THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0634

State of New Hampshire

v.

Erin Warren

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE DEFENDANT

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(Fifteen Minute Oral Argument)

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Issue preserved by pleadings and the court's order*. A13-22; M-II.

2. Whether the court plainly erred in finding A.D. competent to testify.

Issue raised as plain error.

3. Whether the court erred in admitting uncharged conduct evidence under Evidence Rule 404(b).

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4. Whether the court erred by failing to disclose, after its *in camera* review, DCYF and Community Partners' records.

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* Citations to the record are as follows:
"A" refers to the separate appendix to this brief;
"Supp." refers to the supplement attached to this brief;
"M-I" refers to the transcript of the May 4, 2022 motion hearing;
"M-II" refers to the transcript of the May 9, 2022 motion hearing;
"T" refers to the transcript of trial on May 12, 13, 16 and 19, 2022; and
"S" refers to the transcript of the sentencing held on October 5, 2022.

STATEMENT OF THE CASE

A Strafford County grand jury indicted Erin Warren on three charges: first-degree assault for recklessly causing serious bodily injury to A.D., a person under the age of 13, by failing to seek medical attention for a head wound, A3; T-12; and two second-degree assault charges for knowingly causing bodily injury to A.D. by binding her arms for a prolonged period of time and binding her legs. A4-5; T-12-13. The State also charged Warren with two misdemeanor offenses for endangering the welfare of a child, one of which was dismissed before trial. A6; T-3.

Following a four-day trial, the jury found Warren guilty of first-degree assault and the second-degree assault charge alleging that she bound A.D.'s arms. T-644-45. The jury found Warren not guilty on the remaining charges. T-645-46.

The court (Howard, J.) sentenced Warren to serve seven and one-half to fifteen years in prison on the first-degree assault conviction. A7-9; S-61. For second-degree assault, the court sentenced Warren to a suspended five to ten year sentence. A10-12; S-62.

STATEMENT OF THE FACTS[1]

From December 24, 2017 through July 17, 2018, A.D.[2] lived with Warren, her biological mother. T-49, 89-91, 124. A.D. was five years old and had just returned to her mother's care after several months in foster care. T-91, 124. Sometimes A.D.'s younger sister was there too. T-49.

In July 2018, Warren noticed a wound under A.D.'s hair on the back of her head. T-531. Warren thought the wound may have begun with some pimples caused by the hot weather and had scabbed over because A.D. had picked at it. T-531, 544, 547. Warren clipped A.D.'s fingernails so she could not scratch it, told A.D. not to pick it, and tried cleaning the area with hydrogen peroxide and treating it with ointment. T-532-33. She showed it to her friend Amber MacDonald, who suggested Warren get the wound checked. T-386-87.

During the ensuing week, Warren was assaulted by her boyfriend in front of A.D. T-531, 550-51. The incident and its aftermath distracted Warren. T-550-51, 562. As a result, Warren did not pay close attention to the wound, and when she noticed it a few days later, it looked worse. T-533-34. When Warren told MacDonald that the wound was getting

[1] This section summarizes the facts only as material to the charges and issues raised on appeal.
[2] Before trial, A.D.'s last name changed. T 45. This brief will refer to her as A.D., the initials used in the charging documents.

"pretty bad," MacDonald drove them to the urgent care center, because Warren did not have a car. T-387, 394-95, 553-54, 552. Warren denied consciously delaying seeking medical treatment for A.D. T-530-31.

At the time, A.D. also had a few bruises and marks on her body. T 392. Warren believed that a bruise on A.D.'s foot happened when she and A.D. walked from their home to court to deal with the assault Warren suffered. T-535. It was a long walk and A.D. was wearing sandals that were getting too small for her. T-535, 547. Although not sure what caused the symmetrical marks on A.D.'s arms, Warren thought that the area was irritated when A.D. wore pool floaties a couple of weeks earlier. T-534-35, 552-53. See also T-385-86 (MacDonald confirmed A.D. had used pool floaties). Warren said a mark on A.D.'s ear was caused by A.D. picking at the area, and she thought the scratch on A.D.'s face was caused by A.D.'s younger sister grabbing at A.D.'s glasses. T-548-49, 561. See also T-384-85, 392, 394 (MacDonald did not recall seeing any scars or bruises on A.D, and she never saw Warren physically discipline or punish A.D.).

The urgent care staff looked at A.D.'s head wound and advised Warren and MacDonald to take A.D. to the hospital, which they did. T-398, 557. At the hospital, staff examined A.D.'s head wound and the other marks and bruises, and

called the New Hampshire Division of Children, Youth and Families (DCYF). T-92.

A.D. was examined by hospital staff, questioned by medical providers and DCYF workers, and photographed by police. They said that A.D. was clean and well-nourished. T-102, 124. The head wound, however, was large, red, draining puss, and infected. T-153-54, 190-91, 207-08, 369-70, 372. The medical providers believed that the wound had been there for "perhaps a matter of weeks." T-150, 179, 191, 369-70. All but one disbelieved Warren's statement that it was caused by A.D. picking at it. T-162-63, 180, 192-93, 198-99, 201, 371, 377. No one saw A.D. picking at her injuries. T 162-63, 182-83. Although one provider explained that hydrogen peroxide can delay healing, T-166, others did not think that hydrogen peroxide would cause the wound to worsen. T-198-99, 201, 373.

Given the severity of the infection, A.D. was admitted to receive IV antibiotics. T-157. One provider had never seen a child with such a wound. T-201-02. A.D. did not appear to be in pain, but the wound resulted in a scar and the treatment was painful. T-160-61, 182, 202-03, 268, 301. She was hospitalized for about a week. T-238.

The marks on A.D.'s arms were "almost a perfect rectangle across both [arms] and very symmetric," and "looked like something had been strapped across her arms."

T-163, 208, 214, 380. The providers found it very unlikely that the marks were caused by pool floaties. T-163-64.

A DCYF worker interviewed A.D. at the hospital. Although A.D. was talkative during the "rapport-building" phase of the interview, she was "overall pretty sullen" when asked about her injuries. T-112-14, 219-20. A.D. told the assessment worker that she did not know how she got the injuries. T-114-15, 125-26. To a doctor, A.D. only made a "vague comment about somebody" and then "shut down." T-158, 217.

Although some described A.D. as staring blankly and quiet at times, she smiled and enjoyed the attention she got when a police officer photographed her injuries. T-158, 169-70, 208-09, 216, 226-27. As her hospital stay wore on, A.D. sometimes became agitated, throwing herself around and banging her head, requiring staff to physically and medically restrain her. T-158, 160, 172-73, 237-38, 252-53. See also T-232-35, 267 (A.D.'s foster parent, Kathryn Sullivan, and a former teacher, Mellisa Vaughn, visited A.D at the hospital and described her as unusually quiet and apprehensive).

DCYF workers and police talked with Warren. They generally described Warren as cooperative in answering their questions, allowing them to talk with A.D., and assisting with photographing the head wound under A.D.'s hair. T-99, 102, 110-11, 116, 122, 226, 299-300. In general, Warren's

explanations to them about A.D.'s injuries were consistent with her testimony. T-94-95,102-03, 120-21, 216-17, 150, 302-03, 377. But a DCYF worker and officer took issue with Warren not returning to the hospital to talk with them quickly enough after they finished talking with A.D. T-118. A DCYF worker also claimed that Warren said she did not bring A.D. to the hospital sooner because of a lack of health insurance, a statement that was found not true. T-116-17, 304-05.

At the hospital, Warren was upset, emotional, and nervous. T-110-11, 122, 299-300. One officer claimed Warren commented "all this for a five year old." T-221. Warren did not agree that A.D. should be admitted for treatment until an officer threatened to arrest her. T-219. When one DCYF worker told Warren that her explanations for the injuries were implausible, Warren "escalated" and cried uncontrollably. T-136-37.

Warren denied wrongdoing. T-138, 440. She explained that she was upset at the hospital. T-537. See also T-398-400 (MacDonald described Warren as understandably upset about A.D. needing hospitalization but as acting in her normal nutty, outspoken way). A lot of people came in and out of A.D.'s room and several police officers had arrived, with cameras and "measuring things," asking a lot of questions. T-537-38. Warren had a hard time watching A.D. getting "poked" by needles. T-538. She described feeling

overwhelmed and explained she merely went down the street to the cemetery to process what was going on. T-538-39. She denied saying, "all this for a five-year old." T-539.

After A.D. was admitted, DCYF obtained a custody order. T-117-18. When Warren returned to the hospital with clothing and toys for A.D., she was not allowed to see A.D. or deliver the items. T-541-42. See also T-399-400, 541-42, 556 (MacDonald brought the items to A.D.) After that, Warren did not cooperate in signing paperwork regarding A.D. T-136.

Shortly after her discharge from the hospital, A.D. was examined by Cornelia Gonsalves, a pediatric nurse practitioner for the Child Advocacy and Protection Program. T-410, 413-14, 424. Other than the head wound and marks on her arms, Gonsalves found A.D. to be healthy. T-428.

Gonsalves asked A.D. what caused her head injury and the marks on her arms. T-414-15. She recalled probably asking A.D. how the wound or "boo-boo" on her head and the marks on her arms happened. T-414-15. A.D. did not answer her, and Gonsalves did not probe further. T-415, 426. Gonsalves did not think that the wounds were caused by A.D. picking at them. T-416. She concurred with doctors who opined that the head wound was so severe because of a delay in treating it. T-416-17.

After her discharge, A.D. returned to live with Kathryn Sullivan, her prior foster parent. T-235-36. Sullivan acknowledged that, when A.D. previously lived with her, there were issues between Sullivan and Warren about A.D. T-250-51. While Warren was particular about what A.D. should wear and how she should style her hair, Sullivan let A.D. wear what she wanted and style her hair as she pleased. T-250-51.

Although Sullivan claimed not to have asked A.D. about the cause of her injuries, Sullivan's friend and A.D.'s former teacher, Mellisa Vaughn did. T-244-46. A.D. stayed briefly with Vaughn while Sullivan was away in August 2018. T-240, 264-65. Vaughn testified that, during this stay, A.D. made some abuse accusations. T-271-72. Vaughn asked A.D. about her "boo-boos," told A.D. that it was "so sad" the injuries happened, and asked A.D. who made those marks. T-288. At this point, Vaughn believed Warren responsible for the injuries. T-294. Vaughn told A.D. to tell people what happened and when A.D. said she did not want to because the last time she "told" she had to go back to living with Warren, Vaughn told her that if she said who caused the injuries, "maybe then, she wouldn't have to go back to her mom's." T-288-89, 293-95.

At some point while with Vaughn, A.D. made her first accusation, while they were out fishing. T-283. A.D. was

screaming with excitement after catching a fish, leading Vaughn to tell her to keep her voice down. T-283. Vaughn said A.D. responded by asking whether she was going to tape her mouth shut like her mom did. T-283.

Although Vaughn told Sullivan about the statement, Sullivan did not report them to DCYF or the police. T-240, 255-56, 264-65, 289. Instead, a few months later, when the case worker asked A.D. how she got her injuries, A.D. replied with another accusation, prompting the case worker to schedule A.D. to meet with a child advocacy center (CAC) interviewer. T-437.

By this point, Sullivan said that A.D. did not want to live with Warren. T-257-58. When A.D. asked Sullivan if they knew that her mother was mean to her, Sullivan told her, "I think they do, but you can sure tell them." T-257-58. Sullivan said that A.D. "really went for it" at the CAC interview. T-257-58. When she left the interview, Sullivan said A.D. was bouncy and acting like a weight had been lifted. T-248.

Caitlyn Massey conducted the CAC interview. T-328. She testified generally about the interview process, and the protocols she followed. T-332-33. On cross-examination, however, Massey agreed that she did not explore with A.D. who had been asking her about the injuries or why she gave

to others differing accounts of what may have happened. T-354-55.

Warren's defense focused, in part, on the claim that the repeated comments made to and questioning of A.D. by medical providers, DCYF workers, Gonsalves, Sullivan and Vaughn about the injuries could have falsely suggested to A.D. that Warren was to blame or should be blamed. Dr. Eric Mart, a board certified forensic psychologist, testified about suggestibility with children. T-476-77.

Mart described the best practices when interviewing children in cases involving suspected abuse or neglect. T-481-83. He explained how a child's memory works and how it may be susceptible to suggested false memories. T-482-84. Mart said questions should be open ended and not suggest an answer. T-484-85. Questioners also should avoid repeatedly asking a child to explain what happened to them. T-484. The repetition of questions can be viewed by the child as feedback that their prior answers were incorrect, leading them to give a different answer the next time they are asked. T-484-85, 489-90. As a child's answers change, their memory also changes to incorporate the perceived feedback. T-485-86, 489-90. According to Mart, children between the ages of three to six years old are more susceptible to suggestion. T-495-96.

Mart testified that a forensic interviewer should employ techniques to try to determine the accuracy of a child's memory. T-486-91. Those techniques require knowing how many times a child has been questioned and by whom, and understanding what the child has previously said. T-498-99. That information should be used to attempt to determine during the interview with the child the source of the that information the child provides. T-498-99. Mart acknowledged that it can be difficult to determine whether a child has an independent memory of an incident. T-498-500.

Gonsalves did not counter Mart's testimony about suggestibility but did testify about "delayed disclosures." She said that children often delay talking about traumatic events for days or years. T-420. She explained that a child needs to develop trust with another adult and feel safe before talking about any alleged abuse. T-421-22.

Over defense objection, A.D. testified at trial from a remote location via Webex. The judge, jury and counsel in the courtroom could see A.D., but A.D. could not see Warren. M-II 49-52 (discussing logistics after the court's ruling).

A.D. testified that she went to the hospital for a scar on her head. T-50. She denied knowing how she got the scar but claimed that Warren told her she "had freckles" and "itched them." T-50-51. She said that the scar eventually turned into a bald spot. T-51.

A.D. described having other scars that "weren't bad." T-51. She mentioned scars on her wrists, ankle, and face. T-51. A.D. said that she got the scars from being duct taped to a wall in a closet. T-51-52. A.D. also said that Warren used belts on her "on the same spots." T-52. According to A.D., Warren duct taped and belted her while she was standing up for long periods of time or tied her to a chair or baby crib. T-53. A.D. said she was belted to a chair more than once. T-53. See also T-307-08 (State introduced into evidence a chair from Warren's home with apparent duct tape residue). But see T-540 (Warren denied strapping A.D. to any chair and explained she bought the chair used and frequently had to tape it together).

A.D. testified that Warren would punish her for breaking. T-54-55. Warren made her sit or stand for "probably an hour," or "like, a quarter of the day or night." T-55. During those "time-outs" she was not allowed to go to the bathroom. T-55. A.D. also said that Warren would only give her cold showers. T-56. She testified that once she threw up on a pizza and "had to" eat it with her throw up on it, but did not say why or whether anyone, including Warren, made her do so. T-56-57. See also T-540 (Warren denied making A.D. ingest vomit).

A.D. acknowledged that before going to the hospital, she touched the wound on her head sometimes, and it was hard

to leave it alone. T-62, 64. She said Warren tried to clean and treat the wound with ointment, which made it a "little better". T-62-63. A.D. said that eventually Warren and MacDonald took her to the hospital. T-65. By the time of the trial, A.D. said that the wound was better and no longer hurt. T-66.

A.D. said no one at her school had asked her about any bruising. T-68. She also did not recall that anyone at the hospital asking about any bruises on her arms and legs. T-68. But A.D. acknowledged that, when interviewed at the hospital, she told the woman that she did not know how she got the bruises, and that no one had touched them. T-69-70.

When asked why she said something different about the bruising and scars at the hospital than what she testified to at trial, A.D. explained that she had a "bad memory" when she was younger. T-69-70, 75-76. A.D. also agreed that, after leaving the hospital and returning to her foster care family, she did not want to live again with Warren. T-73.

SUMMARY OF THE ARGUMENT

1. After Crawford v. Washington, 541 U.S. 36 (2004), Maryland v. Craig, 497 U.S. 836 (1990), on which the court rested its decision to allow A.D. to testify outside Warren's presence, is no longer good law. Even if Craig survived Crawford, the federal constitution demands more assurance of reliability than was demonstrated here. There was insufficient evidence to support the finding that A.D.'s testimony would be reliable despite being given outside the presence of and without seeing Warren.

This Court has not adopted an exception to the state right to face-to-face confrontation that the Supreme Court endorsed in Craig. State v. Peters, 133, N.H. 791 (1991). Indeed, this Court signaled that such an exception conflicts with our state constitution, which "explicitly provides what the Federal Constitution has only been interpreted to mean." Id. Even if this Court finds that the state constitution does not categorically prohibit trial testimony outside an accused's presence, A.D.'s testimony did not have the requisite indicia of trustworthiness.

2. The record did not support a finding that A.D. was competent to testify under Evidence Rule 601. There was insufficient evidence that A.D. appreciated and understood the obligation to testify truthfully or that she had sufficient

independent memory of the alleged events. Allowing her testimony was plain error.

3. Evidence of uncharged allegations was not probative of whether A.D.'s testimony was suggested to her and did not explain the delay in reporting the allegations. Any minimal probative value the evidence offered was substantially outweighed by unfair prejudice to Warren.

4. The court failed to apply the State v. Girard standard when reviewing confidential records *in camera*. Even if the Court determines that the court applied the correct standard, it should independently review the records to determine if the court erred in only disclosing limited records to the defense.

I. THE COURT ERRED IN ALLOWING A.D. TO TESTIFY REMOTELY OUTSIDE OF WARREN'S PRESENCE

Before trial, the State asked the court to allow A.D. to testify remotely, outside of Warren's presence. A13-17. The defense objected, citing Warren's federal and state constitutional confrontation rights. A18-22. Following a hearing, during which A.D.'s counselor, Brenda Tighe, testified, the court granted the State's motion. See generally, M-II.

Applying Maryland v. Craig, 497 U.S. 836 (1990), the court explained that,

> while face-to-face confrontation is a fundamental right, it is not indispensable where physical presence and face-to-face confrontation must be had. The Court has said that physical confrontation is a preference, but one must occasionally give way to considerations of public policy and the necessities of the case.

M-II 32-33.

Addressing the four components of confrontation identified in Craig - "physical presence, oath administered to the witness, cross-examination, and observation of demeanor by the trier of fact" - the court found that the latter three "are not an issue." M-II 33-34. Regarding the oath, the court found it sufficient that A.D. would be under oath. The court said that,

> [a]t age 9, I expect, although the Defense would probably still have an opportunity to challenge the witness' ability to comprehend the oath, given that age. But I would expect that a witness of 9 years old would understand the obligation to tell the truth. In any event, that issue is not related to the Confrontation Clause.

M-II 33. Defense counsel could cross-examine A.D. either remotely from the courtroom or in the presence of A.D. at the remote location. M-II 33-34. Because A.D. would appear on a video screen located in the courtroom, the jury would be able to "make all of the same observations that it can make as if the witness was in the courtroom." M-II 34.

Regarding A.D.'s physical presence, the court ruled that the trauma to A.D. of testifying in the courtroom was more than "*de minimis*." M-II 34. Specifically, the court explained,

> [t]his case clearly involves serious emotional distress to a child, to the point where there is a significant risk. I believe Ms. Tighe characterized it as an 85 to 90 percent chance that she will, essentially, shut down and not be able to communicate, that she'll have a visceral trauma response to being present with her mother.

M-II 34. Given the trauma risk, the court ruled that,

> there is an important public policy to avoid that kind of reaction, to avoid additional injury to the child, to cause setbacks in the child's emotional development, in light of the abuse that she has allegedly experienced in her life. And it is, therefore, necessary in the case, to protect her

> from the presence of her mother when she testifies.

M-II 35. In so ruling, the court erred. Allowing A.D.'s remote testimony violated Warren's federal and state confrontation rights.

The Court reviews Confrontation Clause challenges *de novo*. State v. McLeod, 165 N.H. 42, 47 (2013). Because the court ruled before trial, the review is limited to considering "only the arguments and evidence presented at the pretrial hearing." State v. Harrington, __ N.H. __ (Nov. 14, 2023) (citations omitted). The limited review is necessary "to avoid the pitfall of justifying the court's pretrial ruling upon the defendant's response at trial to the evidence." State v. Nightingale, 160 N.H. 569, 573 (2010) (quotation omitted).

The facts adduced at the pretrial motion hearing are summarized in section I.A. Section I.B. addresses the federal constitution. The state constitution analysis is in section I.C.

A. Pretrial hearing.

The State presented only Tighe's testimony. M-II. Tighe began treating A.D. in January 2021, meeting twice a month. M-II 5. Because of the impending trial, by the time of the motion hearing, they met weekly. M-II 5.

Tighe treated A.D. for trauma related issues. M-II 5. A.D.'s trauma manifests in various ways. According to Tighe, "[A.D.] tends to get very dysregulated," nervous, "very

bouncy," "very silly," and has a hard time processing what people ask of her. M-II 5, 7. Around holidays or significant anniversaries, A.D. increasingly exhibits "certain defiant refusal behaviors." M-II 5. Although A.D. made progress since being removed from Warren's care, Tighe described her recovery as "fragile." M-II 8. Tighe explained, "when she experiences trauma, she's very quick to revert to those more primitive trauma responses." M-II 9.

When asked what would happen if A.D. saw Warren, Tighe said that A.D. would have a "strong response." M-II 9. A.D.'s receptive language, expressive language [skills] … ability to kind of think, plan, and problem solve" would shut down. M-II 9. According to Tighe, A.D. would have difficulty understanding and answering questions. M-II 10.

When asked how she knows how A.D. would respond, Tighe could only say that she has to base her opinion on an "extrapolation from what [she's] … seen from other kids that, you know, have had trauma … [who] revert developmentally, emotionally to the age they were when the trauma happened." MI-II 17. According to Tighe, "it would not take much to push her over the edge." M-II 17. Tighe, though, had not talked with A.D. about seeing Warren. M-II 18.

The court asked Tighe only one question, to confirm A.D. was nine years old. M-II 21. Neither the court nor the State asked any questions about whether and to what extent

A.D. understood the obligation to give truthful and reliable testimony. See generally, M-II.

B. Federal Confrontation Right.

After Crawford v. Washington, 541 U.S. 36 (2004), Craig is no longer good law insofar as it permits a witness to testify outside a defendant's presence. Even if Craig survived Crawford, the federal constitution demands more assurance of reliability than was demonstrated here. There was insufficient evidence to support finding that A.D.'s testimony would be reliable despite being given outside the presence of and without seeing Warren.

1. Crawford requires that trial witnesses testify in the defendant's presence.

The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. As the Craig Court explained, the Confrontation Clause "ensures reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding," a purpose fulfilled by "guarantee[ing] the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Craig, 497 U.S. at 844 (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988); other citations omitted).

Face-to-face confrontation is critical because, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... [E]ven if a lie is told, it will often be told less convincingly." Coy, 487 U.S. at 1019. Face-to-face confrontation "ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Craig, 497 U.S. at 846 (citing Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

In its 5-4 decision, the Craig Court recognized a limited exception to the requirement of face-to-face confrontation to allow a complainant to testify in a remote location without facing a defendant. Craig examined a state statute authorizing the procedure and applied a two-part analysis.[3] First, the prosecution must demonstrate that denial of face-to-face confrontation is necessary to further an important public policy. Id. at 850. Second, the court must find that the reliability of the testimony is otherwise assured. Id.

In dissenting, Justice Scalia took exception to the majority's reliability-balancing test. He explained, "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." Id. at 862 (Scalia, J., dissenting); see

[3] New Hampshire does not have a similar statute.

also U.S. v. Gigante, 166 F.3d 75, 81 (2nd Cir. 1999) ("[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony."). According to Justice Scalia, the majority's balancing test was inconsistent with the constitutional text. Id. at 870 ("[t]he Court today has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it.").

> We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it.

Id. at 870 (Scalia, J., dissenting).

In the since Craig, the Supreme Court's view of the Confrontation Clause changed as explained in Crawford. See State v. Ata, 158 N.H. 406, 410 (2009) (noting that, in Crawford, the Supreme Court changed its confrontation analysis). "In Crawford, Justice Scalia wrote for the majority and his dissent from Craig became the Court's view, transforming its approach to the Confrontation Clause." People v. Jemison, 952 N.W.2d 394, 398-99 (Mich. 2020). After Crawford, "balancing tests" cannot supplant "categorical constitutional guarantees." Id. (discussing Crawford, 541 U.S. at 67-68). Instead, a defendant's confrontation right is

absolute for all testimonial evidence unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine. Id. (citing Crawford, 541 U.S. at 68).

Indeed, although Crawford did not mention Craig, the 7-2 Crawford decision expressed a fundamentally different view of a defendant's confrontation rights. U.S. v. Cox, 871 F.3d 479, 492-93 (6th Cir. 2017) (Sutton, C.J., concurring) (discussing the import of Crawford on the Court's holding in Craig). As Judge Sutton explained,

> Craig treated the Clause as a safeguard for evidentiary reliability as measured by the judge in that case and today's rules of evidence. But Crawford held that it was a procedural guarantee that commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" in front of the accused.
>
> … Craig said that the face-to-face confrontation requirement is not absolute. But Crawford said that a face-to-face meeting between an accuser and the accused was an essential part of the confrontation right. Dispensing with confrontation because testimony is obviously reliable, Crawford observed, is akin to dispensing with jury trial because a defendant is obviously guilty.
>
> … Craig looked to the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court to identify new exceptions to the right to face-to-face confrontation. But Crawford looked to

> the original publicly understood meaning of confrontation to determine when the exception-free words of the guarantee ([i]n all criminal prosecutions) should have exceptions.
>
> Craig worried that adherence to the words of the guarantee was too extreme and would abrogate virtually every hearsay exception developed by the rules of evidence up to that point. But Crawford refused to rely on the law of evidence at the time of the trial because it would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.
>
> … Craig offered no hint that there was any limit to the kinds of exceptions that the [Ohio v. Roberts, 448 U.S. 56 (1980)] balancing test would allow then or in the future. But Crawford carefully identified the kinds of exceptions that might be allowed under its approach and conspicuously never mentions Craig as one of them.

Cox, 871 F.3d at 493-94 (Sutton, C.J., concurring) (internal quotations omitted).

Crawford "emphasized the importance of face-to-face testimony to the confrontation right, citing historical examples that illustrated how face-to-face testimony was critical to its enforcement." Jemison, 952 N.W.2d at 399 (citing Crawford, 541 U.S. at 43-45). As Crawford explained, "a reliability-balancing test" would not have "provid[ed] any meaningful protection" in those cases. Id. at 68. Consequently, Crawford restored face-to-face testimony as a

fundamental element of confrontation. Id. at 57 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895); see also Coy, 487 U.S. at 1020 (explaining that, although the Supreme Court has indicated that confrontation rights are not absolute, and may yield to other important interests, "the rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine."); California v. Green, 399 U.S. 149, 157 (1970) (emphasizing that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"). In doing so, Crawford overruled Roberts, the case establishing the "reliability framework" underlying the second prong of the Craig analysis requiring assurances of reliability.

For the reasons outlined in Jemison and in Judge Sutton's concurrence in Cox, this Court should find that Crawford supplants Craig to the extent that Craig allowed trial testimony given by a witness shielded from facing the accused. It was error to permit A.D. to do so.

2. The reliability of A.D.'s testimony outside Warren's presence was not sufficiently assured.

Even if Crawford does not supplant Craig, Craig emphasized that any exception to face-to-face confrontation requires a demonstration of reliability not demonstrated here.

As noted in Craig, the Confrontation Clause has long been interpreted to require that a witness appreciate the "seriousness of the matter" and the obligation to testify truthfully. Craig, 497 U.S. at 845-46 (quoting Green, 399 U.S. at 158). "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]." Id. at 846 (quoting Dutton v. Evans, 400 U.S. 530, 540 (1986)).

When the court ruled on the State's motion, it had no evidence about A.D.'s understanding of the obligation to provide truthful and reliable testimony. The court did not ask Tighe about A.D.'s understanding, if any, of that obligation. The State did not offer testimony from A.D. about her understanding of the obligation. Further, the State provided no evidence enabling the court to assess whether A.D.'s anticipated testimony would reflect her truthful memories or the suggestions of others. Instead, contrary to its duty to determine whether the reliability of A.D.'s testimony was assured, the court simply stated that it "expected" A.D. would tell the truth, noting that she will be under oath and subject to cross-examination. Such assumptions were insufficient to allow A.D. to testify outside of Warren's presence.

C. The New Hampshire Constitution

Part I, Article 15 of the New Hampshire Constitution provides that "[e]very subject shall have the right … to meet the witnesses against him face to face." This Court has not adopted an exception to face-to-face confrontation that the Supreme Court endorsed in Craig. See State v. Peters, 133 N.H. 791, 793 (1991) (discussing but not endorsing or adopting Craig). Indeed, the Peters Court signaled that such an exception conflicts with our state confrontation right. See State v. Ball, 124 N.H. 226, 230-31 (1983) (holding that the Court has the power to interpret the state constitution as more protective than the federal constitution). Alternatively, if this Court finds that the state constitution does not categorically prohibit trial testimony outside an accused's presence, A.D.'s testimony did not have the requisite indicia of trustworthiness.

1. Craig is inconsistent with the face-to-face right guaranteed by the state constitution.

In Peters, this Court considered whether a child-complainant's deposition testimony could be presented in lieu of trial testimony. The deposition was taken under RSA 517:13-a and in the defendant's presence. Peters, 133 N.H. at 792. The only question the Court addressed was whether the child-complainant was, in a constitutional sense "unavailable" for trial, thereby allowing the use of the deposition under the statute. Id. at 797. Because the record

lacked evidence that the complainant was unavailable to testify at trial, the Court held that admission of the deposition violated Peters' confrontation rights. Id.

Given the Peters holding, the Court did not address whether the RSA 517:13-a procedure violated another aspect of the confrontation right that Peters also asserted - that submitting the deposition in lieu of trial testimony would impede a jury's ability to assess a witness's demeanor, a question later answered in Hernandez. State v. Hernandez, 159 N.H. 394, 404 (2009) (endorsing Craig to allow in certain cases a witness to testify in disguise). Although the Peters Court suggested that doing so may be an appropriate exception to the state confrontation right, the deposition in Peters was taken in the defendant's presence. On this point, the Peters Court explained that:

> the video tape procedure provided for by RSA 517:13-a (Supp. 1989) does not raise a substantial confrontation clause problem since it involves testimony in the presence of the defendant.

Id. (citing Coy, 487 U.S. at 1023 (O'Connor, J., concurring)).

Here, A.D.'s testimony outside Warren's presence raises the precise "substantial confrontation problem" noted by this Court in Peters. It is a "substantial confrontation problem" because the state constitution explicitly guarantees an accused the right "to meet the witnesses against him face to

face." N.H. Const., Pt. I, Art. 15. "The language of the New Hampshire Constitution['s Confrontation Clause] is the more precise of the two, in that it explicitly provides what the Federal Constitution has been interpreted to mean." Peters, 133 N.H. at 794. Whereas the federal constitution has been interpreted to "reflect a preference for face-to-face confrontation," Craig, 497 U.S. at 489, our constitution specifically requires it. Peters, 133 N.H. at 794.

When interpreting a constitutional provision, the Court first looks to its plain language and its purpose and intent, giving the words used "the meaning they must be presumed to have had to the electorate when the vote was cast." Richard v. Speaker of House of Representatives, 175 N.H. 262, 269-70 (2022) (quotations omitted). The language here cannot be clearer, requiring witnesses to give testimony in an accused's presence "face to face." State v. Coombs, 149 N.H. 319, 322 (2003) (quoting White v. Illinois, 502 U.S. 346, 352 (1992)) (emphasis added). See 6 Sources and Documents of U.S. Constitutions 344, 346 (William F. Swindler ed. 1976) (the right to face-to-face confrontation has been part of the state constitution since it was first adopted).

The state confrontation right simply does not allow for a trial witness to testify outside a defendant's presence. It was error to allow A.D. to do so.

2. A.D.'s testimony lacked adequate assurances of reliability.

Even if the state constitution permits some remote testimony, there was no sufficient basis for the court to find that A.D.'s remote testimony bore the requisite indicia of reliability. In State v. Cook, 135 N.H. 655 (1992), this Court adopted the analysis of Ohio v. Roberts as clarified in Idaho v. Wright, 497 U.S. 805 (1990), to determine the scope of a defendant's state confrontation rights. See e.g., State v. McLaughlin, 135 N.H. 669 (1992). Before an out-of-court statement may be used, the state confrontation clause requires a showing that the declarant is unavailable and her out-of-court statement "bears adequate 'indicia of reliability.'" Cook, 135 N.H. 662 (applying Roberts, 448 U.S. at 66).

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. "'This requires the State to present the trial court with evidence that the [out-of-court statements] were so trustworthy that adversarial testing would add little to [their] reliability.'" Cook, 135 N.H. at 662 (quoting Wright, 497 U.S. at 820). Circumstances demonstrating trustworthiness must be inherent in the testimonial statement, not in other

evidence tending to corroborate it. Wright, 497 U.S. at 821-22.

Here, the record lacks evidence that A.D.'s testimony outside Warren's presence would be so trustworthy that adversarial face-to-face testing would add little to its reliability. As discussed in section I.B.2, the court failed to investigate the trustworthiness of A.D.'s anticipated remote testimony. It assumed that she would understand the oath without any evidence of such understanding. Moreover, it assumed her testimony would be truthful, despite the fact that the defense would challenge its credibility in many ways. See Wright, 497 U.S. at 821-23. Similarly, if Craig is the applicable analysis for determining when face-to-face confrontation need not happen, the court's reliability assumptions do not suffice to allow A.D. to testify outside Warren's presence under the standards set forth in Craig in light of Crawford.

II. THE COURT PLAINLY ERRED IN FINDING A.D. COMPETENT

Warren moved to *voir dire* A.D. before she testified to determine whether she was competent to testify under Evidence Rule 601. A23. The court did so remotely on the first day of trial, with A.D. testifying from the county attorney's office using Webex. T-3-5. Following a colloquy, the court found her competent. T-10-11.

In so ruling, the court erred. Notwithstanding the court's statement that A.D. "can appreciate the oath," T-10, there was no basis in the record to support that finding. On the contrary, the record lacks any evidence demonstrating that A.D. appreciated and understood the obligation to testify truthfully. Because Warren did not object to the competency finding, this issue is raised as plain error.

The Court may consider errors not raised before the trial court under its plain error rule. State v. Racette, 175 N.H. 132, 139-40 (2022). As the Court stated in Racette,

> [t]o find plain error: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Id. (internal citations omitted). The rule "is limited to those circumstances in which a miscarriage of justice would otherwise result." Id. at 140.

During the colloquy with A.D., the court asked her about her ride from her home to New Hampshire. T-4. She did not know the kind of car she rode in and did not know the state she lives in. T-4. The court told her it was going to ask her some "easy questions." T-5. In response, A.D. stated her age, gave her date of birth, told the court she was in third grade, and named her school. T-5-6. When asked if she would change schools in fourth grade, she thought so. T-5. She has lots of favorite teachers and likes math, spelling, reading, and playing outside. T-6-7. She said she has four best friends. T-7. When asked the color of her dress, she confirmed it was black and told the judge his robe was black. T-7.

The court then asked, "do you know the difference between telling the truth and telling a lie." T-8. A.D. responded, "[i]f you tell a lie, it's not the truth. And when you get -- do tell the truth, it's what actually happened." T-8. The court then asked the following questions,

> THE COURT: … So I'm wearing my robe, and you're wearing your shirt, and both are black. But if I said to you, no Abriana, your shirt is white, would that be the truth or a lie?
>
> A.D.: A lie.
>
> THE COURT: And if I told you that my robe was red and not black, would that be the truth or a lie?

A.D: The truth.

THE COURT: Wait. I'm sorry. If I told you that my --

A.D: Okay.

THE COURT: -- is red, would that be the truth or a lie?
A.D: A lie.

T-8-9. The court then asked A.D. to "promise me that you will only tell [counsel] they truth" and "only tell [counsel] what actually happened the way [she] remember[s] it? T-9. A.D. said "yes." T-9. Based on this colloquy, the court found her competent, saying she "clearly understands" the difference between the truth and a lie. T-10.

A witness's competency to testify is a question of fact for the court. State v. Horak, 159 N.H. 576, 581 (2010) (citations omitted). Where the record supports the court's determination, this Court will not disturb it absent an unsustainable exercise of discretion. Id. (citations omitted). "Because so much depends on the trial court's firsthand observations of the witness, its conclusion that the witness is competent is entitled to great deference." State v. Briere, 138 N.H. 617, 620, 644 A.2d 551 (1994). Absent an abuse of discretion, this Court will not disturb the trial court's determination of competency when there is evidence to support it. State v. Mills, 136 N.H. 46, 49-50 (1992) (quoting State v. Scarlett, 121 N.H. 37, 39 (1981)).

Because the court ruled before trial, the Court's review is limited to considering "only the arguments and evidence presented at the pretrial hearing." Harrington, supra. This limited review is necessary "to avoid the pitfall of justifying the court's pretrial ruling upon the defendant's response at trial to the evidence." Nightingale, 160 N.H. at 573 (quotation omitted).

It was plain error to find A.D. competent. Although witnesses are presumed competent under Rule 601, the presumption can be overcome if the witness "lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth." N.H. R. Ev. 601. In determining whether a witness is competent, a court must consider the witness's (1) ability to observe, remember, and narrate; and (2) understanding of the duty to tell the truth. N.H. Ev. R. 601(b); State v. Keyes, 114 N.H. 487, 490, 322 A.2d 615, 617 (1974).

The rule plainly requires not only that the witness be able to understand and answer questions, but also that she had an ability to remember events and demonstrate an understanding of the difference between a truth and a lie and responsibility and obligation to tell the truth. Goy v. Director General, 79 N.H. 512, 514 (1920) (citation and quotation omitted) (the witness must demonstrate "a sense of moral responsibility [and] a consciousness of the duty to speak the

truth."); Griggs v. State, 367 P.3d 1108, 1119-20 (Wyo. 2016) (witness must have an independent recollection of the events); Com. v. Delbridge, 855 A.2d 27, 39-40 (Pa. 2003) (allegation that a witness's memory has been tainted "raises a red flag regarding competency, not credibility"). As the Court explained in Horak, "[a]lthough the witness need not utter any 'magic word' indicating that he or she understands the difference between the truth and a lie or the importance of telling the truth, some indication of the witness's understanding must be apparent on the record." Horak, 159 N.H. at 582 (quoting Mills, 136 N.H. 46, 54 (1992) (Brock, C.J., dissenting)). Regarding sufficient memory, there should be evidence that a witness possesses an independent memory of the event. Delbridge, 855 A.2d at 40.

The record here lacks evidence regarding any independent memory A.D. may have had of the incidents. It also lacked evidence that she appreciated and understood the duty to testify truthfully, besides her promise to tell the truth. In Mills, during a colloquy by the court, the four-year-old witness "stated that he wanted to tell the truth and acknowledged that his parents would be upset if he did not tell the truth," which was sufficient. In Horak, the court and counsel asked similar questions focused on whether an adult witness with disabilities understood "what happens if somebody lies," what it meant to "tell the truth," and whether

it is "good or bad to tell the truth" or "good or bad to tell a lie." Horak, 159 N.H. 579-80. See also State v. Monroe, 161 N.H. 618, 624-25 (2011) (witness understood it was "wrong" to lie); State v. Brown, 138 N.H. 649, 653 (1994) (witness appreciated the "importance of telling the truth"); State v. St. John, 120 N.H. 61, 62-63 (1980) (witness knew it was "good to tell the truth" and "said she would get a licking" if she lied).

Here, in contrast, the court there was no evidence about A.D.'s understanding of the obligation to tell the truth or the consequences of not doing so, or that she possessed an independent recollection of the alleged events. Although A.D. stated that the truth is "what actually happened," she did not otherwise explain her understanding of the obligation to tell the truth or the consequences of lying. During the colloquy, she did not testify about her memory of any alleged events. On this record, there was insufficient evidence to find that A.D. demonstrated the "sense of moral responsibility [and] a consciousness of the duty to speak the truth," or an independent memory of the alleged abuse that Rule 601 requires.

The error affected Warren's substantial rights and the integrity of the judicial proceedings. The State's case rested on A.D.'s testimony. Absent A.D.'s testimony, Warren could not have been convicted of the second degree assault charge alleging that she bound A.D.'s arms for a prolonged period.

A.D. was the only witness who testified about the cause of the marks on her arms. It also is likely that, without A.D.'s testimony about Warren's other uncharged acts, Warren would not have been convicted of the first degree assault charge for failing to seek medical attention, which rested solely on inferences from when Warren sought medical attention for A.D.

III. THE COURT ERRED IN ADMITTING EVIDENCE OF UNCHARGED CONDUCT

Before trial, the State asked the court to allow it to admit uncharged conduct evidence, particularly evidence that Warren taped A.D.'s mouth shut and forced her to take cold showers and stand for extended periods of time. A25-33. The State contended that the evidence was relevant to rebut Warren's claim of A.D.'s suggestibility and to explain the delay in making abuse allegations. Warren objected. A34-40.

The court admitted the testimony, explaining that "the evidence is not being offered for a propensity purpose but is instead offered to rebut the defense's suggestibility argument and to provide an explanation for A.D.'s delayed disclosure. Supp. 62-66. In addition, the court allowed, over Warren's objection, Vaughn to testify to A.D.'s hearsay statement that Warren taped her mouth shut. T-283. The court explained,

> So, after hearing the objection and the reasons for the State's response, the State's proffered reason for the statement being admitted to demonstrate that there was a lack of suggestion to the girl, both that the conduct occurred and that it was the Defendant who did it, that the objection is overruled. I will allow it. I'm going to give a limiting instruction that they can't take the statement for its true, only what the statement was in the context of how it was made

> under the circumstances that it was made.

T-282-84 (the limiting instruction told the jury "[y]ou can only use [the hearsay statement] to determine whether that information was suggested to A.D."). In ruling the evidence was admissible through A.D. and Vaughn, the court erred.

"The State bears the burden of demonstrating the admissibility of prior bad acts." State v. Tufano, 175 N.H. 662, 665 (2023) (quotation omitted). The Court reviews rulings for an unsustainable exercise of discretion and will reverse if the ruling was clearly untenable or unreasonable to the prejudice of the defense. Id.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"The purpose of Rule 404(b) 'is to ensure that an accused is tried on the merits of the crime charged and to prevent a conviction that is based upon propensity and character inferences drawn from evidence of other crimes or wrongs.'" Id. (quoting State v. Thomas, 168 N.H. 589, 599 (2016)). Other act evidence is admissible only if "(1) it is

relevant for a purpose other than proving the person's character or disposition; (2) there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Id. (quoting N.H. R. Ev. 404(b)).

To meet its burden under the first prong, the State "must specify the purpose for which evidence is offered and articulate the precise chain of reasoning by which it will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character or propensity." Id. at 666 (quotation omitted). The State argued that the uncharged acts of abuse was necessary to rebut the argument that A.D.'s allegations about the charged conduct were suggested to her and to explain why she did not immediately make her accusations. The probative value of the evidence for these purposes was minimal. Proof of uncharged acts does not make it less probable that A.D.'s allegations about the charged conduct were the result of improper suggestions. See State v. Gordon, 161 N.H. 410, 415 (2011) (poverty evidence has in many cases little tendency to make theft more probable). The uncharged acts also did not explain why A.D. did not immediately report abuse any more than the evidence of the charged conduct

did. Cf. Harrington (Nov. 14, 2023) (evidence of uncharged conduct explained disclosure delay where the uncharged conduct lead to the eventual disclosure).

Regarding the third prong,

> [e]vidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.

State v. Belonga, 163 N.H. 343, 359-60 (2012) (quotations omitted). Unfair prejudice is inherent in uncharged conduct evidence "because, notwithstanding the permissible reasons for which such evidence might be admitted, there is a risk that the jury will find the defendant had a propensity to commit the charged crime merely because the defendant committed a similar crime or wrong in the past." Id. at 360. "The risk of unfair prejudice, moreover, increases as the degree of similarity between the prior act and the charged crime increases." Id. (citations omitted).

Here, the uncharged conduct evidence is very similar to charged crimes. There was a substantial risk that the jury would conclude that Warren committed the charged acts because she had abused A.D. in other similar ways on other occasions. That unfair prejudice of the uncharged conduct

substantially outweighed its minimal probative value. The court should have excluded the evidence.

IV. THE COURT MAY HAVE ERRED IN FAILING TO DISCLOSE MATERIAL IN THE DCYF AND COMMUNITY PARTNERS' RECORDS REVIEWED *IN CAMERA*

Warren moved the court to review *in camera* and produce DCYF records pertaining to the agency's involvement with Warren and A.D., and Community Partners' records of the intake and counseling services provided to A.D. A41-50. Following an *in camera* review, the court ordered the production of only twelve pages of records and one video interview from the more than 5,000 pages of information DCYF produced to the court. Supp. 67-70. The court ordered that none of the Community Partner's records be produced. Supp. 67-70.

In reaching its decisions, the court relied on and applied the standard set forth in State v. Gagne, 136 N.H. 101 (1992), as discussed in State v. Sargent, 148 N.H. 541 (2002). Supp. 69-70. Regarding the DCYF records, the court explained that only the twelve pages and the video met the "essential and reasonably necessary test" for production. The court explained that the remainder of the documents were:

> (1) not essential or reasonably necessary to the defense; (2) contain only duplicative information found in the disclosed reports; or (3) are police reports and A.D.'s medical records relating directly to the instant investigation. In the case of police reports and A.D.'s medical records, while some portion of them likely meet the standard for disclosure, the court assumes they have been

produced to the defense in discovery . . .

Supp. 69-70.

Regarding the Community Partners' records, the court determined that none met the "essential and reasonably necessary test." The court explained,

> The records involve counseling and other therapies provided to A.D. both before and after the time period encompassed in the charged offenses. Although the records occasionally make reference to the nature and existence of this case, none of the records bear directly or indirectly on any issue in this case, including A.D.'s credibility.

Supp. 69-70.

A. The court applied the wrong standard to its review by relying on *Gagne* instead of *Girard*.

The Gagne decision established the standard for courts to use in determining whether to conduct an *in camera* review of confidential or privileged information. "[I]n order to trigger an *in camera review* … the defendant must establish a reasonable probability that the records contain information that is material and relevant to his defense." Gagne, 136 NH at 105.

Gagne further held that "the trial court must disclose to the defense confidential material that contains evidence that is essential and reasonably necessary to the defense." State v. Girard, 173 N.H. 619, 627 (2020). Nearly twenty years after Gagne, the Girard Court observed that it had "never

elaborated upon or explained what [essential and reasonably necessary] means." Id. While Girard did not alter the showing a defendant must make to trigger an *in camera* review, see id at 628, a matter not disputed here, it clarified the "essential and reasonably necessary" standard governing when a court must disclose information reviewed *in camera*.

When considering whether information in the records is essential and reasonably necessary, a "trial court must determine if material and relevant evidence is in fact contained in the records." Id. at 628. "[M]aterial and relevant" information is not restricted only to credibility evidence (although the Girard Court discussed credibility evidence at length because that was the subject of the case). Rather, evidence is relevant and must be produced if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Girard, 173 N.H. at 628 (relying on Evidence Rule 401). See also State v. Paul, __ N.H. __ (Nov. 14, 2023). This means that the evidence that must be disclosed to the defense after an *in camera* review is not limited to exculpatory or inculpatory evidence or evidence pertaining to credibility. Rather, all material and relevant evidence must be disclosed.

The court's ruling here rested solely on Gagne without any mention of Girard or this Court's clarification of information that is "essential and reasonably necessary." By

not applying the Girard, the court erred and the case should be remanded for *in camera* review of records applying the Girard standard. Cf. State v. Chandler, __ N.H. __ (Oct. 25, 2023) (remanding case so the court could review any undisclosed records again, in accordance with the Girard standard).

B. The court may have erred when it failed to disclose more of the DCYF records and any of the Community Partners records.

If the Court does not determine that the court applied the wrong standard as addressed in section IV.A., it may have erred in failing to disclose more records than it did. Accordingly, Warren requests that this Court review the material provided to the court for *in camera* review, to determine whether the court erred in failing to disclose any material.

"A criminal defendant's interest in obtaining disclosure of material helpful to his defense is rooted in the constitutional right to due process." Girard, 173 N.H. at 627. Part I, Article 15 of the state constitution protects a defendant's rights to due process, compulsory process, all proofs favorable and confrontation. The Sixth and Fourteenth Amendments to the federal constitution protect the right to due process. These provisions require that, following *in camera* review of confidential records, a court must disclose records that are relevant and material. Id. at 628.

As discussed in section IV.A, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Id. Evidence is material "if there is a reasonable probability that disclosure of the evidence will produce a different result in the proceeding." Id. at 628-29 (quoting United States v. Bagley, 437 U.S. 667, 682 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Moreover, as this Court recently noted, it "cannot hypothesize how [an impeachment opportunity erroneously barred by the trial court] would have developed in the absence of the trial court's error." Racette, 175 N.H. at 138-39 (error in barring defendant from impeaching State's witness with prior inconsistent statement may have affected the jury's verdict).

Warren's defense centered on the argument that A.D.'s allegations were the product of repetitive and suggestive questioning and A.D.'s desire to not return to Warren's care, rather than the truth of the allegations. Warren's ability to effectively cross-examine the State's witnesses and persuasively challenge the credibility of the allegations rested on Warren's access to records that would allow her to demonstrate the full extent and nature of the prior questioning of A.D., and her ability to draw reasonable inferences about A.D.'s motive to fabricate. The court had to disclose records that may have helped show bias, motive,

prejudice or supported an inference that A.D. had a tendency to lie or that her allegations were suggested to her. See Girard, 173 N.H. at 629 ("records containing general credibility evidence may be material and relevant thereby requiring disclosure").

If this Court concludes that the trial court erred by failing to disclose any records, it should order a new trial. As the Supreme Court has observed, once a court determines that relevant, material evidence was withheld from the defense, "there is no need for further harmless-error review." Kyles v. Whitley, 514 U.S. 419, 435 (1995). The failure to disclose material evidence, by definition, "c[an] not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" Id.

For these reasons, the Court should review the withheld material to determine whether the court erred in concluding that the remainder of the DCYF records and all of the Community Partners records contained no information relevant and material to Warren's defense.

WHEREFORE, Warren respectfully requests that this Court reverse her convictions.

Undersigned counsel requests a fifteen minute oral argument.

Some of the appealed decisions are in writing and appended to the brief.

This brief complies with the applicable word limitation and contains 10,395 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been mailed, postage prepaid, to:

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DATED: December 27, 2023

S U P P L E M E N T

SUPPLEMENT – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

State of New Hampshire

v.

Erin Warren

Docket No. 219-2019-CR-00059

ORDER ON STATE'S MOTION TO ADMIT 404(b) EVIDENCE

The State moves *in limine* to introduce evidence of the alleged victim A.D.'s history in foster care and other uncharged conduct by the defendant. The defendant objects. The court held a hearing on May 4, 2022.

At the hearing, the defendant contested the relevance of the victim's history in foster care with Kate Sullivan because the defense does not intend to argue that the alleged injuries occurred outside of the time period charged, during which time the defendant had custody of the victim. The defendant, however, did not stipulate to the established timeline. The State, therefore, maintains its burden of proving beyond a reasonable doubt that the defendant committed the charged conduct within the alleged timeframe. While the defendant may not intend to contest the medical evidence the State will present to establish when the alleged injuries were conflicted, that does not obviate the State's burden, which makes the timeline of the victim being in foster care with Kate Sullivan for nearly a year, and without injury during that time, up until the six month period during which she was in the defendant's custody and, allegedly, developed the alleged injuries, relevant to the State's case.

Moreover, Kate Sullivan's prior experience as A.D.'s foster mother is relevant to the behavioral changes she observed in A.D. following the charged conduct. Notably, the New

Hampshire Supreme Court has held that expert testimony opining that a particular complainant's behaviors are consistent with those of an abuse victim is inadmissible, in part, because it "impermissibly bolsters the complainant's credibility." State v. Marden, 172 N.H. 258, 263 (2019) ("Such an opinion is improper because 'that determination is solely within the province of the jury.'").

> The reliability of evidence is of special concern when offered through expert testimony because of the risk that the jury will disproportionately defer to the expert's statements because the subject area is beyond the common knowledge of the average person, and because the expert's opinion is given with an air of authority.

Id. at 264; see State v. Cressey, 137 N.H. 402, 405 (1993) (expert opined that the symptoms exhibited by child victims were consistent with those of a sexually abused child); State v. Collins, 166 N.H. 210, 214 (2014) (expert testified that the complainant's behaviors "fit perfectly" with those of a child sexual abuse victim and that she suffered from PTSD caused by the alleged sexual abuse).

Those concerns, however, do nothing to preclude a lay witness from testifying to her objective observations, without expressing any import on the meaning or consequence of those observations. Even where an expert did not specifically opine about the cause of observed behavior or the types of symptoms that might be observed in a child assault victim, the fact that the trial court recognized the witness as an expert and informed the jury that she could offer an expert opinion allowed the jury to infer that the witness expressed opinions in violation of Cressey. See Marden, 172 N.H. at 265. A.D.'s foster mother Kate Sullivan and pre-school teacher Melissa Vaughn, in contrast, testify as lay witnesses only to their first-hand observations of A.D.'s behavior, and without the air of authority of an expert witness. The witnesses will not be permitted to express an opinion about the cause or significance of those behavioral changes.

For those reasons, A.D.'s 2017 stay with Kate Sullivan is relevant to both the timeline of the charged conduct and the testimony regarding behavioral changes observed by Kate Sullivan and Melissa Vaughn. While the knowledge that A.D. had been removed from her custody before is, in some form, prejudicial to the defendant, that prejudice can be mitigated by an instruction to the jury that they may not speculate as to why A.D. was in foster care at that time, may not make any inferences unfavorable to the defendant, and can only accept that the victim was previously in Sullivan's care as a matter of fact.

The State also seeks to introduce uncharged conduct by the defendant under N.H. R. Ev. 404(b), including that the defendant taped A.D.'s mouth shut, that the defendant forced A.D. to take cold showers as punishment, and that the defendant forced A.D. to stand in a corner for extended periods of time. N.H. R. Ev. 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes..." The State seeks to admit the bad act evidence to rebut the defense expert's opinion regarding A.D.'s suggestibility and the import of her delayed disclosure. To be admissible under 404(b), however, the State must establish that there exists clear proof that the bad acts occurred, that the defendant committed them, and that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. N.H. R. Ev. 404(b).

"Clear-proof requirement is satisfied when the State presents evidence firmly establishing that the defendant, and not some other person, committed the prior act." State v. Howe, 159 N.H. 366, 377 (2009) (quotations omitted). There is clear proof that the defendant committed these other uncharged acts of abuse against A.D. because A.D. specifically stated that her mother committed these acts. With respect to the allegation of duct-taping her mouth, a medical expert

identified markings on A.D.'s face that are consistent with duct tape on her face, including an abrasion to her cheek and scabbing on her lip.

Additionally, both Melissa Vaughn and Kate Sullivan can corroborate that A.D. disclosed to them that her mother would tape her mouth shut. Sullivan stated that when she had custody of A.D. in 2017, and when she had custody in 2018, A.D. disclosed to her that her mother forced her to stand in the corner of a room for an extended period as a form of punishment. A.D. also reported to Vaughn that her mother forced her to take cold showers and, in one instance in particular, asked Vaughn if she was going to tape her mouth "like my mom does." Not only did A.D. disclose these prior bad acts to Vaughn and Sullivan, but she made subsequent disclosures about being forced to stand in the corner at her CAC interview. This evidence, through the victim's disclosures and the corroborating evidence discussed at the hearing, establishes clear proof that the defendant committed these uncharged bad acts.

In support of its motion, the State asserts it does not intend to offer the uncharged conduct to show that the defendant acted in conformity therewith, but rather it is offered to rebut a claim of suggestibility, and to provide an explanation of delayed disclosure. State v. Kim, 153 N.H. 322, 327 (2006) ("The State is required to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute."). The defense seeks to introduce an expert who will testify as to the suggestibility of A.D.'s disclosure – that is, that A.D. was somehow coached into making the allegations against the defendant. Relatedly, the State asserts the evidence is necessary to explain why A.D. delayed in disclosing the abuse. Accordingly, the evidence is not being offered for a propensity purpose but is instead offered to rebut the defense's suggestibility argument and to provide an explanation for A.D.'s delayed disclosure.

Because the evidence is not produced for a propensity purpose, and because there is clear proof of the prior bad acts, the final inquiry is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. N.H. R. EV. 404(b). While this evidence is certainly prejudicial to the defendant, its prejudicial value does not substantially outweigh the probative value as demonstrated by the State. Similar to the victim's history in foster care, any unfair prejudice to the defendant can be mitigated with an appropriate jury instruction as to the limited purpose for which they may consider the uncharged conduct.

SO ORDERED.

Date: May 6, 2022

Mark E. Howard
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/16/2022

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS SUPERIOR COURT

State of New Hampshire

v.

Erin Warren

Docket No. 219-2019-CR-59

ORDER FOLLOWING *IN CAMERA* REVIEW OF COUNSELLING RECORDS
(Under Seal)

Pursuant to prior order of the court, the court received under seal for *in camera* review counselling records from Community Partners relating to counseling of the alleged victim, A.D. This court carefully reviewed the records *in camera* and has determined that none of the records meet the standard for disclosure of confidential or privileged records.

Disclosure of confidential or privileged information such as counseling records will be ordered only if the information contained therein, whether or not admissible at trial, is "essential and reasonably necessary" to the defense. *See e.g.*, State v. Gagne, 136 N.H. 101, 104-5 (1992); State v. Sargent, 148 N.H. 571, 573 (2002). Upon *in camera* review of the counseling records, the court determines that they do not meet the "essential and reasonably necessary" test for disclosure. The records involve counseling and other therapies provided to A.D. both before and after the time period encompassed in the charged offenses. Although the records occasionally make reference to the nature and existence of this case, none of the records bear directly or indirectly on any issue in this case, including A.D.'s credibility. Accordingly, the records will not be disclosed.

The records will remain under seal with this court consistent with the Superior Court retention policy, and will be available for review by the New Hampshire Supreme Court in the event of an appeal.

So ordered.

May 19, 2020
Date

Mark E. Howard
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/04/2020

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS SUPERIOR COURT

State of New Hampshire

v.

Erin Warren

Docket No. 219-2019-CR-59

ORDER FOLLOWING *IN CAMERA* REVIEW OF DCYF RECORDS (Under Seal)

Pursuant to prior order of the court, the Division of Children, Youth and Families (DCYF) produced in excess of 5,000 pages of investigative reports, notes, assessments, police reports, interviews, medical records, and other documents relating to the alleged victim A.D. and her biological mother, Erin Warren. DCYF also produced a copy of a video interview of A.D. at the Frisbie Memorial Hospital. The records include multiple DCYF interventions with the family both before and as a result of the instant prosecution. The court has examined all of the records *in camera* and determines as follows.

Disclosure of confidential information such as DCYF records will be ordered only if the information contained therein, whether or not admissible at trial, is "essential and reasonably necessary" to the defense. *See e.g.,* State v. Gagne, 136 N.H. 101, 104-5 (1992); State v. Sargent, 148 N.H. 571, 573 (2002). Upon *in camera* review of the DCYF records produced under seal, the court determines that twelve (12) pages of the documents and the video interview contain information meeting the "essential and reasonably necessary" test for disclosure. The records that meet the test for disclosure are attached to this order. The documents not disclosed are either: (1) not essential or reasonably necessary to the defense; (2) contain only duplicative information found in the disclosed reports; or (3) are police reports and A.D.'s medical records relating directly to the instant investigation. In the case

of police reports and A.D.'s medical records, while some portion of them likely meet the standard for disclosure, the court assumes they have been produced to the defense in discovery in the criminal case and they are therefore not disclosed here.

Admission of a document, or permission to refer to its contents at trial, shall not be presumed from an order for pretrial disclosure and the parties are admonished not to refer to any such document at trial without prior authorization from the court.

The court orders as follows:

1. Copies of the documents attached to this order shall be provided to the defendant and the State, subject to the protective orders set forth in paragraphs 2 – 6, below.

2. Absent further order of the court, the materials and the information set out therein may be disclosed only to parties and their counsel, and to investigators, experts, or witness coordinators directly involved in, and essential to the preparation of a party's case for trial.

3. Absent further order of the court, all persons coming into possession or knowledge of these materials or their contents are barred from further disclosing the information therein in any form, and from using the information for any purpose other than this litigation.

4. Each party is being provided with one copy of the documents disclosed. No further copies shall be made, and all persons who pursuant to paragraph 2 above review or otherwise become aware of these documents shall be fully informed of paragraphs 2, 3, 4 and 5 of this order.

5. After the appeal period in the case has expired, the parties shall destroy the *in camera* documents in their possession. The Clerk shall retain the original *in camera* documents and recordings as part of the official court file. The Clerk shall destroy the documents after 10 years. The date of destruction will be entered into the Strafford County Superior Court *in camera* document registry.

6. The materials submitted, the parties' pleadings related to this issue, and the court's orders concerning this issue remain under seal.

So ordered.

Mark E. Howard

May 20, 2020
Date

Mark E. Howard
Presiding Justice