In the Supreme Court of the State of Vermont
Docket No. 21-AP-275

State of Vermont, Appellee

v.

Joshua Boyer, Appellant

Appeal from the
Superior Court of Vermont – Criminal Division
Bennington County
Docket No. 370-4-18 Bncr

Brief of the Appellee

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Statement of the Issues

1. Whether the Bennington Criminal Division erred in denying Appellant's motion to suppress the DNA evidence seized from the trashcan located outside of his residence.

2. Whether Appellant's constitutional right to a speedy trial was violated.

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Statement of the Case

This Court should uphold Appellant's conviction for sexually assaulting his underage daughter, M.B., because:

1. M.B. had authority to consent to the search of her family's residence and the trashcan located outside of it;
2. M.B. had authority to consent to the search of her bedroom, laundry, and trash for evidence of the crimes committed against her;
3. Exigent circumstances justified the seizure of the trashcan located outside the residence, which police later searched pursuant to a warrant; and
4. Any delays in bringing Appellant's case to trial did not violate his speedy trial rights.

Statement of Facts

On April 23, 2019, the State charged Appellant with Aggravated Sexual of a Child, premised on repeated nonconsensual acts, in violation of 13 V.S.A. § 3253a(a)(8), Aggravated Assault in violation of 13 V.S.A. § 1024(a)(1), and Aggravated Sexual Assault of a Child in violation of 13 V.S.A. § 3253a(a)(1). AV-1534-1535. On October 16, 2019, the State amended the second charge to Aggravated Domestic Assault in violation of 13 V.S.A. § 1043(a)(1). AV-1202-1203. On August 2, 2021, a jury found Appellant not guilty of Aggravated Sexual Assault of a Child, but guilty of the lesser offense of Sexual Assault of a Child in violation of 13 V.S.A. § 3252(c). 8/2/21-TR-97. It also found Appellant not guilty of Aggravated Domestic Assault. *Id.* The trial court granted Appellant's motion for a judgment of acquittal on the third charge, Aggravated Sexual Assault of a Child, concluding the serious bodily injury occurred at a different time than the sexual assault. 8/2/21-TR-15-16.[1]

[1] The jury did not, as Appellant claims, "reject[] M.B.'s allegations as incredible." AB-7. The standard of proof in a criminal case is beyond a reasonable doubt. The acquittals mean the jury had a reasonable doubt, not that it rejected the allegations as incredible. The conviction for Sexual Assault of a Child required the jury to believe M.B.'s account of at least one sexual assault beyond a reasonable doubt. As the trial court stated, "M.B. did testify that the defendant sexually assaulted her on a regular basis. However, she was only able to testify about the details of the one sexual assault as detailed above. Otherwise, her allegations lacked detail and specificity. Under these circumstances, it is not inconsistent for the jury to have found the defendant not guilty of repeated sexual assaults, but guilty of a single sexual assault." AV-59. The jury's verdict of guilty does necessarily mean it found Appellant's testimony that he never engaged in any sexual acts with M.B. incredible. 8/2/21-TR-19.

I. Evidence at Trial.[2]

M.B. testified that in 2017 and 2018 she lived with Appellant, her stepmother and stepbrother, and two younger siblings. She testified that Appellant began touching her inappropriately on an occasion when she was getting ready for bed and Appellant was sitting on her bed. She was wearing shorts and asked him to take a knot out of her tank top. After he did so she put on the tank top and as they were sitting on the bed, he started rubbing her private parts and touching her vagina over her clothes. She recalled another occasion when just she and Appellant were together watching television. He gave her an alcoholic beverage and started touching her breasts. She became so intoxicated that he had to carry her upstairs to go to bed. 7/30/21-TR-8 *and* 14-15.

This behavior increased until one night at a party when people were gathered in the yard. Appellant gave her another alcoholic beverage and brought her inside to the bathroom where he put her hand on his penis. She tried to pull away, but he just kept putting her hand on his penis and saying it was fine, just normal, and he loved her that way. This was skin to skin contact. Appellant also touched her breasts under her shirt that night. 7/30/21-TR-15-16.

After that night the sexual activity increased. Appellant had M.B. give him hand jobs and blow jobs, and that eventually led to sex. One night M.B. became so fed up that she refused to do it and Appellant grabbed her by the throat, threw her on the floor, and choked her with his hands. Her younger siblings saw this and Appellant told them to get in their rooms. M.B. managed to get Appellant off her, ran downstairs, and locked herself in the bathroom. He knocked on the door, eventually she opened it, and he took her upstairs to her bedroom and forcefully put his penis in her mouth and then proceeded to have sex with her. This assault, during which Appellant used a condom, occurred shortly before M.B. ran away with her boyfriend Elijah. She told Elijah what happened, and he called his parents who picked them up. The parents gave M.B. the choice of either going home or to the police station. She chose the police station. 7/30/21-TR-17-23.

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[2] Appellant does not challenge his sentence. So it is unclear why his brief contains material concerning his childhood from the presentence investigation. His brief also cites extensively, in support of its factual assertions, to material not part of the factual record on appeal, including his attorney's opening statement and motion to suppress, and the following items not admitted into evidence: transcripts of interviews of himself, his wife, and M.B.; the affidavit of probable cause; a sworn statement by M.B.; and a police report. This Court should disregard factual assertions in Appellant's brief which are not supported by reference to the trial record or otherwise admitted evidence.

At the police department on Friday, April 20, 2018, M.B. met with Detective Sergeant Lawrence Cole, who also spoke with Elijah and his parents. While speaking with Detective Cole, M.B. was able to look him in the eye, did not hesitate in answering questions, and appeared to give some thought to the questions he asked before answering. Several times she became emotional. Detective Cole then contacted Appellant, spoke with him at the police department, and arrested him. 7/29/21-TR-25-26 *and* 32-33.

On the following Monday, April 23, 2018, Detective Cole again met with M.B., this time with an investigator from the Department of Children and Families ("DCF"). M.B. remembered something potentially important to the investigation, so they all went back to her home. The main entrance the family used was the rear door, and that's the door Detective Cole followed M.B. through. He followed her up to her bedroom on the second floor. She found someone had gone through her room and it was a complete mess. She also found that the clothes she left in her room had been mixed with Appellant's and laundered when normally she was responsible for her own laundry. She also found her trash had been taken out. 7/29/21-TR-33-36.

M.B. and Detective Cole left the house through the same door they had entered and then M.B. went to a trashcan and opened the lid. She said, "this doesn't look right," and Detective Cole seized the trashcan and had it taken to the police department. After getting a search warrant, he found a plastic bag amongst the other trash, and when he looked inside he saw items that were clearly from M.B.'s trash, such as a school schedule and a prescription with M.B.'s name on it. Also in the bag was a condom wrapper and a small wet rectangular rug, which M.B. testified had been in her room and on which Appellant had ejaculated. 7/29/21-TR-36-46.

Detective Cole also testified that M.B. told him Appellant's pubic area was shaved. So, Detective Cole obtained a non-testimonial identification order and photographed Appellant's pubic region. Although the top portion of Appellant's pubic hair was not shaved, Appellant had refused to show his penis or testicles. 7/29/21-TR-67-69 *and* AV-116.

Analysis disclosed that DNA from sperm found on the rug was from Appellant, with a probability of a random match greater than one in one quadrillion. The epithelial portion of the sample consisted of a mixture of DNA from Appellant and M.B., with the same probability of a random match. DNA found on the condom wrapper was found to be a mixture from Appellant and M.B., with a probability of a random match of one in 500. 7/29/21-TR-163, 167, *and* 169.

Appellant testified in his own defense and denied having sexually assaulted M.B. He described tensions in the household and disciplinary issues with M.B. He testified

that he did not shave his pubic hair as an adult, the rug had not exclusively been in M.B.'s room, and laundry was not sorted in the household. He testified he had recently told M.B. the family was going to move out of state. 8/2/21-TR-19-36. The defense also called a DNA expert who testified that "under the right circumstances" seminal fluid could be transferred from one item to another. 7/30/21-TR-76 *and* 105. On cross-examination the expert acknowledged a scientific article which stated that with absorbent substrates, such as the rug, "minimal transfer rates on average of 2.1 percent are observed and this increases slightly to 5.3 percent when the friction is applied." 7/30/21-TR-116.

II. The Motion to Suppress.

Appellant moved to suppress the evidence obtained from M.B.'s and Detective Cole's visit to the home. The trial court denied the motion in an April 4, 2019 written decision.

A. The Trial Court's Factual Findings.

With one exception, Appellant has not challenged the trial court's factual findings,[3] which are summarized as follows.

After meeting with M.B. on Friday, April 20, 2018, Detective Cole arrested Appellant. Appellant was released on bail and ordered to appear in court for arraignment on Monday, April 23, 2018 and not to return to the family home. AV-1212.

On April 23rd, Detective Cole and a DCF investigator met with M.B. at a different home in Bennington, where she was staying with a friend. M.B. said earlier Appellant would use condoms and flush them down the toilet. In this meeting Detective Cole asked M. B. if she had had any further thoughts about the disposal of the condoms and the possible presence of DNA evidence in the home. M.B. said Appellant may have disposed of a condom in her bedroom waste basket. She also said Appellant used a pair of her

[3] Appellant's opening paragraph contains several misrepresentations of the facts and the trial court's findings. The police did not "urge" M.B. to accompany them to the house. AB-7. Detective Cole asked if she would be comfortable returning to the house and she said yes. AV-1213. There was no testimony she no longer lived there. The trial court found M.B. "lived full time on the premises and had joint access to the house along with its other occupants." AV- 1218. There was no testimony the police "intentionally timed the search for when Mr. Boyer and his wife were at a mandatory court hearing." AB-7. The trial court found Detective Cole knew Appellant was at his arraignment, but not that the search was intentionally timed to coincide with it. The court further found this was immaterial since Appellant was ordered not to return to the house. AV-1218. There was no testimony that Detective Cole and M.B. "sneak[ed]" into the house. AB-7. The rear entrance was "the entrance that they use." 2/21/2019-TR-10.

underwear to wipe himself off, which would now be in her bedroom laundry. Detective Cole knew Appellant and his wife were in court for Appellant's arraignment, and he asked M.B. if she would be comfortable returning to the house to locate the condom and underwear, knowing she wouldn't have to face her parents. She said she was comfortable doing so. Detective Cole described M.B. as a mature, articulate adolescent. AV-1212-1213.

M.B., Detective Cole, and the DCF Investigator drove to the house and M.B. led Detective Cole upstairs to her bedroom where she saw her laundry hamper and her waste basket had been emptied. She led Detective Cole downstairs to the laundry room, opened the washer, and said her clothing was mixed with Appellant's. She then led Detective Cole outside and opened a trashcan by the side of the house. Upon seeing the contents, she told Detective Cole something like "this isn't right," or that the trash "had been gone through." Detective Cole then transported the trashcan to the police department. AV-1213.

On April 25, 2018, Detective Cole obtained a search warrant to search the trashcan. The search produced various objects, including a condom wrapper, stained paper towels, and pharmacy receipts. Detective Cole and the DCF investigator met again with M.B. on April 30, 2018 who told them an area rug in her room would contain Appellant's DNA. She went to the police station and identified the rug among the contents of the trashcan. Subsequent forensic analysis confirmed the presence of semen on the rug. AV-1213.

B. The Trial Court's Legal Conclusions.

The trial court concluded that, although Appellant had a privacy interest in his home and its curtilage, the State met its burden in proving M.B. voluntarily consented to the search. It also held that under the Fourth Amendment and Article 11, a minor can consent to the warrantless search of her family's house if the minor has common authority over it. After reviewing federal caselaw, the court concluded M.B.'s common authority over the house was consistent with widely shared expectations and a commonly held understanding about the authority co-inhabitants may exercise in ways that affect each other's interests. M.B. was a full-time resident and had joint access to the house along with the other occupants. AV-1214-1218.

The court found two factors critical to this determination – the minor's age and the scope of M.B.'s consent. Here, M.B.'s age supported the conclusion – she was not a five-year-old, whom no one would expect to have authority to allow strangers to enter the

home. She was fourteen years old, and thus "no longer blissfully ignorant to the ways of the world." With respect to scope, the court found it was reasonable for Detective Cole to act on M.B.'s consent to search her own bedroom and the home's common areas, whereas it might not have been, for example, to search a parent's home office. AV-1216-1217.

The court noted that in society, parents, consciously or not, assume the risk that minors of a certain age will allow strangers at the threshold to enter the common area of a home. The court also noted that not only did the officers not remove Appellant from the home for the sake of avoiding his objection to the search, but the court actually barred Appellant from returning to the home. Therefore, it was immaterial that Detective Cole knew Appellant was at his arraignment when he sought M.B.'s consent. Although the police may not produce a potential objector's absence, they need not wait for his presence. AV-1218.

Finally, when M.B. opened the trashcan, she provided valid third-party consent to search its contents. There was no distinction between this act and her previous acts in opening her closet and the washer. In seizing and obtaining a warrant before searching the trashcan, the officer complied with the added protection of *State v. Morris*, 165 Vt. 111, 680 A.2d 90 (1996), which recognized a reasonable expectation of privacy in garbage left curbside, but held law enforcement may seize trash bags without a warrant. AV-1218-1219.

C. Appellant's Challenge to the Trial Court's Factual Findings.

On appeal Appellant argues the trial court's finding that M.B. lived full time on the premises and had joint access to the house was clearly erroneous and the finding that M.B. consented to the search was unsupported by the evidence. The testimony on this issue at the motion to suppress hearing was as follows.

In a meeting on Monday, April 23, 2018, M.B. volunteered, before being asked, that she remembered that at times Appellant had put an opened condom wrapper in a trash basket in her bedroom, and she believed a wrapper and used condom were possibly in the trash basket "in her own bedroom." 2/21/19-TR-9. They discussed who empties the trash in the house and when it gets picked up, and Detective Cole "asked her if she would be comfortable returning to *her home*." 2/21/19-TR-9 (emphasis added). M.B. said she would. When they left for the house, "it was for the idea of her taking [Detective Cole] to her home." 2/21/19-TR-11. On arrival, M.B. "went to the rear of the house. That's the entrance that they use." 2/21/19-TR-10. Detective Cole followed her upstairs

to "her bedroom." 2/21/19-TR-10. After checking her laundry basket, M.B. said she was going to check the wash downstairs. This "was totally, 100 percent her idea." 2/21/19-TR-11. Upon leaving the house, M.B. opened the lid to a trashcan and looked in. Opening the trash can "was totally her" idea. 2/21/19-TR-13.

Detective Cole testified:

> A. So during my entire interaction with her, she -- I was very surprised about her level of maturity and grasp of what had happened, and why it had happened, and what her thoughts were. She was a very articulate 15-year-old.
>
> Q. And you said you were surprised at her level of maturity, meaning she had a high-level of maturity or a low level of maturity?
>
> A. High. Not what I would normally expect.

2/21/19-TR-14.

There was no testimony that M.B. had been "removed" from the home. When she met with Detective Cole, she was "at a home with a friend." The DCF investigator wanted to discuss with her another place for her to go "if she couldn't return to her own home." M.B. was not in DCF custody. She was "just staying with a friend until this had been figured out." 2/21/19-TR-18.[4]

In addition to the testimony, the parties agreed to the admission of the exhibits attached to the motion to suppress. According to the search warrant affidavit, upon arrival at the house, M.B. "entered her home and invited [Detective Cole] to join her." AV-1327. Upon entering "her bedroom," M.B. stated, "someone's been through my stuff!" AV-1327. Looking into "her clothes basket" she said, "Someone has taken my clothes!" AV-1328. When M.B.'s stepmother Christine Sousis arrived, Detective Cole told her someone had gone through M.B.'s bedroom, and her stepmother said it wasn't her. She confirmed that both M.B.'s and Appellant's clothes were in the dryer. AV-1328. Ms. Sousis also stated that when M.B. left that Friday she left a note saying "she would be back." AV-1431.[5]

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[4] Although Appellant argues Detective Cole knew M.B. had moved out because they referred to the house as "your dad's house," Detective Cole subsequently referred to the house as "your house" when speaking with M.B. AV-1360.

[5] The note was admitted at trial as Appellant's Exhibit B and reads in part: "I'll be back, don't worry about me." AV-112.

III. The Motion to Dismiss for Lack of Speedy Trial.

On August 26, 2020, Appellant filed a motion to dismiss for lack of speedy trial and a denial of due process.[6] The trial court denied the motion in writing on November 18, 2020. The court first found the delay of 31 months was sufficient to require consideration of the remaining factors bearing on the speedy trial right. In assessing the reasons for the delay, the court found there had been no deliberate attempt by the State to delay the trial and much of the delay was attributable to the inherent complexity of the case, motion practice, scheduling of hearings, and discovery. AV-234-235. These motions include an April 25, 2018 Motion for Home Detention, a December 11, 2018 Motion to Suppress, a January 23, 2019 Motion for Deposition, a July 1, 2019 Motion to Depose Complaining Witness, a November 14, 2019 Motion to Review Bail, a January 14, 2020 Motion to Dismiss, an April 20, 2020 Motion to Review Bail, an August 13, 2020 Motion to Exclude Witness Testimony, an August 26, 2020 Motion to Dismiss, and a November 25, 2020 Motion to Review Bail, as well as litigation over Appellant's attempts to obtain DCF records. AV-12-17.

In addition, all delays after March 2020 were due to this Court's Administrative Order 49, which, as this Court has held, are the government's responsibility, but which are neither intentional nor unwarranted. Thus, this period of delay, is still considered "more neutral." Next, the court found Appellant's assertion of his speedy trial right did not weigh in his favor, since he hadn't formally asserted the right until August 26, 2020, and this was not a case where Appellant had aggressively asserted his speedy trial rights. Finally, the court found "the delays in getting to trial have not impaired his defense," and Appellant "has not identified actual prejudice to or impairment of his defense," and, therefore, this factor does not weigh in Appellant's favor. The trial court concluded Appellant's speedy trial right had not been violated. AV-229-234.

The trial court next denied Appellant's claim that his due process rights were denied by Administrative Orders 48 and 49. Applying the standard articulated in *State v. Labrecque*, 2020 VT 81, 213 Vt. 635, 249 A.3d 671, the court held: the charges were extremely serious; any delay was neither intentional nor unwarranted; and the length of

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[6] In his brief, Appellant doesn't address the denial of his motion to dismiss for the alleged due process violation. Instead, he only briefs the speedy trial issues. Consequently, this Court should refuse to review Appellant's separate due process claim. AB-29-31. *See, e.g., State v. Settle*, 141 Vt. 58, 61, 442 A.2d 1314 (1982) ("[M]atters which are not briefed will not be considered on appeal.").

detention, although long and unusual, was not alone dispositive nor excessive when considering the other factors. The court also concluded this Court had the constitutional authority to suspend jury trials. AV-234-235.

Standard of Review

When reviewing the denials of Appellant's Motion to Suppress and Motion to Dismiss, this Court reviews the trial court's findings of fact for clear error and its conclusions of law *de novo*. *State v. Weisler*, 2011 VT 96, ¶ 7, 190 Vt. 344, 35 A.3d 970, *State v. Reynolds*, 2014 VT 16, ¶ 9, 196 Vt. 113, 95 A.3d 973 *and State v. Turner*, 2013 VT 26, ¶ 6, 193 Vt. 474, 70 A.3d 1027. When reviewing the court's factual findings, this Court must "tak[e] the evidence in the light most favorable to the prevailing party, and exclude[e] the effect of modifying evidence." *State v. Ford*, 2010 VT 39, ¶ 7, 188 Vt. 17, 998 A.2d 684. *See also State v. Zaccaro*, 154 Vt. 83, 574 A.2d 1256 (1990) (regarding motions to suppress, this Court "will not disturb the trial court's findings of fact unless they are unsupported by the evidence or clearly erroneous").

Argument

I. Consent, Exigent Circumstances, and a Search Warrant Authorized the Searches Leading to the DNA Evidence from the Trashcan.

The trial court appropriately denied Appellant's motion to suppress because M.B. had authority to consent to the search of her family's residence and the trashcan located outside of it. In addition and at a minimum, M.B. had authority to consent to the search of her bedroom, her laundry, and her trash. Appellant's proposed restrictions on minors' ability to consent don't alter these conclusions because they run contrary to the weight of existing authority, including this Court's own decisions. Finally, exigent circumstances justified Detective Cole's seizure of the trashcan and the warrant issued afterwards authorized its search.

A. M.B.'s Consent Authorized the Search.

Appellant proposes a "special, multifactor" test he thinks should apply when law enforcement searches a home pursuant to a minor's consent: (1) whether the minor lives in the home; (2) whether law enforcement reasonably believes the minor has the authority to consent; and (3) whether the minor's consent was freely and voluntarily given under

the totality of the circumstances. AB-24 (citing *Saavedra v. State*, 622 So.2d 952, 954 (Fla. 1993)). The doctrines of third-party consent and apparent authority, which this Court has recognized, already account for these factors and the age of the consenting party. Under these doctrines, M.B.'s consent authorized the search.

"The Fourth Amendment to the United States Constitution provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated….' As a general rule, the amendment prohibits warrantless entry into a person's home…." *State v. Roberts*, 160 Vt. 385, 390-391, 631 A.2d 835 (1993). This prohibition does not apply when law enforcement has received voluntary consent from either the owner of the property or "from a third party who possessed common authority over *or other sufficient relationship* to the [property]." *United States v. Matlock*, 415 U.S. 164, 171 (1974) (emphasis added). *See also Roberts*, 160 Vt. at 390-391 ("The prohibition does not apply, however, where an officer has received consent from either the owner, or a third party who has common authority over the premises…."), *State v. Chenette*, 151 Vt. 237, 250, 560 A.2d 365 (1989) (holding third party consent is valid if the "consenting party could have permitted the search in his own right"), *and Zaccaro*, 154 Vt. at 87 ("Probable cause and a search warrant are not required when consent to search is voluntarily given by one authorized to do so."). A third party has common authority if he or she has "joint access or control [of the property] for most purposes." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (internal citations omitted). A minor who is a victim of a crime committed in their home may bear a sufficient relationship to consent to its search. *People v. Jacobs*, 729 P.2d 757, 766, 43 Cal.3d 472, 483 (Cal. 1987) ("Exceptional circumstances also may justify a search that otherwise would be illegal. For example, some courts have upheld searches made at the request of a child or when a child is the victim or a witness to a crime.") *and Abdella v. O'Toole*, 343 F.Supp.2d 129, 135 (D.Conn. 2004) (recognizing an important consideration is whether "the child has contacted the police and requested the search, or the child is a victim of, or witness to, the crime that led to the search"). This third-party consent doctrine recognizes the widely shared societal expectation that defendants have assumed the risk that such third parties might permit the search. *Georgia v. Randolph*, 547 U.S. 103, 110-111 (2006). *See also Chenette*, 151 Vt. at 250 (recognizing the third-party consent doctrine applies when a "defendant has assumed the risk that a third party might permit a search").

Third-party consent "is valid against…absent, nonconsenting person[s]," including a defendant. *Matlock*, 415 U.S. at 170. This is true even if it turns out the third party lacked the authority to consent to the search: "[T]he exception for consent extends even

to entries and searches with permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority…." *Randolph*, 547 U.S. at 109. *See also Roberts*, 160 Vt. at 390-391 ("[P]olice conducting a search under an exception to the warrant requirement must be reasonable, though not always correct, in making the factual determinations necessary to establish the exception.") *and United States v. Gutierrez-Hermossillo*, 142 F.3d 1225, 1230 (10th Cir. 1998) ("[T]he Fourth Amendment is not violated when officers enter without a warrant when they reasonably, although erroneously, believe that the person who consents to their entry has the authority to consent to this entry."). All that is required is that "the facts available to the officer [would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188 (internal citations omitted). *See also Gutierrez-Hermossillo*, 142 F.3d at 1230 ("The determination of reasonableness…is an objective one: 'Would the facts available to the officer at the moment warrant a man of reasonable caution to believe that the consenting party had authority over the premises?'"). This apparent authority doctrine recognizes that "[w]hat [defendants are] assured by the Fourth Amendment…is not that no government search of [their] house will occur unless [they] consent' but that no such search will occur that is unreasonable." *Rodriguez*, 497 U.S. at 183.

In the present case, and as the trial court found, on Friday, April 20, 2018, M.B. walked into the Bennington Police Department and complained that Appellant had sexually assaulted her numerous times. The last assault took place the previous day. When the assaults took place, M.B. lived in the house full time with Appellant, Appellant's wife, and other children. She had joint access to the house along with its occupants and the record is devoid of any suggestion she was restricted or limited in her access to or use of the home. Because of the assaults, M.B. reasonably decided to stay with a friend. Appellant was arrested and at his arraignment, the court prohibited him from returning home. The same day as Appellant's arraignment, M.B. informed Detective Cole that evidence of the assaults, consisting of a condom and her underwear, might be in her bedroom waste basket and bedroom laundry hamper. M.B. also told him she would be comfortable returning to her house to obtain these items from her bedroom knowing Appellant would not be there. Once at home, M.B. searched her laundry and her trash and discovered the condom and underwear were missing because both her trashcan and her laundry hamper had been emptied. Aside from her bedroom and the laundry room, M.B. did not search any other areas inside the home. She did search the trashcan located outside and noticed it had been gone through. As a result, Detective Cole seized the trashcan and later searched it pursuant to a warrant. As the trial court found, there was

no evidence that law enforcement coerced M.B. to return home to search her trash and laundry. AV-1212-1219. These findings are supported by the record, (summarized above), are not clearly erroneous, and establish M.B. had authority to and did voluntarily consent to the search of her trashcan and her laundry.

Appellant nonetheless asserts, in his challenge to the trial court's factual findings, that M.B. did not have authority to consent to the search arguing "she went to live with her boyfriend's family." AB-18. This assertion is factually inaccurate and the case he relies on is inapposite. M.B. did not permanently leave her home. She had been gone only a few days and when she left, she left a note specifically saying "I'll be back." AV-112 *and* 1431. These facts establish M.B. still had a sufficient relationship with her home, her bedroom, her trash, and her laundry to consent to their search. In addition, *May v. State* did not involve a minor who left home shortly before the search of it to seek refuge from a sexually abusive parent. 780 S.W.2d 866 (Tex. App. Ct. 1989). It involved the defendant's 18-year-old stepdaughter and estranged wife who "wanted to set up" the defendant and decided "the easiest and quickest method of searching [defendant's] home" was for the stepdaughter to let the police in with the key she still possessed. 780 S.W.2d at 867. The stepdaughter, however "admitted that she no longer considered the home to be her residence…that she had taken everything that was important when she left…that she did not think she had authority to enter the home…[and] that she was frightened and hurried the search so that she and [the] Officer…would not be caught." *Id.* at 873. The facts in this case are drastically different and support the trial court's finding that M.B. consented to the search.

B. The Court Should Reject Appellant's Proposed Restrictions on Minors Consenting to Searches.

Appellant urges this Court to hold that individuals under 16 are *per se* incompetent to consent to a warrantless search because they "cannot waive the constitutional rights of their parents." AB-25. Appellant alternatively urges this Court to hold that individuals under 16 cannot consent to a warrantless search unless the test applicable to a waiver of trial rights is satisfied. AB-22. The Court should decline to adopt either rule for three reasons.

First, "a consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 171. The third-party consent doctrine does not rest upon the third-party's ability to waive someone else's constitutional rights. It rests upon the principle that a defendant has a diminished expectation of privacy over property a third-

party either has common authority over or some other sufficient relationship with. *Chenette*, 151 Vt. at 249 ("[D]efendant cannot assert the fourth amendment to bar admission of evidence seized in the search, not because his rights were waived by the third party, but because he has relinquished his privacy."). Consequently, Appellant's proposed rules are based on legal principles not implicated in this case. In addition, the test applicable to a waiver of trial rights does not serve the same purpose in cases like this when the consenting minor is not a suspect, but a victim of a crime perpetrated by the very individual who would normally serve the type of parental role the test requires.

Second, Appellant's arguments rely on cases that are easily distinguishable from this appeal. In support of his proposed *per se* prohibition on individuals under 16 consenting to searches, Appellant principally relies on the Montana Supreme Court's decision in *State v. Ellis*, 210 P.3d 144 (Mont. 2009). A majority of jurisdictions have declined to adopt the *per se* rule in *Ellis*. An obvious reason why is that Montana, unlike most jurisdictions including Vermont, has not recognized the apparent authority doctrine. *Compare Chenette*, 151 Vt. at 250 (recognizing the doctrine) *with Ellis*, 210 P.3d at 150 (acknowledging Montana does not recognize the doctrine). In addition, while the Montana Supreme Court held minors don't have actual authority to consent because "the parent retains…the right to rescind the authority given to the child," it failed to explain why that differentiates minors from any other individual, such as a records custodian, whose authority can also be rescinded. *Id.* This Court has not held that such individuals lack authority just because another individual could alter it. *See, e.g., Chenette*, 151 Vt. at 250 (holding that "senior physician and records custodian had the apparent authority to consent to the search and seizure of defendant's records"). In support of adopting a test akin to that which applies to the waiver of trial rights, Appellant principally relies on *In re E.T.C.*, 141 Vt. 375, 449 A.2d 937 (1982). That case involved the suppression of statements by a 14-year-old suspected of breaking into condominiums, and this Court's decision rested on the "recognized fact that juveniles *many times* lack the capacity and responsibility to realize the full consequences of their actions." *Id.* at 376 *and* 379 (emphasis added). This appeal, however, involves a 14-year-old seeking law enforcement's protection from a parent who sexually assaulted her. The record establishes M.B. was articulate, possessed a high level of maturity, and on her own determined what to search for in the residence and where to search for it. 2/21-19-TR-11 *and* 13-14. This Court should recognize that society can reasonably expect 14-year-olds like M.B. to know they can seek assistance from law enforcement when they have been victimized. *Jacobs*, 43 Cal.3d at 483 (recognizing "some courts have upheld searches made at the request of a child or when a child is the victim or a witness to a crime").

Finally, Appellant's proposals are inconsistent with the prior rulings of this Court and the United States Supreme Court that voluntariness of consent must be evaluated based on the totality of the circumstances. *See, e.g., Weisler*, 2011 VT 96, ¶ 42, 190 Vt. 344 ("The question must be resolved in light of the totality of the circumstances, assessed in a practical common sense manner." (citations omitted)), *State v. Badger*, 141 Vt. 430, 444, 450 A.2d 336 (1982) ("The United States Supreme Court requires courts to evaluate the voluntariness of consent as a factual question based on the totality of the circumstances."), *and Zaccaro*, 154 Vt. at 88 ("Voluntariness is a question of fact to be determined from all the circumstances surrounding the controversy."). This Court has recognized that age is one of many circumstances included in this analysis: "Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances. Relevant circumstances include the defendant's age, intelligence, and emotional state, as well as the actions of law-enforcement officials." *State v. Sole*, 2009 VT 24, ¶ 23, 185 Vt. 504, 974 A.2d 587. *See also Weisler*, 2011 VT 96, ¶ 25 ("[T]he voluntariness of a consent to search focuses on a variety of objective factors relating to the suspect's age, mental ability, and experience and the environment in which the consent was obtained…."). The 10th Circuit Court of Appeals has succinctly summarized why this approach is preferrable to a *per se* bar on minors' ability to consent:

> Minors do have the capacity to give consent because: (1) legal sophistication is not required for adults to give valid consent; (2) the list of factors bearing upon the voluntariness of consent is open-ended, and the youth of the consenter, with its attendant vulnerability to coercion, is certainly among them; (3) consent searches serve a legitimate purpose properly balanced against the possible harm of limiting a child's ability to consent; and (4) the rationale behind third-party consent does not hinge on agency, and the compromise of the expectation of privacy is no less the case for a minor co-occupant than for an adult.

Gutierrez-Hermossillo, 142 F.3d at 1230-1231. The 11th Circuit Court of Appeals has noted that an "individualized assessment" of how a minor's age impacts their capacity to consent to a search "obviates the need for a categorical rule to protect subjects of searches from subtle coercive tactics to secure a minor's consent." *Lenz v. Winburn*, 51 F.3d 1540, 1548-1549 (11th Cir. 1995).

Most jurisdictions have followed this approach: "Although neither the Second Circuit nor the United States Supreme Court has ruled directly on this issue, a distinct consensus has emerged. It is clear that there is no *per se* rule that all minors lack the

authority to consent to a search." *Abdella*, 343 F.Supp.2d at 135. *See also Allen v. State*, 44 So.3d 525, n.5 (Ala. Crim. App. 2009) (conducting a jurisdictional survey, which found "20 states allow minors to provide valid third-party consent to a search of a parent's house," three additional states seem inclined to do so, and only Montana "categorically rejects the theory that a minor can provide valid third-party consent"). Instead, courts analyze, amongst other factors, whether the "minor's age, maturity, and intelligence…indicate that the minor could exercise sufficient discretion to freely, knowingly, and voluntarily consent to the search and not merely acquiesce to a request of a police officer." *Allen*, 44 So.3d at 532. *See also United States v. Sanchez*, 608 F.3d 685, 690 (10th Cir. 2010) ("[A]ge is not a bar to consent…but one factor within the totality of the circumstances we consider…."), *Saavedra*, 622 So.2d at 957-958 (listing other factors in addition to age that courts should consider), *and Davis v. State*, 422 S.E.2d 546, 549 (Ga. 1992) (same). In this case, it cannot be said M.B. merely acquiesced to a request from law enforcement because what to search for and where to search was "100 percent her idea." 2/21/19-TR-11.

This analysis recognizes that not all individuals of the same age possess the same level of maturity and it is maturity that bears a greater relation to one's capacity to consent: "As a general consideration, there is every reason to suppose that mature family members possess the authority to admit police to look about the family residence, since in common experience family members have the run of the house." *United States v. Clutter*, 914 F.2d 775, 777 (6th Cir. 1990). It also recognizes that one's capacity to consent can grow over time and that minors who are victims may possess the type of "other sufficient relationship" the *Matlock* Court recognized could authorize consent:

> As a child advances in age she acquires greater discretion to admit visitors on her own authority. In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas. Exceptional circumstances also may justify a search that otherwise would be illegal. For example, some courts have upheld searches made at the request of a child or when a child is the victim or a witness to a crime.

Jacobs, 43 Cal.3d at 483. *See also Abdella*, 343 F.Supp.2d at 135 (an important consideration is whether "the child has contacted the police and requested the search, or the child is a victim of, or witness to, the crime that led to the search").

This Court should recognize that society can reasonably expect that a 14-year-old with M.B.'s "high-level of maturity" is capable of consenting to the search of her bedroom, her laundry, and her trash. Contrary to Appellant's suggestion, the fact that he

was not present to object does not vitiate M.B.'s consent. A third party's consent is valid notwithstanding the absence of an objecting party "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121-122. Law enforcement in this case did not deliberately remove Appellant. Instead, the court prohibited him from returning home. AV-1212-1218.

C. Exigent Circumstances Authorized Seizure of the Trashcan and a Search Warrant Authorized its Search.

In Vermont, law enforcement may not search an individual's trash unless they have a warrant or an exception to the warrant requirement applies. *Morris*, 165 Vt. at 114. One such exception is exigent circumstances. *State v. Savva*, 159 Vt. 75, 80, 616 A.2d 774 (1991). Exigent circumstances include situations in which evidence must be secured because of a risk that it will be destroyed or moved. *State v. Connolly*, 133 Vt. 565, 571, 350 A.2d 364 (1975), *Badger*, 141 Vt. at 447, *and State v. Medina*, 2014 VT 69, ¶ 42, 197 Vt. 63, 102 A.3d 661.

When exigent circumstances exist, law enforcement must "operate in the least intrusive manner possible under the circumstances. *Savva*, 159 Vt. at 88. One recognized example of operating in this manner includes seizing evidence pending the application for a search warrant. *Id.* at 88-90. *See also State v. Platt*, 154 Vt. 179, 188, 574 A.2d 789 (1990) ("By merely seizing defendant's car and holding it for a reasonable amount of time before obtaining a warrant to search it, the police acted in the least intrusive manner possible under the circumstances.").

Detective Cole seized the trashcan located outside M.B.'s residence and obtained a warrant to search it. Doing so is consistent with the exigent circumstances exception: "Ordinarily, the seizure of trash bags would be permitted without a warrant given the exigency of the situation. Once the police have seized the bags, however, they cannot search them before obtaining a warrant based on probable cause." *Morris*, 165 Vt. at 126. The exigency in this case was readily apparent because: M.B.'s trash had already been removed from her room (7/29/21-TR-33-36); the trashcan itself "had been gone through" (AV-1213); and Ms. Sousis, who could have moved, removed, or emptied the trashcan, arrived shortly after Detective Cole seized it (AV-1328). Importantly, Detective Cole would have been aware of these facts even if he hadn't gone into the home. Since what to search and where to search was "100 percent her idea," M.B. could have gone into the

residence on her own and relayed what she discovered to Detective Cole who could have then seized the trashcan. 2/21/19-TR-11.

II. Appellant's Speedy Trial Rights were Not Violated.

"The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial." *Vermont v. Brillon*, 556 U.S. 81, 85 (1009). This right "is imposed by the Due Process Clause of the Fourteenth Amendment on the States." *Barker v. Wingo*, 407 U.S. 514, 515 (1972). The Vermont and United States Constitutions provide the same speedy-trial protections. *Reynolds*, 2014 16, ¶¶ 17-18. This Court balances four factors when determining whether a speedy trial violation has occurred: "the length of the delay, the reason for the delay, the extent to which defendant asserted his speedy trial right, and any prejudice to the defendant caused by the delay." *Reynolds*, 2014 16, ¶ 8 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). *See also Turner*, 2013 VT 26, ¶ 7 (listing the same factors). Consideration of these factors reveals "this is not a case in which repeated calls for a trial went unanswered," such that Appellant's speedy-trial rights were violated. *Reynolds*, 2014 16, ¶ 24.

Regarding the first factor, "the length of detention alone is not dispositive and will rarely by itself offend" the constitution. *Labrecque*, 2020 VT 81, ¶ 29. This is because "the right to a speedy trial is a constitutional guarantee that cannot be quantified into a specified number of days or months." *State v. Recor*, 150 Vt. 40, 42, 549 A.2d 1382 (1988). Instead, the first factor considers whether the length of the delay "was presumptively prejudicial." *Reynolds*, 2014 16, ¶ 19. If it isn't, "it is unnecessary to inquire into the other balancing factors…." *Turner*, 2013 VT 26, ¶ 7. In this case, almost 40 months passed before Appellant was charged and his second trial concluded. This is presumptively prejudicial. *Reynolds*, 2014 16, ¶ 19 (holding that a 23-month delay was presumptively prejudicial). Consequently, the delay must be "balanced along with the remaining factors." *Turner*, 2013 VT 26, ¶ 7.

Regarding the second factor:

> Deliberate delay to hamper the defense weighs heavily against the prosecution. More neutral reasons such as negligence or overcrowded courts weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. In contrast, delay caused by the defense weighs against the defendant.

Brillon, 556 U.S. at 90. None of the delays in this case resulted from a "deliberate attempt to delay the trial in order to hamper the defense" that is "weighted heavily against the government." *Barker*, 407 U.S. at 531. There was a 19-month delay between when Appellant was charged and his first trial. Appellant's need to conduct discovery and the motions he filed, including the ten listed on page twelve supra, caused this delay. *See also* AV-229 (summarizing the motions, continuances, and scheduling issues that led to the delay). As such, these delays are attributable to him and don't weigh in favor of a speedy trial violation. *Labrecque*, 2020 VT 81, ¶ 25 ("[D]elay caused by the actions of a public defender is attributed to the defendant, not the state.") *and Turner*, 2013 VT 26, ¶ 7 (discovery delays "are attributable to defendant either directly or through his attorney"). More importantly, a 19-month delay "fall[s] within normal limits for trial preparation." *Reynolds*, 2014 VT 16, ¶¶ 13 *and* 21 ("[S]erious felony cases…may take a year or longer to reach trial"). The first trial resulted in a mistrial, but "the time lost due to [a] mistrial cannot be attributed to either the prosecution or the defense." *Id.* at ¶ 21. The delays in between Appellant's first and second trials was due to Administrative Order No. 49, Appellant's motion to dismiss, and litigation over Appellant's attempts to subpoena records from DCF. Only the delays related to the pandemic are attributable to the State. *Labrecque*, 2020 VT 81, ¶ 26 *and State v. Labrecque*, 2022 VT 6, ¶ 25, 273 A.3d 642. However, they weigh against finding a violation because they were "neither intentional nor unwarranted":

> That portion of the delay in bringing defendant to trial which may be attributed to the government is not the result of malfeasance or neglect. Rather, it is a function of the government's efforts to respond to a novel health crisis by establishing procedures which would serve to mitigate the resulting health risk to those who must gather in close physical proximity in order to conduct such a trial – including defendant himself.

Labrecque, 2020 VT 81, ¶¶ 28 *and* 30. This Court has recognized it "can imagine few clearer cases of exceptional circumstances, showing cause for temporary postponement [of the timelines for bringing cases to trial] than a global public-health emergency." *State v. Blodgett*, 2021 VT 47, ¶ 30, 257 A.3d 232. As such, the length of the delays does not weigh in favor of finding a violation:

> [T]hirty-eight months…without trial…is undeniably an extraordinary long time…. However, the length of detention alone is not dispositive and will rarely by itself offend due process. Here defendant's prolonged

> incarceration is the only factor that weighs in defendant's favor…and about half of the delay was due to the COVID-19 pandemic, making this a highly unusual situation when compared to prolonged pretrial detention outside the context of a global pandemic.

Labrecque, 2022 VT 6, ¶ 27. *See also State v. Labrecque*, 2022 VT 20, ¶¶ 30-31, 279 A.3d 118 (holding that a delay "of over forty months…is undoubtedly at the limit of what is acceptable," but "the State's blame for the pandemic-related suspension of jury trials…are due to neutral factors unrelated to this case"). Even if the judiciary could have been more aggressive in resuming jury trials, this factor does not weigh in favor of finding a violation. *State v. Vargas*, 2009 VT 31, ¶ 14, 185 Vt. 629, 971 A.2d 665 ("Neutral reasons for delay, such as the negligence of courts, weigh only lightly in favor of a speedy-trial claimant.").

Regarding the third factor, Appellant filed his speedy trial motion almost 28 months after he was charged. AV-229. Prior to that his defense attorney verbally stated during a hearing that Appellant wanted a trial scheduled as soon as possible. AV-230. This Court has previously held that similar efforts don't constitute an aggressive assertion of speedy trial rights that weighs in favor of defendants. *State v. Lafaso*, 2021 VT 4, ¶¶ 25-32, 214 Vt. 123, 251 A.3d 935 (defendant did not aggressively assert right even though he filed a speedy trial motion to dismiss based and expressed concern in writing and orally about the delays) *and State v. Bartsche*, No. 2019-161, 2020 WL 620769, *4 (Feb. 7, 2020, Vt.) (unpub.) (defendant did not aggressively assert right even though he "filed a pro se document asking that the trial commence immediately and without delay" and filed a speedy trial motion to dismiss).

Regarding the final factor, "the actual prejudice as a result of the delay…is the most important factor." *Turner*, 2013 VT 26, ¶ 12. "[T]he most important consideration is prejudice to the defense at trial." *Recor*, 150 Vt. at 42. It is, however, "difficult to prove." *Reynolds*, 2014 VT 16, ¶ 25. This is especially true because "some prejudice inheres in *any* extension of pretrial incarceration." *Vargas*, 2009 VT 31, ¶ 16 (emphasis original). Prejudice must "be assessed in light of the interests of defendants which the speedy trial right was designed to protect…oppressive pretrial incarceration, minimization of anxiety and concern, and, most importantly, limiting the possibility that the defense will be impaired." *Turner*, 2013 VT 26, ¶ 12. Appellant claims he was prejudiced by being incarcerated during the COVID-19 pandemic. However, this Court's constitutional authority to manage the courts includes the ability to suspend jury trials. *Vt. Supreme Court Admin. Dir. No. 17 v. Vt. Supreme Court*, 154 Vt. 392, 579 A.2d 1036 (1990). More importantly, this claimed prejudice relates to concerns about COVID-19 more than

concerns about his unresolved criminal charges. As such they don't constitute the type of "prolonged anxiety and public embarrassment attendant upon an untried accusation of crime" that the speedy trial right protects against. *State v. Dragon*, 130 Vt. 570, 574, 298 A.2d 856 (1972). They are also concerns that all incarcerated individuals would share and are tantamount to an argument that any incarceration while Administrative Order No 49 suspended jury trials is prejudicial. This court refused to find prejudice based on such generalized *per se* arguments. *Recor*, 150 Vt. at 43 ("Defendant's claim, thus, amounts to nothing more than an unsupported assertion that delay is per se prejudicial. This claim has no basis in our case law and is not sufficient to show prejudice here.") *and Vargas*, 2009 VT 31, ¶ 16 ("[D]efendant's recitation that the extension of his pretrial incarceration for four months caused increased anxiety and concern, without more, is not sufficient to establish enough prejudice for this factor to weigh in his favor"). Nor does the record support Appellant's assertion that he was denied access to counsel. As the trial court found Appellant was able to have face-to-face meetings with counsel for two years before Administrative Order No. 49 and, after it, he was able to have telephone contact with counsel. AV-233.

Notably, this is not the first time this Court has considered the impact of COVID-19 related delays on Appellant's case. In *State v. Boyer*, 2021 VT 19, 252 A.3d 804, this Court rejected Appellant's argument that Administrative Order No. 49 was unconstitutional and required him to be released on bail. In doing so, the Court favorably cited the trial court's analysis in its denial of Appellant's motion to dismiss on speedy trial grounds:

> The court's ruling on the due-process issue closely tracked our decision in *State v. Labrecque*, a case in which a defendant held without bail under 13 V.S.A. § 7553 pending trial appealed, arguing that the extended length of his pretrial detention under A.O. 49 violated his constitutional due-process rights…. Because the court applied the analysis from *Labrecque*, which was a bail-review case, defendant's contention that the court's analysis should be different in this context is unpersuasive.

Boyer, 2021 VT 19, ¶ 19. Appellant does not cite any facts or circumstances, which change this assessment. Consequently, the Court should conclude the COVID-19 related delays in Appellant's case didn't violate his speedy trial rights.

Conclusion

For the foregoing reasons, Court should uphold Appellant's conviction for sexually assaulting M.B. in violation of 13 V.S.A. § 3252(c).

Certificate of Compliance

I certify that the above brief complies with the word-count limit in V.R.A.P. 32. The word count is 8,967.

Date: September 19, 2022

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Deputy State's Attorney