injury to [the victim's] vagina did not rule out rape or attempted rape.") In any event, Roman's failure to identify such an expert makes it impossible for the Court to evaluate the persuasiveness of this argument. *Cf. Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007) (noting that complaints about uncalled witnesses "are not favored[.]")

Finally, Roman's contention that he was unfairly prejudiced by the trial court's decision to permit Nurse Gonsalves to testify as an expert is even less persuasive when examined under the unique circumstances of this case. The trial court did not find that Nurse Gonsalves's testimony was inadmissible under any constitutional provision, statute, or rule of evidence. Her testimony was of the type that courts across the county have found relevant when the victim of sexual assault does not have any physical injuries. *Supra*, p.18-19. The trial court entered an order prohibiting Nurse Gonsalves's testimony only because the State did not timely amend its witness list. Def. Appx. at 3. Even then, the order was meant to protect Roman from the "last minute litigation" that would be necessary should he be "forced to decide whether to explore medical observations of the SANE nurse on cross-examination." *Id.* But Roman himself injected those medical observations into the trial. Further, the trial court was free to reconsider its pretrial order as the trial progressed and unexpected evidence was presented

to the jury. "[T]he trial court's discretionary powers are continuous. They may be exercised, and prior exercise may be corrected, as sound discretion may require, at any time prior to final judgment." *State v. Haycock*, 139 N.H. 610, 611 (1995) (internal quotations omitted).

Simply put, Roman cannot have it both ways. He cannot insist that it was necessary to elicit, in great detail, testimony regarding the results of J.J.'s CAPP exam and then complain when the State put on evidence explaining the medical significance of those findings. Reversal cannot be premised on testimony that did nothing more than provide the jury with a full and accurate representation of all the evidence.

E. Harmless error

Even if the trial court's decision to permit Nurse Gonsalves to testify as an expert was an error, it was harmless. "The erroneous admission of evidence is harmless only if it is determined, beyond a reasonable doubt, that the verdict was not affected by the admission." *State v. Skidmore*, 138 N.H. 201, 203 (1993). "[I]t is not a question whether the evidence, apart from that erroneously admitted, would support a finding of guilt, but whether it can be said beyond a reasonable doubt that the inadmissible evidence did not affect the verdict." *Id.* at 203-04 (quotation omitted). Whether an error is harmless is determined by evaluating the "totality of the circumstances." *State v. Boudreau*, 2023 N.H. LEXIS 107, *21 (June 7, 2023). *See also State v. Woodbury*, 124 N.H. 218, 221 (1983) ("[W]e must also consider the State's argument that the admission of his testimony, in light of all the existing circumstances, constituted harmless error.") Relevant factors to the harmless error analysis include the strength of the

State's case, whether the erroneously excluded or admitted evidence was cumulative, the presence of evidence corroborating or contradicting the erroneously excluded or admitted evidence, and whether the evidence of the defendant's guilt was overwhelming. *Id.*

Nurse Gonsalves's testimony was relevant to explain that J.J.'s testimony that she had been raped was not disproved by the absence of injury or trauma on her hymen or genital area. However, Roman was not convicted of any charge in which sexual penetration was an element of the offense. S at 38-39. Since he was acquitted of the charges in which a juror might expect to hear of some sign of physical injury, Nurse Gonsalves's testimony could not have affected the verdict on these charges.

Conversely, the evidence on the charges that required the jury to find Roman fondled J.J.'s breast or engaged in a pattern was overwhelming. J.J.'s report to her mother was close in time to Roman's most recent assault, so the State did not have to explain a delay of years as is often the case. L.R., Roman's own daughter, testified that she confronted him and he told her that he was "sorry" and retrieved a firearm, which he then began to load, suggesting that he was intent on harming or even killing himself. T1 at 155-57. While J.J. and L.R. were at the police station, the defendant arrived there as well, telling the police that he "did something wrong." T2 at 221.

Further, Nurse Gonsalves's testimony was cumulative and merely corroborated Detective Kozowyk's similar, albeit unqualified, testimony. Detective Kozowyk testified that "it's not always obvious that . . .there'd be injuries present for signs of sex." T2 at 245. Roman did not object to this testimony or move to strike it. He should not be permitted to claim it was

proper to elicit Detective Kozowyk's testimony and allege the similar, qualified testimony offered by Nurse Gonsalves requires a new trial. Under the totality of the circumstances, the Court can be confident beyond a reasonable doubt that the admission of Nurse Gonsalves's testimony did not affect the jury's verdict.

CONCLUSION

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

The State requests a fifteen minute oral argument.

Respectfully Submitted,

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June 30, 2023

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CERTIFICATE OF COMPLIANCE

I, Robert L. Baldridge, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,600 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.

June 30, 2023 *<u>/s/ Robert L. Baldridge</u>*
Robert L. Baldridge

CERTIFICATE OF SERVICE

I, Robert L. Baldridge, 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.

June 30, 2023 *<u>/s/ Robert L. Baldridge</u>*
Robert L. Baldridge