STATE OF NEW HAMPSHIRE
SUPREME COURT

2009-0313

STATE OF NEW HAMPSHIRE

v.

LEONARD MONTOUR

Appeal From A Final Judgment
Of The Rockingham County Superior Court

DEFENDANT'S BRIEF

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Fifteen Minute Oral Argument Requested
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QUESTIONS PRESENTED

I. DID THE TRIAL COURT WITHHOLD EXCULPATORY EVIDENCE FROM THE DEFENSE?

Preserved by written motion for discovery (A,28-30), written motion for reconsideration (A,34-36), and oral argument (T,684-684, 689-691) [1]

II. DID THE TRIAL COURT IMPROPERLY RESTRICT THE DEFENDANT'S CROSS-EXAMINATION AND LIMIT HIS DEFENSE?

Preserved by oral argument (A,684-685, 689-691).

III. DID THE TRIAL COURT ERR BY DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL?

Preserved by written motion (A,40-45) and written motion for reconsideration (A,62-68).

[1]The trial court record is cited as follows:

"A" refers to the Appendix to the Defendant's Brief.

"T" refers to the five volume, sequentially paginated transcript of the jury trial held on November 17 to 21 2008.

"Sealed Exhibit" refers to the unnumbered sealed exhibit that was transferred to this court pursuant to its order of July 31, 2009.

STATEMENT OF THE CASE

The Charges And The First Jury Trial: Defendant Leonard Montour was charged, by a combination of indictments, waivers of indictment and complaints with: (a) Two counts of Aggravated Felonious Sexual Assault by a pattern of sexual assaults (RSA 632-A:2,III); (b) Four counts of Felonious Sexual Assault (RSA 632-A:3,II); and (c) Two counts of Misdemeanor Sexual Assault (RSA 632-A:4).

All of these charges involved the same complainant, a young teenager named Lisa who babysat Montour's children. T, 49. The charges were brought in three different counties—Rockingham, Merrimack and Hillsborough North—but were later consolidated, at the defendant's request, for both pretrial and tria purposes in Rockingham County. A,21-22.

The case was tried and submitted to a jury which deadlocked. A,27. A second trial was ordered. A, 27.

The Motion For Discovery: Prior to the second trial, Montour and his fiancé received a series of harassing and threatening phone calls from the complainant. A, 28-30. Montour sought discovery of the police reports relating to these calls. A, 28-30. He could not obtain the reports without a court order because the police investigation was ongoing. A, 29,31. After initially denying discovery, A, 30, the trial court reviewed the reports *in camera*. A, 39; T, 688. The court then refused to disclose the reports to Mr. Montour. T,684-686.

The Evidentiary Dispute And The Conviction: The case proceeded to a second a jury trial. At trial, Montour requested, but was denied permission to cross-examine the complainant about the harassing phone calls. T,684-685. Following the trial, Montour was convicted of all eight charges. T, 681-682.

The Motion For New Trial: Prior to sentencing, Montour filed a motion for a new trial. A,40-45. He argued that he now had proof that at least one important portion of the complainant's testimony was false. Id. The complainant was adamant that she engaged in sexual intercourse with Montour in a specific Harley Davidson truck during a very narrow time frame. A,40-41; T,72-73. In his motion for a new trial, Montour provided the bill of sale which proved that he did not purchase the truck until several months later. A,47. The trial court denied the motion for a new trial and a subsequent motion for reconsideration. A,61, 71-74.

The Sentence: Montour was then sentenced to serve a minimum of 15 years at the New Hampshire State prison. This appeal follows.

STATEMENT OF THE FACTS

A. Introductory Note

This appeal asks the court to decide whether certain evidence that was excluded from trial, and certain evidence that was not discovered until after trial could have led to a possible acquittal had it been brought the jury's attention. This requires an examination of the entire record, including both the facts and inferences that support the jury's verdict and those that the defendant marshaled in support of his argument for acquittal. Therefore, the facts are set forth below in a manner which highlights the testimonial disputes which the jury was asked to resolve.

B. Undisputed Background Facts

Defendant Leonard Montour lived with his wife Michelle and their two children in Auburn, New Hampshire. T,49, 52-53. They had a son and a daughter. T,417, 472. The daughter, who was approximately eight years old when the events pertinent to this appeal began, is blind. T,150-151, 417. Their son was less than one year old. T,142, 479.

Montour worked as a drywall subcontractor and his wife was employed by Verizon Wireless. T,54, 419. They both worked on Saturdays. T,54. In order to get to work on time on Saturdays, both Montour and his wife needed to leave the house early in the morning. T,53-54. They did not return until late in the afternoon. T,53-54.

While the Montours were away on Saturdays, and at other times, they regularly left their children in the care of the complainant, Lisa B. ("Lisa"). T,54. Lisa is Leonard Montour's "step-cousin." T,52. Her natural uncle married Montour's mother. T,52. She knew Mountour as a member of her extended family since she was a baby. T,52.

Lisa began babysitting for the Montours when she was twelve. T,52. She was fourteen in the summer of 2005 and she began high school later that fall. See, A,1; T,54, 58.

Because Lisa could not drive, the Montours gave her rides to and from her home in Manchester. T,54. Sometimes she stayed over at the Montour's house on Friday nights so that she would already be there in the morning when she was needed to babysit. T,53-54; 419.

In the summer of 2005, Lisa told Montour she wasn't a virgin and that she drank alcohol. T, 55. Although Lisa and Montour recall these words, neither remembers their context. T,55, 538-539. Their testimony about what happened next differed dramatically.

C. Lisa's Accusations And Montour's Defense In A Nutshell

According to Lisa, as soon as Montour discovered that she had been sexually active, he reached for her crotch, T,56-57, and then began a year and half long pattern of sexual activity with her. She claimed—among other things—that they had sexual intercourse in a truck which caused her to become pregnant, T,73, in a shower with Montour's eight year old daughter in the next room, T,69, in her house within sight of the front door at time when her family was

expected to come home, T,86, and in a motel room using a "sex toy" that Montour allegedly wore over his penis. T,89.

Montour took the stand and denied each of Lisa's accusations. T,479. Through counsel he argued that Lisa was a troubled girl who was deeply infatuated with him and made up stories about a sexual relationship that never existed. T,625. Montour suggested that her infatuation was eventually replaced by jealously toward Montour's new adult girlfriend or simple misdirected anger. T,625. In any event, his defense was one that required the jury to weigh witness credibility and decide who was telling the truth.

D. The Initial Incident In Litchfield

Lisa's Account: Lisa told the jury that, immediately after she said she was not a virgin, Montour responded by saying "You shouldn't have told me," and then "things got a little weird." T,56. That evening, Montour drove her back to her house in Manchester near the Litchfield line. T,56. However, (according to Lisa) Montour did not turn onto Lisa's street but instead continued into Litchfield. T,56. Then, Lisa claimed, Montour again told her that she should not have said she was not a virgin as he placed his hand on her crotch, over her clothing. T,56-57.

According to Lisa, Montour then rubbed her vagina over her pants and asked if he had touched her "G spot." T,59. Lisa testified that she grabbed Montour's hand and pushed it away. T,56-57. She said that she felt weird and did not know how to act while this was happening. T,56. Lisa claimed that Montour then said, for the third time, that she should not have told him she was not a virgin. T,57. She told the jury that Montour then took her hand and placed it on his penis, over his clothes. T,57. Lisa said she pulled away and Montour drove her home. T,57.

According to Lisa, Montour asked her not to tell anybody about what happened. T,57. Lisa told the jury that she kept silent about it because she was shocked and "didn't want to screw up anyone's life." T,58.

Montour's Account And Impeachment Evidence: Montour denied touching Lisa when he drove her home from babysitting. T,480. He also introduced prior inconsistent statements that Lisa made about the incident:

-She told her boyfriend Joe C. ("Joe") that the "virgin" conversation began in the car when Montour abruptly asked her if she was a virgin. T,319. Lisa told Joe that she responded that it was none of Montour's business whether she was a virgin or not. T,319. Lisa said to Joe that Montour then pulled up her thong underwear from behind and said "this is how I know you're not a virgin." T,319. (Thus, Lisa never told Joe that Montour said "you shouldn't have told me you're not a virgin" and, conversely, Lisa never told the jury that Montour reached for her thong underwear.)

-Lisa also spoke about the incident with a high school counselor. Once again, she said nothing about Montour saying "you shouldn't have told me you're not a virgin." T,303. Instead, she claimed that Montour said "You make me feel horny," T,303, which was something she did not accuse him of saying at trial. Lisa also told the counselor that Montour "put his hand on her thigh," not that he fondled her vagina looking for her "G spot." T,303.

E. The Shower Incident

Lisa's Account: Lisa told the jury about another occasion, later in 2005, when Montour came home and asked his blind daughter to take a nap or relax in her room. T,68. Lisa said that the daughter, who was eight years old, protested that she did not take naps. T,68. However, according to Lisa, the daughter went to her room and was quiet. T,68.

Lisa testified that she then accompanied Montour to the shower in the master bathroom where they engaged in sexual intercourse. T,69. She claimed that they remained in the shower for 20 to 30 minutes and that they both made loud moaning noises while having sex. T,154-156.

Lisa said that after they left the shower Montour reminded her that she could not say anything about the sexual activity. T,69. She claimed that that Montour, quoting the lyrics of a popular song, told her that she was his "dirty little secret." T,69.

Montour's Account And Impeachment Evidence: Montour denied engaging in sexual contact with Lisa in the shower. T,498, 479. Montour's wife and daughter (who was eleven at the time of trial) both testified that the daughter stopped taking naps years before the incident and, due to her blindness, had a very heightened sense of hearing. T,420, 425-426, 462-463.

This was significant because the daughter's room abutted Montour's bedroom and she testified that she could easily hear the shower running in his bathroom. T,465. Presumably, she would have also heard any "load moans," T,156, coming from the shower. However, the daughter testified that she never heard her father and Lisa in the shower at all. T,465

The daughter also testified that she was never asked to spend time in her room alone when Lisa was present. T,464-465. The daughter said categorically that, "I would never go in my room," because she preferred to spend time with either her father or Lisa. T,465.

Montour also impeached Lisa with the account of the incident that she gave during a prior recorded interview. T,152-154. In that statement, Lisa said that Montour told his daughter to take a nap. T,153. She did not say that (a) the daughter refused to nap; (b) the daughter was too old for naps; and (c) the daughter simply went to relax in her room. T,153. Through counsel, Montour suggested that Lisa embellished on her original story about a napping eight year old after she heard the attorneys arguing about the issue at a prior court proceeding. T,153.

F. The Bedroom Incident

Lisa's Account: Lisa claimed that, on another occasion in the summer of 2005, Montour "picked [her] up at night" and drove her to his home so that she could babysit the following day. T,59. She claimed that he bought Smirnoff malt beverages on the way home. T,59. According to Lisa, when they arrived she went downstairs to go to sleep in the basement (where she usually slept) but Montour invited her upstairs so that she could sleep in his bedroom. T,59.

She testified that she went to Montour's bedroom where he gave her one of the Smirnoff bottles. T,59. Lisa had a few sips but did not want to finish the drink because she was tired and wished to go to sleep. T,61. According to Lisa, Montour complained about the fact that she was not drinking because he purchased the alcohol for her. T,61.

Lisa told the jury that she then lied face down on the bed and began to go to sleep. T,60. Lisa said that she was wearing her customary sleep clothes, shorts and a large T-shirt. T,59. She claimed that Montour laid down next to her, wearing jeans but no shirt. T,61.

According to Lisa, Montour then pulled down her shorts while saying that she looked like she was eighteen because she was "too sexy to look [her] age." T,61. Lisa said that Montour next took off her shorts and underwear and removed all of his clothes. T,61. She said he then got on top of her and engaged in sexual intercourse, eventually ejaculating on her leg. T,61.

Lisa claimed that Montour then said he would "go to jail" and "be in big trouble" if Lisa told anybody about what happened. T, 61. He asked her to keep it a secret. T,62. The incident ended when Lisa put her sleep clothes back on and returned to the basement for the night.

Montour's Account And Impeachment Evidence: Montour denied engaging in any sexual contact with Lisa at his home. T,479. He also presented minor inconsistencies between Lisa's courtroom testimony and the statements she made during her forensic interview. T,147-

148, 587. At trial, Lisa said that she and Montour both just arrived at Montour's residence and, therefore, she was still awake when Montour asked her to go upstairs to his bedroom. T,60. However, when she was first interviewed Lisa said she was already sleeping or "kind of sleeping" on the basement couch when Montour came home from being out. T,146-148.

G. The Sunbathing Incident

On another occasion in the summer of 2005, Lisa watched the Montour's baby during the afternoon. T,62. The baby had gone to sleep and Montour told Lisa that she could use the opportunity to sunbathe on their deck. T,62. Lisa claimed that Montour said she could "tan nude" because the houses were far apart and the neighbors would not see her. T,62. Lisa then removed her clothes and sat down on the porch. T,62.

According to Lisa, Montour then appeared unexpectedly. T,63. She claimed that Montour said she would tan better with baby oil and that he started rubbing oil all over her body. T,63. She said that he rubbed her breasts and genitals and penetrated her vagina with his fingers. T,63. She claimed that Montour said that "his dick is a perfect match for my pussy." T,64. The incident ended when the baby woke up and they both left the area. T,64.

Montour's Denial And Impeachment Evidence: Montour denied engaging in sexual contact with Lisa on his deck or elsewhere. T,479. He testified that his backyard porch could be clearly seen by nearby neighbors whose window was approximately 150 feet away. T,499-500. Montour's wife also testified that the porch was within close eyesight of the neighbors. T,499-500. She pointed to several pictures taken from the porch to prove this point. T,499-500. She also explained that the area could be seen from a nearby horseback riding trial. T,422-423.

H. The Victoria's Secret Incident

Lisa's Accusations: Lisa claimed that, in the fall of 2005, during her freshman year of high school, Montour brought her to Victoria's Secret where he purchased see-through underwear for her. T,66, 126-128. She said that they went to the mall for back to school shopping. T,126. They stopped at Victoria's Secret where, Lisa said, she looked at the "normal bras," while Montour kept picking out "sleazy kind[s] of bras…[and] trashy lingerie and underwear." T,66. Lisa said Montour purchased her two pairs of underwear for her, one of which was see-through. T,66.

Lisa told the jury that when Montour paid for the underwear he told the cashier "I'm buying my babysitter underwear, she owes me." T,66. According to Lisa, the employee laughed, made a weird facial expression, and looked shocked. T,66-67.

Lisa gave two pairs of underwear to the authorities, T,354, which she swore were the specific one's purchased by Montour. T,104.

Impeachment Evidence And Montour's Testimony: A Victoria's Secret store manager with fifteen years' of experience testified that the manufacturer's labels on the two pairs of underwear indicated they were manufactured in Sri Lanka in February, 2006. T,554. She also testified that it probably takes several months for newly manufactured clothing to clear customs and travel through the distribution system all the way to the retail shelves at the Victoria's Secret stores in New Hampshire. T,556. Accordingly, the underwear introduced at trial could not have been purchased in the **Fall of 2005** when Lisa was in her freshman year of high school.

Montour insisted that he never took Lisa shopping at Victoria's Secret. T,479. He impeached Lisa with her prior testimony: At trial she testified that they needed to keep a low profile in the mall, because Montour's wife had "friends" their. T,120-121. However, she said

nothing about this at her forensic interview and she may have learned that Montour's wife actually worked at the mall as a result of the testimony at a previous court hearing. T,120-121.

I. The Basement Incident

As noted, Lisa often slept in the basement at the Montour's house so she would be ready to start babysitting in the morning. T,53-54, 70 Montour typically left his house through the basement to go to work early in the morning when Lisa was still asleep. T,70. Lisa claimed that one morning he woke her up, pulled down her sleepwear and put his fingers in her vagina. T,70. According to Lisa, he then engaged in cunnilingus and actually "bit down" to the point where it hurt. T,70. She said that when she asked him to be gentle, he responded "it's foreplay." T,71.

Montour denied that engaging in any type of sex with Lisa in his basement. T, 479.

J. The Harley Davidson Truck Incident

The most critical incident in the case—and the one that was the subject of Montour's motion for a new trial—involved a claim by Lisa that she had sexual intercourse with Montour in February, 2006 in a Harley Davidson truck (e.g. a Ford F-350 with a special "Harley Davidson" themed interior). T,212-213. Lisa claimed that she became pregnant that night and could not have become pregnant on any other occasion. T,71,

The Harley Davidson truck incident allegedly occurred in the late winter of 2006 (more than year after the sexual relationship began). T,70-71. Lisa got into a fight with her teenage boyfriend, Joe, who left her stranded in Epping. T,71. She called Montour for a ride to his house, where she was planning to babysit that evening. T,71.

According to Lisa, Montour picked her up but, on the way to his house, he took a detour down a dirt road in Auburn. T,72. Lisa gave a detailed and graphic description of how she and Montour then had sexual intercourse at this location:

> I laid across the center console of his Harley Davidson truck, my head against the passenger side door with my butt on top of the console and he had taken off my pants and he got on top of me. And we had sex and it was really uncomfortable because my head kept hitting the door back and forth.
>
> And then he ejaculated in me. After that happened, I grabbed a T-shirt from one of the back seats, got out of the—opened the passenger side door, got out, wiped myself, then got back in the car and we left.

T,73. Lisa said this was the first time Montour ejaculated inside her and they did not use any form of birth control. T,72-73. She said that on the following day they went to a drug store for the "Plan B" emergency contraceptive pill, but were told they needed a prescription. T,74.

K. <u>The Pregnancy, The Abortion And The Boyfriend</u>

Lisa became pregnant in or about late February, 2006. T,72. She had an abortion on April, 26, 2006 and was told that she had been pregnant for approximately eight weeks. T,72. T,9, 230. Lisa testified that, while she cannot be 100% sure, she believes she became pregnant as a result of sexual intercourse with Montour in the Harley Davidson truck. T, 136.

However, as soon as she learned she was pregnant, Lisa told her boyfriend Joe that he got her pregnant. T,74. Joe denied responsibility and told Lisa, "No way is that mine…that's not mine, you're cheating on me, I did not get you pregnant." T,74. Lisa responded by saying to Joe, "it has to be you because I didn't sleep with anybody else." T,74. Eventually, during the same conversation, Lisa started screaming, "It's your baby." T,109. Lisa then told others, including her parents and the Concord Feminist Health Center that she was pregnant because she had sex with Joe. T,75. She said nothing about Montour.

Joe claimed he had not had sex with Lisa for "two months" prior to the abortion and had not had unprotected sex with her for "three months." T,324, 347. Lisa claimed she had not had sex with Joe for "months" and, therefore, he was not responsible for her pregnancy. T,73. However, according to Joe, prior to (and subsequent to) this "two month" hiatus, he and Lisa had

sexual intercourse at "my house, her house, anywhere we could pretty much" including "her friend's car [and] my friend's car." T,322. They had sex "fairly regular[ly]" since the summer of 2005, although sometimes they did not see each other for a few weeks. T,320-321.

At trial, Lisa claimed that she lied to Joe, by telling him that he got her pregnant, to defend herself from any suggestion that she had been unfaithful to Joe. T,75, 108-109. However, Lisa admitted at trial that, since she decided to get an abortion, she didn't have to tell Joe anything at all about the pregnancy, let alone lie to him. T, 131-132.

Lisa told Montour that she was pregnant. T,75. He "acted oblivious" and said "oh, did you get yourself in trouble." T,76. Lisa then asked him to help her pay for the abortion. T,76, 132. Montour gave her $400. T,76, 132. Montour's wife, Michelle, testified that he consulted her before he gave Lisa the money. T,428. She said that Montour stated that neither Lisa nor her mom could afford the abortion. T,428.

Lisa did not tell her mother that Montour gave her funds for the abortion. T,76. She feared that if she did, her mother would "know there's were something going on." T,133. Therefore, she instead told her mother that she had no money and her mother responded by giving her a second $400. T,76, 132.

L. <u>The Charlotte Street Incident</u>

<u>Lisa's Accusations</u>: Lisa testified that after the abortion, in the fall of 2006, Montour visited her at her house in Manchester. T,84. She shared this house with her five siblings, her mother, her mother's boyfriend and his four children. T,157-158. According to Lisa, all eleven of her family members were away, doing various things, when Montour arrived. T,84, 157-158.

Lisa claimed that during this visit Montour kissed her—which she said he had not done before—and that she did not like it because he smoked. T,84. Then, according to Lisa, he

unzipped his pants and began to masturbate. T,84. Lisa claimed that Montour then said that "I always do stuff for you [but] you never do stuff for me" and then started to push her head onto his penis. T,84-85. Lisa testified that she tried to pull away, and eventually did pull away, but that for a brief period of time Montour's penis was in her mouth. T,85.

Lisa said that after she pulled her head away, she "ended up on all fours on the floor…and we had sex in that position." T,85. Lisa testified that during the time they were engaged in sexual intercourse she could see straight upstairs to the front door. T,86. She said that this made her nervous because she feared somebody from her family might come home. T,86. However, nobody came home and, according to Lisa, Montour left after having sex with her. T,86.

Montour's Denial: Montour denied engaging in any sort of sexual contact with Lisa at her house (or elsewhere). T,479, 502. Montour's counsel argued that Lisa's testimony was implausible, because if Montour "can have her when he wants her in the truck or at his house," then "he'd have to be a nut" to lie down on the floor of her house and masturbate, and then have sex with Lisa on all fours, on a weekend afternoon when any one of eleven family members could walk through the door. T,604-605.

M. The Kozy 7 Motel Incident

Background Facts: Montour separated from his wife in December, 2006 and they divorced in April, 2007. T,417, 433. Montour stayed at the Kozy 7 Motel in Hooksett during portions of December, 2006 and again from January 4 to January 6, 2007. T,383, 402, 413-414.

Lisa's Accusations: Lisa testified that sometime around Christmas, 2006, Montour called her, said he was getting divorced, and then said he was going to pick her up. T,87. She said he

drove her to a local pizza restaurant for take out and then to his motel room. T,87-88. Lisa claimed that this was the first and only time she went inside the motel. T,87.

According to Lisa, "we had to be careful because obviously we didn't want anyone to see [him] taking in—a young girl to his room." T,88. Once inside the room, they ate the food they purchased and then watched the movie "Jeepers Creepers" on television. T, 88.

Afterward, Lisa said she was "on [her] period" and had cramps. She claims that Montour told her that "sex on your period is the best." T,88-89. According to Lisa, they then engaged in sexual intercourse. T,89. After that—according to Lisa—Montour took out a sex toy called "Big Blue." T,89. This was a plastic device which slid over Montour's penis. T,89.

Lisa claimed that Montour engaged in sexual intercourse with her while wearing Big Blue over his penis. T,90. She graphically described how Montour ejaculated into "Big Blue" and then "pulled out with Big Blue on." T,90. Due to her period, Lisa got a significant amount of blood on herself and there was blood on the sheets as well. T,90, 201.

Lisa testified that she then went into the bathroom, cleaned up and put her clothes on. T, 90. She claimed, they then "look[ed] out the window to see if the coast was clear"and, seeing nobody around, they left the room and Montour drove her home. T,90.

<u>Possibly Corroborative Evidence</u>: Lisa gave a fairly accurate description of the rooms at the Kozy 7 motel. T,88. She described a room with a flower décor, T,88, that was similar to several of the rooms at the Kozy 7. T,399, 411. She also described a generic motel room layout that accurately described most, if not all of the Kozy 7 rooms. T,88, 410.

There was no dispute that Montour stayed at the Kozy 7 motel several times in late 2006 and early 2007. Business records revealed that he stayed there from December 8 to 17, 2006, December 21 to 28, 2006 and January 4 to January 6, 2007, T,383, 414, 503-506.

There was also no dispute that Montour regularly frequented ABC Pizza in Hooksett, both when he was living with his wife in Auburn and after he moved out. T,506. Records showed that Montour ordered food from the pizza restaurant on at least two occasions. T,509.

Finally, the State introduced a photograph of a "sex toy" that Lisa and her mother found on the internet so that they could demonstrate for the jury what "big blue" looked like. T,89. However, neither party introduced any actual "sex toy" that had been in Montour's possession.

Montour's Testimony And Impeachment Evidence: Montour denied ever taking Lisa to the Kozy 7 motel. T,535. He testified that Lisa and her entire family knew that he had been staying there after separating from his wife, circa Christmas, 2006. T,535. Montour also introduced prior inconsistent statements that Lisa made about the Kozy 7 motel incident:

-Just six months earlier, Lisa had testified that Montour ejaculated on her leg: "He pulled out and it was on my thigh, kind of my inner thigh." T,201. At trial she said he "pulled out with big blue on after he ejaculated" and the device covered his entire penis like a condom. T,200.

-Lisa did not mention "big blue" or any "sex toy" at all during her forensic interview. T,187, 198-199. Yet it was an extremely dramatic, graphic and central part of her later testimony concerning the event.

-During the same forensic interview, Lisa indicated that the afternoon began when *she* called Montour asking to hang out or get something to eat. T,182. At trial, she claimed that *he* called her, said that he was getting divorced and then said he would prick her up. T,87, 180.

-In her *prior statements*, Lisa claimed that the incident occurred on a weekend afternoon in January, 2007. T,180. Business records and testimony established that Montour was not a resident at the motel on any weekend day in January other than Saturday January 6, 2007. T,383, 413, 505. Consistent with motel policy, T,413, Montour testified that he checked out at

10:00 am that day which was inconsistent with Lisa's account of pizza in the afternoon. T, 505. Montour introduced evidence that Lisa sent MySpace messages to her friends that same morning. T,207-209.

N. Lisa's Other Dealings With The Montour and His Family

In General: Although Montour vigorously denied any sexual involvement with Lisa, he did not dispute that he became close to the girl. T,480. For example, he gave Lisa occasional rides, including one that she requested to Canobie Lake Park in Salem, T,67, 481, and he spoke with her about her concerns, including her troubles with her boyfriend, Joe. T,483.

Montour also transgressed certain boundaries with Lisa. Montour admitted that he gave Lisa alcohol from his house and allowed her to take it with her when she left. T,483. When both Lisa and his wife were present, Montour once stated that "when you [Lisa] turn eighteen I'll divorce you [wife] and marry her [Lisa]." T, 427. Montour's wife took this as a joke, both when it was said and at the time of trial. T,427.

The Late Night Text Messages And Their Aftermath: Montour's wife testified that she was more concerned by text messages that Lisa sent to Montour after 11:00 pm one night in May or June, 2006. T,429-432. According to the wife, Montour's cell phone kept buzzing, so she looked at the message, which came from Lisa and read, "What did Missy [Montour's wife] want?" T,429-430.

The wife testified that she then pretended to be Montour and texted Lisa back with a message consisting of a question mark. T,429-430. Lisa replied, "You don't know?" T,430. The wife then called Lisa, demanding to know why she texted Montour late at night. T,430. According to the wife, Lisa said she just needed to talk to him. T,430. Montour's wife then asked Lisa if she had "a thing" for Montour and Lisa responded, "That's disgusting." T,431.

The day after receiving the late night text message, Montour's wife asked him why Lisa had been calling him. T,432. Montour said that Lisa was having a lot of problems and he said she could call. T,432. According to the wife, Montour told her that Lisa tried committing suicide a couple of times.[2] T,433. Based on this conversation, the wife insisted that they stop using Lisa as a babysitter. T,432-433.

When the Montours separated and divorced several months later, the parenting plan included a provision which forbid Lisa from babysitting. T,433. The wife testified that this was written into the plan because, in her view, Lisa was unstable and she didn't want a breakdown or meltdown in front of her children. T,433. The wife testified that she never thought there was any sort of sexual relationship between Lisa and Montour. T,434.

Flirtatious Behavior: In addition to the texts, the wife also noticed that she Lisa "was always following [Montour] around the house" and chose to wear revealing clothing. T,431. Lisa's boyfriend Joe testified that the wife left voice mail messages and texts on Lisa's phone telling her stop "flirting" with Montour. T, 349.

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[2]There was a factual dispute about the timing and significance of Lisa's suicide attempts:

-Lisa testified that ***following the abortion***, she overdosed on prescription pills and, on a separate occasion, cut her wrists. T,51, 77-78. She testified that she was depressed and thought this would relieve the pain she was feeling, due to (a) the abortion, T,77 (b) feeling like she had been "cheating on Joe," T,77, and (c) "holding in" the fact that she had been having sex with Montour, T,51-52. Lisa was hospitalized briefly at the Elliot Hospital. T,51.

-In contrast, Montour testified that Lisa had had overdosed and cut herself ***before the abortion***. T,527. He said it was precisely because she was a "troubled kid" with this history that he gave her money for the abortion in the first place. T,527. No hospital records were presented to prove the dates on which Lisa was treated for any suicidal incidents. See, T,81.

The jury was thus free to view Lisa's suicide attempts as either (a) victim impact evidence stemming from sexual exploitation by Montour or (b) a sign of emotion instability which, in turn, might be relevant to credibility.

One of Montour's friends witnessed similar flirtatious behavior on Lisa's part. T,559. In 2006, sometime after he separated from his wife, and while he was dating his new fiancé, Lisa sent Montour a text message with provocative and "sexy" (but not nude) pictures of herself. T,541-543, 559. The friend testified that Montour showed her the pictures and explained that it was his sixteen year old babysitter. T,558. She said Montour was concerned and she suggested he show the photographs to somebody, or call the police "because I don't think a 16 year old should be sending someone a photo like that." T,559.

Testimony By Lisa's Friend: One of Lisa's friends testified that she was at the Montours' home on several occasions in the fall of 2005 when both Lisa and Montour were present. T,278. The friend testified that she once saw Montour put his hand on Lisa's upper thigh. T,279. She said Montour was "always around her always" and often touched her on the "shoulder, on her leg, or whatever." T,29-0291. She also said that Lisa told her Montour was "touchy-feely." T,290.

The Booty Call Phone: At trial, Lisa testified that late in her relationship with Montour, he told her that he started using a new cell phone which he called his "booty call" phone. T,91. Lisa opined that the name implied it was a phone used to call girls for sex. T, 122. She did not mention a "booty call" phone at either her forensic interview or a prior court proceeding. T,124. She first mentioned it at the second jury trial. T,124.

O. The End Of The Relationship And Lisa's Disclosures

Lisa testified that her last sexual encounter with Montour was the one in the Kozy 7 motel circa Christmas, 2006. T,226-227. She said she last spoke with Montour a few months later, on April 15, 2006, when she called him on her sixteenth birthday. T,91-92, 227. Montour

testified that prior to this phone call, in February, 2006, he started dating a woman who later became his fiancé. T,506.

Lisa told several friends about her relationship with Montour. While Lisa was still babysitting for Montour, she insinuated to her friend Mandy that Montour touched her sexually. T, 96-97, 273-274, 292. Lisa did not get into specifics with Mandy. T,241.

Lisa claimed that she told a second friend, Elena (also spelled as Helena in the transcript) about the initial incident in Litchfield. T,94. In the fall of 2006, she told a third friend, Shannon about the Litchfield incident. T,95. Lisa testified that she could not remember whether she told Shannon that she had sex with Montour. T,95.

Shannon then spread a rumor in Lisa's high school that she was "fucking [her] uncle for clothes and things of that nature." T,235. T,95, 235-236. Other students began to ask Lisa if it was true. T,95. Lisa said the rumor was false. T,96. She accused Shannon of spreading lies about her. T,236. Lisa even got into an altercation with Shannon, over what Lisa referred to as "lies," that led to school suspensions for both students. T,236. Eventually, Lisa switched high schools due in part to the stress caused by the rumor started by Shannon. T,95-96.

Some months later, during an argument with her boyfriend Joe, Lisa blurted out that Montour "grabbed" her and "forced on his bed" and had sex with her. T,327. She told Joe, "I was raped" that's why I'm acting this way. T,328 She also told Joe that sex with Lenny was "a one time thing", T,337, but that's why she became pregnant. T,326. Joe found this "hard to believe because we were in an argument at the time she told me…[and] I didn't know if she was just tell me for me to feel bad for her." T,327.

Lisa participated in a group counseling program at her school. T,295. During one session she complained about the rumor that Shannon started. T,295. Lisa said that she had

confided in Shannon about having sex with somebody who was not her uncle. T,295. The counselor told Lisa that because this was a sexual assault she would have to make a report. T,296. Later that day Lisa told the counselor that she had sexual contact with a man she was babysitting for on several occasions. T,298. Eventually, Lisa's parents were notified, T,299, and the police became involved.

P. The Verdict

Based substantially on this evidence, defendant Leonard Montour was convicted of the following offenses: (A) In Rockingham County, (i) AFSA by a pattern of digital penetration; (ii) AFSA by a pattern of sexual intercourse; and (iii) FSA by sexual penetration; and (iv) FSA by cunnilingus; (B) In Hillsborough County, (i) FSA by sexual penetration; (ii) Misdemeanor Sexual Assault by placing her hand on his genitalia; and (iii) Misdemeanor Sexual Assault in by touching her genitalia; and (C) In Merrimack County, FSA by sexual penetration.

Q. Evidence Excluded From Trial And Evidence Discovered After Trial

The evidence excluded from trial, and the evidence discovered after trial is described in the legal argument section of this brief.

SUMMARY OF ARGUMENT

I. Lisa made harassing and allegedly threatening calls to Montour after his first jury trial ended in a mistrial. The Manchester Police opened a criminal investigation and Montour requested discovery of the police reports. The trial court reviewed the police reports *in camera* but refused to disclose them to Montour. This was error—when the police reports became public (after Montour's conviction, while this case was on appeal), counsel learned that Lisa initially denied making the calls. Assuming that the sealed exhibit includes the same documents, it is clear that the trial court withheld evidence that **Lisa lied to the police in an effort to obstruct a criminal investigation concerning this defendant.** This was exculpatory impeachment material that should have been disclosed pursuant to State v. Laurie, 139 N.H. 325 (1995).

II. The trial court also erred when it forbid Montour from cross-examining Lisa about the phone calls. Montour had a right to impeach Lisa with respect to both (a) general credibility and (b) her bias and motive to fabricate. Lisa's obsessive phone calls jibed perfectly with Montour's argument that she had been obsessed with him, first as an object of infatuation, and later as an object of anger and bitterness. While the trial court could set limits on cross-examination, it was required to allow at least a threshold level of inquiry into the phone calls and police investigation.

III. Finally, the trial court should have granted Montour's motion for a new trial. Lisa testified in graphic detail how she and Montour had in sex in his Harley Davidson truck. The Harley Davidson incident was central to the State's case at trial because Lisa claimed she became pregnant that night. After trial, however, Montour learned, through dealership records, that he did not yet own the truck at the time of the incident. Montour was not at fault for failing to discover this earlier and, had the jury learned of it, the trial should have ended differently.

ARGUMENT

I. THE TRIAL COURT WITHHELD EXCULPATORY EVIDENCE FROM THE DEFENSE

A. Standard Of Review

In response to Montour's discovery motion, the trial court reviewed certain Manchester Police Reports *in camera* but declined to disclose them to the defense. T,684-685, 688; A,39. This court should reverse a trial court's denial of pretrial discovery "if the defendant demonstrates that the decision was clearly unreasonable to the prejudice of his case." State v. Larose, 157 N.H. 28, 39 (2008). This requires the defendant to demonstrate that the trial court's decision was "an unsustainable exercise[] of discretion." Larose, 157 N.H. at 39. See also, State v. Emery, 152 N.H. 783, 789 (2005).

B. Procedural History And Factual Background

Shortly after Montour's first jury trial ended with a hung jury and a mistrial, he and his fiancé began receiving harassing phone calls. A,28. Montour received numerous "hang up calls." A,28. Additionally, during one call the caller made threatening comments, A,28, including (according to Montour and his fiancé) a statement that "you are going to die." T,690. Montour reported these calls to the Manchester Police which traced them to Lisa's phone. A,28; T,689-690.

The Manchester Police Department refused to provide the reports of these phone calls without a court order because its criminal investigation was ongoing. See, A,28, 31. After initially denying Montour's request for discovery of the reports, A,33, the trial court ordered the reports brought to the courthouse for an *in camera review*. A,39. See, Sealed Exhibit. Ultimately, it refused to disclose any of the reports to the defense. T,684-686.

The police reports have since been transported to this court as a sealed exhibit and Montour's motion for access to this exhibit has been denied. See, Supreme Court order of July 31, 2009. ***Accordingly, appellate counsel has not seen the sealed exhibit.*** Therefore, appellate counsel cannot summarize or argue this portion of the actual record in this brief.

However, while this appeal has been pending, Montour's family obtained the underlying police reports (with Lisa's name redacted) from the Manchester Police Department as public records. See, Lodge v. Knowlton, 118 N.H. 574 (1978) (applying RSA Chapter 91-A to police reports). Although appellate counsel has no way to compare these public records to the actual trial court record, he believes in good faith that the public record can used to draw the court's attention to matters that are likely in the actual record. To do less, would be to abandon advocacy in favor of simply stating the question presented.

Thus, the **public records** are included in the Appendix to this Brief (where they are prominently labeled as documents that are not part of the record). Reference to the public records is made solely as a heuristic aid to assist the court in its own plenary *in camera* review of the actual trial court exhibit. The **public records** establish that--

(A) When initially confronted by the police, Lisa flat out denied making calls to anybody named "Lenny." A,81.

(B) Four days later, Lisa admitted making the calls. A,83. She claimed that she "wanted to know if [Lenny] Montour still had the same phone number," A,83, and also wanted to let him know that she was planning to go through with a second jury trial. A,83.

(C) Lisa denied making repeated phone calls to Montour's phone and suggested that her phone might have automatically dialed the last number it called. A,83. She also denied making threats to Montour or his fiancé.

(D) Montour's fiancé told the police that she received two calls, close in time, during which a female told her "You are going to die," and "You will die." A,76. Montour and his fiancé both also complained about hang up calls. A,78. These calls came from a restricted number, A,76-78, but the police were able to trace them to Lisa's phone via a subpoena to the carrier. A79,80.

C. Argument

Criminal defendants are entitled to an *in camera* review of potentially exculpatory, but confidential evidence held in the hands of third parties. See e.g., State v. Gagne, 136 N.H. 101 (1992); State v. Cressey, 137 N.H. 402 (1993); State v. Amirault, 149 N.H. 541 (2003). Following that review, defendants are entitled, by virtue of the Fourteenth Amendment's due process clause and Part 1, Article 15, to disclosure of material exculpatory evidence. Gagne; Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987). Evidence that impeaches the credibility of a key government witness is "exculpatory" within the meaning of the Gagne/Ritchie rule and must, therefore, be disclosed. Giglio v. United States, 92 S.Ct. 763, 764 (1972); United States v. Bagley, 473 U.S. 667 (1985); Ouimette v. Moran, 942 F.2d 1, 9 (1st Cir. 1991); State v. Laurie, 139 N.H. 325 (1995).

When that evidence is otherwise ***privileged,*** the courts must balance the need for the ***privilege*** against the criminal defendant's due process right to marshal exculpatory evidence. That balance of competing interests is summarized nicely in the boilerplate standard under which courts determine whether ***privileged*** material should be released to the defense: "[A] trial court must permit defendants to use privileged material if such material is 'essential and reasonably necessary to permit counsel to adequately cross-examine for the purpose of showing unreliability

and bias.'" Gagne, 136 N.H. at 104, quoting State v. Farrow, 116 N.H. 731, 733 (1976). See also, State v. McLellan, 146 N.H. 108, 113 (2001).

In this case, however, there was no privilege. The trial court reviewed Manchester Police Department reports that would have been public records had the police investigation been concluded. The information in those documents was not otherwise privileged by statute or court rule.[3] Compare e.g. Gagne, (DCYF records, privileged by statute); Cressy, (psychologist's notes); Amirault (police personnel files, privileged by statute). Therefore, the trial court should have disclosed the police reports if they met the general Laurie standard, regardless of whether disclosure was "essential" or "reasonably necessary." Under Laurie, "Upon a showing by the defendant that favorable, exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict." Laurie, 139 N.H. at 330.[4]

If the public records (described above) reflect the sealed exhibit reviewed by the trial court, there is no question but that the Laurie standard was met. ***Lisa lied to the police.*** When she was first confronted about making the phone calls, she falsely denied making them. See, A,81 (public record). This was a dishonest attempt to obstruct a police investigation. The facts that Lisa (a) lied; (b) to a police detective; (c) about a fact she knew to be material to a criminal

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[3]The Manchester Police Department reports related to an *adult* criminal investigation. Lisa was seventeen years old at the time that she made the phone calls. See, RSA 169-B:2,VI. Therefore, she was an adult for criminal law purposes and the police department properly treated the reports as public records after the case was closed.

[4]Laurie sets forth the State Constitutional standard under Part 1, Article 15. The federal standard, under the Fourteenth Amendment, is slightly less protective: "Favorable evidence is material under the federal standard only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Laurie, 139 N.H. AT 328, citing Bagley, 105 S.Ct. at 3383.

investigation; (d) concerning her interactions with Montour; (e) when she necessarily knew that anything she said could filter back to the Rockingham prosecutor in this case, were clearly admissible to impeach her credibility. See, N.H.R.Ev. 608(b). See generally, State v. Miller, 155 N.H. 246 (2007); State v. Hurlburt, 132 N.H. 674, 675 (1990).

Additionally, as explained below in more detail, Lisa's harassing phone calls to Montour and his fiancé, along with her statements to the police, were admissible to show her bias and motive to fabricate. They support Montour's argument that Lisa became obsessed with Montour, initially by infatuation and later by anger at Montour and his fiancé. T,625.

Because the undisclosed police reports contained exculpatory evidence within the meaning of Laurie, Montour was entitled to receive them and use them at trial. Because he was denied that right, this court should reverse Montour's conviction and order a new trial.

II. THE TRIAL COURT IMPROPERLY RESTRICTED MONTOUR'S CROSS-EXAMINATION AND LIMITED HIS DEFENSE

A. Standard Of Review

The trial court precluded Montour from cross-examining Lisa about the harassing and allegedly threatening phone calls she made to Montour and his fiancé. T,684-658, 688. A trial court's ruling, curtailing cross-examination should be reversed if it was an unsustainable exercise of discretion. State v. Bashaw, 147 N.H. 238, 241 (2001); State v. White, 145 N.H. 544, 547 (2000). That standard is met if the ruling is "clearly untenable or unreasonable to the prejudice of a party's case," Carignan v. New Hampshire International Speedway, Inc., 151 N.H. 409, 416 (2004), and if the record fails to "establish[] an objective basis sufficient to sustain the discretionary judgment made." State v. Lambert, 147 N.H. 295, 296 (2001).

B. Governing Standards

This case turned on witness credibility. If the jury believed Lisa beyond a reasonable doubt, it should have convicted Montour. However, if the jury had so much as a reasonable doubt as to whether Lisa's story was true, it should have acquitted. See e.g., State v. Wentworth, 118 N.H. 832 (1978).

In our adversary system, cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S.Ct. 1105, 1110 (1974). In cases such as this, where compelling forensic evidence does not exist, cross-examination likely remains "the greatest legal engine ever invested for the discovery of truth." Kentucky v. Stincer, 107 S.Ct. 2658, 2662 (1987), quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940). For this reason, the right to vigorous cross-examination is protected by the confrontation clauses of the Sixth Amendment and Part 1, Article 15, as well as by Rules 608(b), 611(b) and 404(b) of the New Hampshire Rules of Evidence. See generally, Smith v. Illinois, 390 U.S. 129, 131 (1968) (holding that the confrontation clause requires trial courts to give defendants reasonable latitude to cross-examine on issues which "place the witness in his proper setting and put the weight of his testimony and his credibility to a test."); Davis v. Alaska (holding that the right to confront includes the right to impeach on matters related to credibility and bias); Olden v. Kentucky, 488 U.S. 227 (1988) ; Delaware v. Van Ardsdall, 475 U.S. 673 (1986); Delaware v. Fensterer, 474 U.S. 15, 19 (1985); State v. Brum, 155 N.H. 408, 416 (2007).

Thus, while trial courts have discretion to fix the limits of proper areas of cross-examination, they "may not completely deny a defendant the right to cross-examine a witness upon a proper matter of inquiry and must permit sufficient cross-examination to satisfy a

constitutional threshold." State v. Brum, 155 N.H. 408, 416 (2007). See also, State v. Fichera,153 N.H. 588, 599 (2006); State v. Ramos, 121 N.H. 863, 867 (1981); State v. Rodriguez, 136 N.H. 505, 508-509 (1992). Further, the scope of a defendant's right to cross-examination is "witness specific;" "A criminal defendant's entitlement to cross-examine a witness increases in sensitivity in direct proportion to the witness' importance to the prosecution's case." Bui v. DiPaolo, 170 F.3d 232, 241-42 (1st Cir. 1999).

C. Argument

Montour was prohibited from cross-examining Lisa about (a) the harassing and allegedly threatening phone calls that she made and (b) her initial statement to the police in which she denied making those calls. As noted above, the false denial was an admissible area of cross-examination because it went directly to Lisa's credibility and reliability. See, N.H.R.Ev. 608(b). A witness who lies to the police in the course of a criminal investigation may not be wholly worthy of belief. Cf: Davis v. Alaska, 94 S.Ct. at 1110 (discussing impeachment of general credibility).

More important, the phone calls supported Montour's arguments concerning Lisa's motives to fabricate. Montour argued that Lisa was an infatuated teenager who (a) boasted about a fictional relationship to impress her friends, with disastrous results, and then (b) became bitter and angry when, far from returning her infatuation, Montour began dating his fiancé:

> This is a girl who is not stable. This is a girl who maybe liked the attention she got from Lenny Montour – innocent as it was. ...But somewhere along the line, she starts telling her friends -- I do have this older person who kind of likes me. And she'd get feeds off that [sic]. And they turned that around and say, oh, yeah, so you're closer to him, huh? So what are doing -- F-U-C-K-ing him? And all of a sudden, it blows up in her face in September -- November of 2006. And she denies it all.
>
> She doesn't say anything about it, but the pressure keeps building up -- building up. And finally, what she does is she tells Lisa Smith in May of 2006 and…

> And from that moment on, the train left the station.
>
> She goes to her mother -- her mother goes to the police. She's not going to come in this Court and say, oops -- you know, I lied about all that.
>
> T,624 (Closing Argument); and
>
> [S]he was infatuated with him. At some point along the line when she realized that Lenny was just a guy she'd babysit for and Lenny was moving on to Jen, she brings up these incidences to explain all her problems.

T,625 (Closing Argument).

Consistent with this motive, Lisa placed several calls to Montour's phone and—according to Montour and his fiancé—threatened the fiancé with death. T,689; A,81(public record). These calls could support an inference that Lisa remained obsessed, preoccupied, angry and bitter at Montour and his fiancé. It is true that Lisa apparently denied making the threats. But the statements of both Montour and his fiancé (both of whom testified at trial) were more than sufficient to allow the questions to be put to Lisa.

This was a legitimate area of cross-examination, probative of general credibility, bias and motive. Accordingly, the trial court erred by unfairly forbidding cross-examination into an area probative of Lisa's bias, motive to fabricate and credibility.

II. THE TRIAL COURT SHOULD HAVE ORDERED A NEW TRIAL BECAUSE NEW EVIDENCE STRONGLY SUGGESTED THAT LISA GAVE FALSE TESTIMONY ABOUT AN IMPORTANT AND MATERIAL FACT

A. Governing Standards And Standard Of Review

After the verdict, but prior to sentencing, Montour filed a motion captioned as a "Motion For New Trial Based Upon New Evidence Of The Complainant's False Testimony." A,40-45. Motions for new trial are controlled by RSA 526:1 which provides that:

> A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable.

See, State v. Monroe, 146 N.H. 15,16 (2001), State v. Jaroma, 139 N.H. 611, 613 (1995). Although the bottom line question must always be the statutory one—i.e., whether through accident, mistake or misfortune justice has not been done—when a new trial is requested on the grounds of recently discovered evidence New Hampshire courts resort to a three pronged test:

> To prevail on a motion for a new trial based upon newly discovered evidence, the defendant must prove: (1) that he was not at fault for failing to discover the evidence at the former trial; (2) that the evidence is admissible, material to the merits and not cumulative; and (3) that the evidence is of such a character that a different result will probably be reached upon another trial.

State v. Cossette 151 N.H. 355, 361 (2004). See also, State v. Bader, 148 N.H. 265, 282 (2002); State v. Davis, 143 N.H. 8, 11 (1998).

This court reviews a trial court's denial of a motion for new trial under the "unsustainable exercise of discretion" standard. Cosette, 151 N.H. at 361; Bader, 148 N.H. at 282.

B. The New Evidence In This Case Could Have Led To A Different Outcome

Overview: Between verdict and sentencing, Montour discovered, from dealership records that he first purchased his Harley Davidson truck in **May, 2006** *after* Lisa's abortion. A,41,47. This was important new evidence because, as explained above:

-Lisa insisted she had sexual intercourse with Montour in the Harley Davidson truck in **February, 2006**. T,212-213. She gave a detailed and graphic description of where she and Montour located themselves in the interior of this truck. T,73.

-Lisa insisted that this was the first and only time she could have become pregnant from Montour. T,71-73. Thus, according to Lisa's testimony, she was pregnant because of what happened in the Harley Davidson truck in February, 2006.

-Lisa had an abortion in late April, 2006 and was told that she had been pregnant for approximately eight weeks. T,72. This confirmed the fact that she became pregnant in February, 2006.

Because Montour did not possess his Harley Davidson truck in February or March 2006[5], he could not have possibly had sexual intercourse with Lisa in that truck during that time frame. A jury armed with this knowledge would have necessarily concluded that either (a) Lisa was mistaken about what was described at trial as the "Harley Davidson" incident, see e.g., T,213, 218, or (b) she fabricated her graphic testimony about how her "head kept hitting the door back and forth" in the Harley Davidson truck, and how she was positioned on the truck's console. Given her detailed Harley Davidson-centric account of the incident, it is difficult to attribute Lisa's testimony to confusion rather than fabrication.

The trial court denied Montour's motion for a new trial. The court found that Montour failed to prove first and third prongs of the "new evidence" standard, i.e., (a) that Montour was at fault for not discovering the evidence earlier and (b) that the new evidence was not such that a different result would probably be reached at a new trial.

Fault: It is certainly true that Montour understood from the discovery in the case that Lisa maintained she had sexual intercourse in the Harley Davidson truck. A,72. However,

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[5]In addition to the sales receipt for the vehicle he owned, Montour also produced a receipt for a vehicle that he rented during part of Febauary, 2006. A,42. That vehicle was also not a Harley Davidson truck. In ruling on Montour's motion to reconsider the denial of his motion for new trial, the trial court accepted the fact that Montour did not have possession of any Harley Davidson truck during the relevant time frame. A,71-72.

neither Montour nor counsel had any reason to research the specific date of purchase. Montour contacted the truck dealership because—*one weekday prior to the start of the second jury trial*—the prosecutor disclosed a photograph of Lisa and her mother posing inside a truck, to suggest that it was possible to have sexual intercourse in the cab of a Harley Davidson truck. A,43. In order to rebut this inference, Montour contacted the truck dealership to learn the actual dimensions of his Harley Davidson truck. A,43, 62. The dealership did not provide the requested information until after the trial and, when it did, Montour learned that he did not even own the truck in February, 2006. A,43.

Montour was not "at fault" for failing to discover this evidence earlier. As the "accident, mistake or misfortune" language in RSA 526:1 suggests, criminal defendants are not presumed to be omniscient. Montour and his counsel may properly be charged with knowing what is in the discovery. See e.g., State v. Steed, 140 N.H. 153 (1995) (defendant "at fault" for failing to review the video of his statement to the police). But there is no concomitant obligation for a criminal defendant to memorize and recall all of the picayune dates from his lifetime of economic activity. Indeed, neither the trial court nor the State suggested that Montour had earlier actual knowledge of the date he purchased the truck.

Instead, the trial court and the State claimed that Montour was "*at fault*" because he could have unearthed the dealership records earlier. A,73. His failure to do so was, in the words of the trial court, "inadequate trial preparation," A,73. To the extent that this definition of *fault* shifts the burden of evidence gathering to a criminal defendant, it goes beyond RSA 561:1 ("accident, mistake or misfortune") and this court's case law. This court should now find that Montour was not "at fault" for failing to obtain the dealership records prior to trial.

Materiality: The trial court conceded that, in light of the new evidence, "the defendant could probably prove to a jury that this incident could not have occurred in a Harley Davidson truck." A,73. However, the trial court nonetheless found that Lisa "may have been mistaken," rather than deceitful, because Montour owned a truck during the relevant time period. A,73. This finding overlooked Lisa's apparent certainty about the truck at trial: See e.g., T,73 ("I laid across the center console of his Harley Davidson truck."); T,212-213 ("Q. Okay. And do you remember talking about the incident where you had sexual intercourse in the Harley? A. Yes."). More important, a *jury* could well determine—based on all of the evidence in the case—that Lisa fabricated the entire Harley Davidson truck incident from whole cloth.

The fact that Montour had not yet purchased his Harley Davidson truck could push an otherwise inert mass of impeachment evidence into critical mass. Maybe Lisa confused her dates when she testified about the Victoria's Secret underwear (which, as noted above, was manufactured months after she claimed she received it from Montour, T,554-556). But the date of the Harley Davidson incident was pegged to the date of her abortion, so there was no confusion there as to dates. Maybe Lisa's prior inconsistent statements could be attributed to the difficulties we all have when giving the same account twice. But there was no suggestion by anybody at trial that she told the Harley Davidson story differently in the past. In short, it is new, powerful impeachment evidence which could have caused the jury to see things differently or at least find a *reasonable doubt* in Montour's favor.

Further, the importance of the Harley Davidson incident in this case can hardly be overstated. According to Lisa it led not only to her pregnancy, but to an abortion, depression, self-mutilation and suicide attempts. Indeed, these highly inflammatory topics were only admissible because Lisa was able to pin them to the Harley Davidson incident. Without the

pregnancy (which, as noted above, Lisa initially blamed on her boyfriend Joe, T,74, 109) Lisa's account would have been virtually uncorroborated.

Thus, the Harley Davidson incident formed the keystone of the State's evidence. It not only furnished corroboration (in the form of the pregnancy) but it served as the fulcrum for all manner of other evidence. If the jury thought the Harley Davidson incident was fabricated, rather than real then it would have to call into question the rest of Lisa's testimony. *Compare e.g.*, Cosette, 151 N.H. at 362 (2004) (new trial not warranted when new evidence would only be admissible for the purpose of further impeachment of the victim).

Accordingly, this court should find that the new evidence was material and that trial court erred by denying Montour's motion for new trial.

CONCLUSION

This court should reverse and vacate all of Leonard Montour's convictions and order a new jury trial.

Respectfully Submitted

Leonard Montour,
By his attorney

_____

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CERTIFICATE OF SERVICE

I, Andrew R. Schulman, hereby certify that I have served a two copies of this Brief on Assistant Attorney General Stephen Fuller, Esq., by hand delivery, to the Office of the New Hampshire Attorney General, 33 Capitol Street, Concord, NH 03301 on November 6, 2009, and also by email attachment on the same date.

_____
Andrew R. Schulman

REQUEST FOR ORAL ARGUMENT

Defendant requests a fifteen minute oral argument. Oral argument will assist the court because this case is factually complicated and legally nuanced. If the court grants oral argument, Attorney Andrew R. Schulman will argue.

ADDENDUM

Order of 10/8/08 (denying motion for discovery)..... Addendum p. 1

Order of 11/7/08 (partially granting reconsideration re:
motion for discovery and ordering *in camera* review) ..... Addendum p. 2

Order of 3/6/09 (denying motion for new trial)..... Addendum p. 3

Narrative Order of 3/20/09 (denying motion for reconsideration re:
motion for new trial)..... Addendum p. 4

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS **SUPERIOR COURT**

NOTICE OF DECISION

RECEIVED
OCT 15 2008
BY:

Paul Maggiotto
58 Pleasant Street
Concord NH 03301

State v. Leonard Montour

Docket #'s:
07-S-2434; 2435; 2436 etal

Please be advised that on 10/08/2008 Judge McHugh made the following order relative to:

Motion for Discovery ; Denied
"Motion denied. What happened after the last trial has no relevance to any issues in the re-trial."

10/14/2008

Raymond W. Taylor, Clerk
P.O. Box 1258
Kingston, NH 03848-1258
603-642-5256

cc: County Attorney Office
Merrimack County Superior Court
Hillborough County Superior Court-

AOC Form SUSP052 (Rev. 08/14/2003)

Office of
Clerk of Superior Court
Rockingham County

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November 7, 2008

Paul A. Maggiotto, Esq.
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Jerome Blanchard, ACA
County Attorney Office
P.O. Box 1209
Kingston, NH 03848

Re: State v. Leonard Montour, 07-S-2434 through 2436

Dear Gentlepersons:

Please be advised that on November 7, 2008, the Court (McHugh, J) made the following order:

"Prior to trial on November 17, 2008, the state is to produce for the court's in camera review the report from the Manchester police of a call made by the complainant in this case to this defendant after the first trial in June, 2008.

Prior to trial (on or before November 14, 2008) the defendant is to produce a copy of the transcript of the first trial to the state as well as statements of witnesses he intends to call who were not called in the first trial."

Very truly yours,

Raymond W. Taylor, Clerk

RWT/pac

RECEIVED
NOV 10 2008
BY:

Tel: (603) 642-5256 • TTD/TTY Relay: (800) 735-2964

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS **SUPERIOR COURT**

NOTICE OF DECISION

Paul Maggiotto
58 Pleasant Street
Concord NH 03301

State v. Leonard Montour

Docket #'s:
07-S-2434; 2435; 2436

Please be advised that on 3/06/2009 Judge McHugh made the following order relative to:

Motion for New Trial ; Denied
"FOR ALL OF THE REASONS SET FORTH IN THE STATE'S OBJECTION, THE DEFENDANT'S MOTION FOR NEW TRIAL IS DENIED."

03/06/2009

Raymond W. Taylor, Clerk
P.O. Box 1258
Kingston, NH 03848-1258
603-642-5256

cc: County Attorney Office
Hillborough County Superior Court-
Rockingham County House of Correct
Merrimack County Superior Court
Dept of Corrections/Probation Dept
Linda Barry

AOC Form SUSP052 (Rev. 08/14/2003)

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MAR 09 2009

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY **SUPERIOR COURT**

State of New Hampshire

v.

Leonard Montour

Docket No: 07-S-2434, et al

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

On November 21, 2008 a jury convicted the defendant of eight sexual assault crimes of varying degree against the same victim, the acts having alleged to have occurred in three counties over a two year period. The alleged victim in all of these assaults was the same. The assaults purportedly began when she was age fourteen and ended when she was age sixteen.

One of the alleged assaults was described by the victim as having taken place in the defendant's truck. The assault was in the form of sexual intercourse that was unprotected. Shortly thereafter the victim learned that she was pregnant. While she believed that the defendant was the father of the fetus, there was a possibility that it was the product of intercourse with her former boyfriend. The defendant admitted that when he learned of her pregnancy he agreed to pay her sufficient funds to enable her to get an abortion which she did obtain. It was his position that he took this action because she was his babysitter and therefore he cared about her well being.

After the defendant's convictions on the eight sexual assault charges he filed a Motion for New Trial Based Upon New Evidence on February 24, 2009. The motion focused upon the one indictment alleging sexual intercourse in the defendant's vehicle. The victim testified that the act of sexual intercourse took place in the defendant's Harley Davidson truck.

The "new evidence" which the defendant outlined in his Motion for New Trial was the fact that when the victim testified that this unprotected sexual intercourse took place, the defendant did not have possession of a Harley Davidson truck. The time of the alleged assault had to be limited to one or two specific months, given the fact that it was during this episode that the victim believed she became pregnant. The date of her abortion enabled her to determine the date of her impregnation. For those two possible months, the defendant did not have possession of a Harley Davidson truck. Thus the defendant claims that this so-called newly discovered evidence is of such a magnitude to require a new trial. In essence the defendant's argument is that if he can prove the victim was mistaken about this one incident than the likelihood is that a jury would find her less credible with respect to the other seven incidents that resulted in separate sexual assault convictions.

The Court by Order dated March 6, 2009 denied the defendant's Motion for New Trial. In its Order it did not detail its rationale, electing instead to note that the State's objection adequately explained the reasons why there was no basis for the granting of the motion. However in light of the defendant's Motion for Reconsideration filed on March 16, 2009, the Court feels compelled to address the issues raised in the defendant's Motion for New Trial in some detail.

The Court finds that the Motion for New Trial has no merit for both procedural and substantive reasons. Procedurally, what the defendant now alleges does not fall into the category of "newly discovered evidence." In his trial preparation he knew from discovery the time period when the alleged unprotected sexual intercourse took place in his vehicle. He had every opportunity to obtain evidence necessary to show that at the time of the victims impregnation he did not possess a Harley Davidson truck. Thus the fact that this

evidence was not brought before a jury falls into the category of inadequate trial preparation as opposed to newly discovered evidence. If this type of evidence warranted a new trial then in every criminal case where some action that a defendant could have taken or some evidence he could have produced was not produced, then that would encourage a defendant to poorly prepare his defense knowing that if he was convicted he would have an opportunity to get a second bite of the apple by showing that a jury did not have an opportunity to hear potential exculpatory evidence. Were that the law then there would be no finality to criminal trials.

However even assuming that there was no possible way of the defendant knowing that the time period when he did not possess a Harley Davidson truck was allegedly crucial to his defense, under the facts of this case that truck evidence would have had no effect on the jury's ultimate decision. The jury heard the victim describe eight separate sexual assaults. The fact that she may have been mistaken with respect to the defendant's operation of a Harley Davidson truck at the time of the unprotected sexual intercourse would not appear to be significant. She did not testify that this motor vehicle sexual intercourse took place in a Volkswagen; rather she identified the incident as having taken place in a truck. While it is true that the defendant could probably prove to a jury that this incident could not have occurred in a Harley Davidson truck, he would have to admit that he was in possession of similar truck at the time when the victim was impregnated.

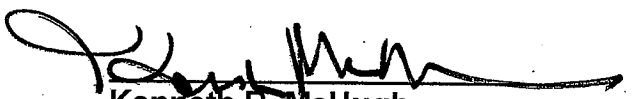
In the defendant's Motion for New Trial he argues that he was successful in showing that the victim made certain mistakes with respect to time regarding the other assaults. His argument is that if this so-called newly discovered evidence was brought to a jury's attention now, then that would be the straw that would break the camel's back and

a jury would find the victim wholly incredible thus assuring his acquittal. Even looking at this issue in a light most favorable to the defendant, this so-called newly discovered evidence in terms of what type of truck the victim was assaulted in would never rise to the level of being such a key piece of evidence as to assure a different result after trial.

In the defendant's Motion for Reconsideration he cites a series of old New Hampshire cases as support for his position. However none of those cases have a fact pattern even close to the circumstances of this case. Throughout the lengthy examination and cross examination of the victim the jury was given a sufficient opportunity to weigh her credibility. Given the fact that there were so many assaults over such a long period of time it would not be unusual for the victim to identify the wrong truck in which one of the assaults occurred. As the trial judge this Court must make that assessment. Accordingly the defendant's Motion for Reconsideration is denied.

So Ordered.

DATED: March 20, 2009



Kenneth R. McHugh
Presiding Justice

Mailed: 3/20/09
CC: Paul A. Maggiotto, Esq.
Jerome Blanchard, Esq.