NEW HAMPSHIRE SUPREME COURT

No. 2017-0387

THE STATE OF NEW HAMPSHIRE
Appellant

v.

FOAD AFSHAR
Defendant / Appellee

ON APPEAL FROM JUDGMENT AND SENTENCE
OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT – APPELLEE FOAD AFSHAR

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15 minutes Oral Argument
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INTRODUCTORY NOTE

Although Supreme Court Rule 16(4)(a) does not require the opposing party in a mandatory appeal to include sections for Question Presented, Statement of the Case, and Statement of the Facts, this brief includes these sections, with the last two combined, in order to present the complete factual record necessary to decide this appeal.

QUESTION PRESENTED

1. During *voir dire* in a trial where Dr. Afshar was accused of sexual assault of a child-patient, two jurors failed to disclose, both on their questionnaires and during the court's *voir dire*, that they had been the childhood victims of sexual assault. These two jurors did, however, inform the rest of the jury of their victimization during deliberations, immediately after a juror expressed doubt as to the defendant's guilt. The jurors' conduct was not discovered until after the jury had convicted Dr. Afshar. The trial court convened an evidentiary hearing and found that one of the jurors was actually biased in favor of a complainant, both jurors were incapable of rendering a fair and impartial verdict, and the integrity of the jury verdict had been compromised by the two jurors' disclosure to the other jurors. Did the court, based on these findings that are well supported in the record, sustainably exercise its discretion in granting the defendant's motion for a new trial?

Issue preserved as stated in the State's Brief. SB. 1.[1]

[1] References to the record are as follows:
"SB. [#]" refers to the State's brief;
"App." refers to the Appendix to this brief;
"S-S. App." refers to the State's Sealed Appendix;
"T-JS." refers to the May 23, 2016 transcript of jury selection;
"T1." – "T9." refers to the separately-bound transcripts of trial, which commenced on June 2, 2016;
"T-MH." refers to the transcript of the February 22, 2017 hearing on motion for new trial.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

These charges arise out of a brief period in late 2014 and early 2015 when Dr. Foad Afshar, a therapist, was treating a 12-year-old client. The treatment ended, after only 5 therapy sessions, when the child accused Dr. Afshar of touching his penis. T3. 493-94. In July, 2015, the State brought indictments accusing Dr. Afshar of aggravated felonious sexual assault as well as informations alleging simple assault and two counts of unlawful mental health practice. App. 145-148; T-JS. 3-5. The latter charges were based on the fact that, just prior to the last two therapy sessions, Dr. Afshar failed to file routine paperwork with respect to the biennial renewal of his license, which caused his license to lapse. T4. 803-804. Dr. Afshar was released on bail pending trial.

A. The Jury Selection and Trial.

Before and during jury deliberation, the trial court (Nicolosi, J.) implemented procedures and conducted *voir dire* questioning designed to identify any prospective jurors who may have had life experiences which could impact their ability to remain fair and impartial. App. 75-76; T-JS. 2-16. Thus, prior to jury selection, the court mailed out questionnaires for the jurors to complete. App. 76; T-MH. 50. In response to the question, "Have you or has any member of your family been the victim of a crime?", Jurors 6 and 14 both answered, "No." App. 76; T-MH. 8, 50.

As further explained below, Juror 6 was sexually assaulted by a male babysitter, repressed the memory for 50 years, and then recovered the memory 10 years before trial when the perpetrator showed up at his place of business, an event so traumatizing that "he was disabled to the point of not being able to breath or function for several days." App. 78, 79; T-MH. 9, 21, 23. Also explained below, Juror 14 was sexually assaulted in middle school by a younger girl

whose teenage brother was "watching and involved." App. 80; T-MH. 53, 56.

On May 23, 2016, the trial court conducted jury selection. It began by reading the charges so that the jurors would be "fully aware of the allegations." App. 77; T-JS. 3-5. It then explained that if a juror's name were selected and the juror answered "yes" to any of the questions read to the jury pool, the juror should approach the bench to discuss the answer. App. 77; T-JS. 3-5. The court informed the jurors that the microphones would be turned off so the pool could not hear the discussions at the bench, and, if there was a sensitive subject matter that a juror did not wish to discuss in the presence of the lawyers and defendant, a request to speak privately with the judge would be accommodated. App. 76-77; T-JS. 11.

Subsequently, the court asked the entire jury pool a series of questions, which included the following:

> Have you or a close member of your family ever been the victim of a crime?
>
> And when I ask that question, I do not mean whether somebody has been prosecuted or identified or charged, I just mean you have ever been victimized?

App. 77; T-JS. 13.

When prospective jurors were called by name, several came forward in response to those questions to disclose that either the prospective juror, or a family member, had been the victim of a sexual assault. App. 77-78; T-JS. 18, 59, 67-68. Another came forward and disclosed that as part of her job, she reviews records of children who had been sexually abused. T-JS. 22-23. After conducting *voir dire* with these jurors, the court disqualified several as unsuitable to serve. App. 77-78; T-JS. 18, 59, 68.

When the names of Jurors 6 and 14 were called, however, both answered that they did not have any "yes" answers to the questions asked by the court. App. 77; T-JS. 59, 72. Because they identified no potential issues that could affect their ability to be fair and impartial, they were

found qualified and seated on the jury. App. 75, 77; T-JS. 59, 72, 124-25.

On June 17, 2016, after a 7-day trial, the jury convicted Dr. Afshar of all counts. App. 75. Pursuant to RSA 597:1-a, the court revoked Dr. Afshar's bail, so he was incarcerated immediately following the jury's verdict. T9. 14-15. On August 26, 2016, the court sentenced Dr. Afshar to serve three to six years in the State Prison, stand committed. App. 75.

B. The Post-Conviction Investigation and Motion for New Trial.

On or about September 20, 2016, undersigned counsel filed Dr. Afshar's Notice of Appeal with the New Hampshire Supreme Court to initiate a direct appeal. At the same time, the defense was conducting a post-verdict investigation, including attempts to interview jurors.

Subsequently, Juror 14 disclosed to a defense investigator that she had been the victim of sexual assault as a child. App. 75; T-MH. 49. She said that she informed other jurors of this fact during deliberations. App. 75; T-MH. 51. She said that in response, the foreperson, Juror 6 similarly identified himself to the other jurors during deliberations as a victim of childhood sexual assault. App. 79; T-MH. 60, 61; *see* T-MH. 5. The defense investigator attempted to interview Juror 6, but after consulting with the prosecuting attorney, he refused to speak to the investigator. App. 76, 81; T-MH. 36.

On or about December 9, 2016, Dr. Afshar filed a motion to stay the briefing deadline and transfer jurisdiction back to the trial court, so that Dr. Afshar could file and litigate a motion for a new trial. On December 14, 2016, this Court granted that motion.

On January 3, 2017, Dr. Afshar, through counsel, filed a Motion for New Trial in the trial court. App. 1, 54. The motion asserted two independent grounds: (1) juror misconduct violated Dr. Afshar's right to a fair and impartial jury and to due process of law, and (2) Dr. Afshar's defense attorney at trial provided ineffective assistance of counsel. App. 1-2. The parties agreed

that the post-conviction proceedings should be bifurcated so that the trial court would hear and decide only the juror nondisclosure ground for a new trial in the first instance. App. 56, 75.

An investigator employed by the Merrimack County Attorney's Office conducted recorded interviews of Jurors 6 and 14. App. 58, 59. Subsequently, on February 3, 2017, the State filed an Objection to Motion for New Trial, limited to the juror misconduct issue, and provided the court with copies of the juror interviews conducted by the prosecution and defense. App. 55, 69-73.

C. Juror 6's Testimony.

On February 22, 2017, the trial court convened a hearing and summoned Jurors 6 and 14 to attend. T-MH. 1, 4, 48. The court first brought Juror 6 into the courtroom and explained to him why his attendance had been requested. T-MH. 4. The court conducted questioning regarding the details of Juror 6's childhood sexual assault at the bench, with microphone turned off so that only the parties could hear. T-MH. 5, 6. In response to the court's questions, Juror 6 acknowledged he had been sexually assaulted by a male babysitter when he was just five or six years old. App. 78; T-MH. 4-5. Juror 6 testified that "[i]t started out as game playing, and then neither one of us had any clothes on." T-MH. 5. Juror 6 elaborated that the babysitter "started to introduce his body parts to mine, and I didn't like it." *Id*. The assault ended when they were interrupted. *Id.* Juror 6 told his mother that he did not want to return to that babysitter without telling her what had happened, and she acceded to that request. T-MH. 5; App. 78.

Juror 6 further acknowledged that he had repressed the memory of the assault for approximately fifty years. App. 78; T-MH. 8. But then one day, the perpetrator showed up at Juror 6's place of business, a service station. App. 78; T-MH. 9, 20-21. When the perpetrator identified himself, "the whole experience of being sexually assaulted flooded back into" Juror

6's mind. T-MH. 21. The trial court found that Juror 6 was profoundly impacted by this experience: "After encountering the perpetrator, he was disabled to the point of not being able to breathe or function for several days." App. 79; *see* T-MH. 21, 23.

Juror 6 acknowledged that he failed to disclose other information during jury selection that should have been disclosed in response to the *voir dire* questions. App. 80. For example, Juror 6 failed to disclose that he "had been the victim of numerous other crimes while he owned and operated service stations." App. 80; *see* T-MH. 15-16. The court noted that these included an episode in which an "employee stole a company vehicle, burned a hole in a safe, escaped, and then ultimately was convicted and sentenced to a year in jail." App.79; *see* T-MH. 16-17.

Juror 6 also failed to disclose his contacts with law enforcement during jury selection. App. 80; T-MH. 15. The written and oral *voir dire* questions instructed each prospective juror to answer "yes" if the juror was "related to or close to anyone who is or has been in the past involved in … law enforcement activity." T-JS. 11, 14. Juror 6 did not answer "yes" to any of the questions. App. 77; T-JS. 59. At the post-trial hearing, however, he acknowledged that he had many friends in law enforcement. T-MH. 15, 17.

The trial court made the factual determination that Juror 6 provided inconsistent explanations regarding his failure to disclose these facts. App. 79. When asked why he did not disclose the sexual assault, "he told [the prosecutor's investigator] that he did not disclose his victimization in part because no one was convicted or found guilty beyond a reasonable doubt." App. 80; *see* T-MH. 30. When the court confronted him with the clarification that had been provided during *voir dire* (that it did not matter whether the offending party was prosecuted, charged or even identified), Juror 6 represented that "either he did not hear [or] think it pertained to him." App. 80-81. However, when asked why he did not disclose that an employee had burned

a hole in his safe, stolen a company vehicle, and ultimately been prosecuted, convicted and jailed, Juror 6 "then suggested that it was not he who was the victim, but rather the victim was the company of which he was the owner and president." App. 79; *see* T-MH. 30. Alternatively, he claimed that he did not see himself of the victim of that crime "because it was 'the cost of doing business.'" App. 80 (quoting T-MH. 30). Thus, the trial court found that Juror 6's explanation for not disclosing the theft "conflicts [with] his explanation of why he did not come forward to report his victimization as a child." App. 80.

The trial court took note of another inconsistency in Juror 6's testimony. Juror 6 relied on an alternative explanation for his failure to disclose the sexual assault: "To justify why he did not come forward and report the assault, Juror 6 explained that he did not see himself as a victim when the questions were asked." App. 79. The court contrasted this explanation with a different, inconsistent answer that Juror 6 gave during the post-trial hearing: "He indicated that if the judge had asked whether he had been a victim *of sexual assault*, he would have revealed the childhood incident." App. 79 (emphasis added).

The court found that Juror 6 further contradicted himself as to his ability to be fair and impartial in this case. Specifically, Juror 6 acknowledged that "he would not be able to sit on a sexual assault trial if the alleged victim had been a girl, because of how he feels about his daughter, a circumstance he had to contemplate during a jury selection involving an alleged aggravated felonious sexual assault of a girl." App. 79; T-MH. 25-27. Nevertheless, Juror 6 maintained he had remained fair and impartial throughout a trial where Afshar had been accused of sexually assaulting a boy. T-MH. 47 As the court pointed out in its Order: "Juror 6…has a son as well, who is three years older than his daughter, so it is not clear why this would not likewise effect his ability to be neutral." App. 80.

The court also made additional factual findings relevant to Juror 6's capacity to be a fair and impartial juror in this case and his apparent bias in favor of a complainant:

> He described himself "an advocate for people." As an example, he noted that he had read a book about a female sexual assault survivor before the Defendant's trial, reached out to the author, and started communicating with her through email and directly. After trial, he involved himself in discussions related to pending sexual assault legislation that would have required corroboration of an alleged victim's testimony for conviction and changed the use of the term 'victim' in court to 'alleged victim' or 'complainant.' He contacted the sponsor of the proposed legislation to express his strong disagreement with the legislative changes.

App. 79; T-MH. 28, 32-33..

Based on all of the above, the trial court made a finding regarding Juror 6's credibility: "[T]he Court does not find Juror 6 to be credible about his ability to have been fair and impartial…." App. 81. The court based its credibility determination on its observations of the juror on the stand in the post-trial hearing: "The juror's demeanor at times was defensive and his explanation for not reporting his connection with law enforcement and the criminal conduct he experienced were not internally consistent or completely logical." *Id.* The court noted that the assault suffered by Juror 6, committed by a "caretaker in a position of authority," was "quite similar to that described by the youth in the case at bar…." *Id.* The court concluded that Juror 6 should not have been seated on the jury: "The Court finds the juror's answers, his demeanor, and his actions and communications before, during and after trial, including seeing himself as an advocate for victims, show his personal identification with persons who report being victims of sexual assault, which resulted in at the very least a subjective bias that could not be set aside." *Id.*

D. Juror 14's Testimony.

Prior to the hearing, Juror 14 participated in a recorded interview with an investigator for the county attorney's office. During that interview, she characterized her childhood victimization: "It was very personal to me. I don't really talk about it to anyone." T-MH. 57.

Having reviewed that recording prior to the hearing, the trial court took special precautions during the hearing to attempt to put Juror 14 at ease and protect her privacy. At the outset, the court told Juror 14 why she had been summoned to the hearing. T-MH. 48-49. The court conducted all questioning of Juror 14 at the bench and explained to the juror that the people in the gallery would not be able to hear her answers. T-MH. 48, 49, 59. Early on, Juror 14 said that the childhood assault had not "ever affected [her]," but when the court asked her what had happened, she responded, "I don't really want to talk about it." T-MH. 51, 52. Similarly, when defense counsel asked Juror 14 about her statement to the prosecutor's investigator that her childhood experience was very personal and something she did not like to talk about to anyone – again, testimony which no one in the courtroom could hear but the Judge and parties - she responded: "Yep. This is humiliating." T-MH. 57.

Nevertheless, Juror 14 acknowledged she did not disclose during jury selection that when she was "in middle school, she was assaulted by another girl younger than she, whose teenage brother was watching and involved." App. 82; *see* T-MH. 50, 53, 56. Her parents called the police, and a formal report was made. App. 82; T-MH. 52.

Further, "Juror 14 acknowledged that when she heard the charges involved in the trial, she thought immediately of her own experience." App. 82; *see* T-MH. 58, 63. Juror 14 agreed that the experience of being assaulted "kept popping into [her] head during deliberations…." T-MH. 63. She acknowledged that she told the other jurors during deliberations that she had been the victim of assault. App. 83; T-MH. 54. Nevertheless, Juror 14 testified that she did not disclose these facts during jury selection because "she did not consider the incident to be a crime or herself to be a victim, because there was no court case and no lawyers were involved." App. 82.

Although Juror 14 ultimately claimed she had remained fair and impartial throughout the trial, T-MH. 67, the court observed that Juror 14 "was extremely emotional during the questioning," causing the court to take a recess. App. 83; *see* T-MH. 59. Although the court had planned to conduct part of the questioning in open court, it had Juror 14 finish her testimony at the bench rather than on the witness stand, explaining that "[t]his is a juror, not a defendant or a witness, and I think she has a right to privacy on these issues." T-MH. 59-60. The court noted that from that point forward, Juror 14 "remained upset, but was able to answer questions." App. 83.

The court made clear that the issue with respect to Juror 14 was a "much closer call" than that of Juror 6, because Juror 14 sincerely expressed her desire and intention to "arriv[e] at the correct outcome." App. 82; *see* T-MH. 64. The trial court found that, although Juror 14 was "honest" and "perceives herself as neutral," her "emotional response suggests otherwise." App. 83. The court concluded: "Had she been interviewed prior to selection and presented as she did at the post-trial hearing, the Court would have excused her for cause." App. 83-84.

E. The Court's Ruling Granting a New Trial.

Based on the testimony of the jurors and the entire record, the court reached the factual and legal conclusion that "Jurors 6 and 14 were not as 'impartial as the lot of humanity will admit.'" App. 84. The court concluded: "Had these conversations occurred before selection, the Court would have excused both jurors as being unsuitable to serve in the Afshar case, Juror 6 because of a clear bias favoring a complainant and Juror 14 because of her emotionality and difficulty with her own victimization." App. 84-85. The court further concluded that the jurors' "bias went to the heart of the matter in dispute, the credibility of the complainant," and "produced the jurors' verdicts," depriving the defendant of the right to an impartial jury. App.

85. Finally, the court determined that "justice was not done, and the equities require a new trial." App. 86.

On March 28, 2017, the trial court issued an Order, granting a new trial. App. 86. The court vacated all of the convictions. App. 85. The court also vacated the post-trial bail order, and reinstated the pretrial bail order. *Id*. As a result, Dr. Afshar was released from prison.

The State filed a motion to reconsider. App. 87. Dr. Afshar filed an objection to the motion to reconsider. App. 134. On May 23, 2017, the trial court denied the State's motion to reconsider. App. 144. Subsequently, the State filed this appeal.

SUMMARY OF ARGUMENT

Part I, Article 35 of the State Constitution provides that all litigants have the right to be tried by jurors "as impartial as the lot of humanity will admit." Thus, trial courts employ procedures to protect this right, including voir dire examination, peremptory challenges, and for-cause challenges. But, these safeguards cannot function when jurors do not answer questions accurately during jury selection. The trial court, however, did not grant a new trial merely because two jurors failed to answer questions accurately. Rather, the trial court sustainably granted a new trial based on its factual findings that Juror 6 was actually biased, that both jurors were unfit to serve in this case, and that they disclosed they had been victimized to other jurors, contaminating the deliberations and inflicting prejudice. In the alternative, the trial court's ruling must be affirmed under controlling precedent not cited in the proceedings below and not cited in the State's brief. *Shulinsky v. Boston & Me. R.R.*, 83 N.H. 86, 87-88 (1927) (new trial should be granted where juror provided incorrect information during jury selection).

The State, by advocating that this Court should adopt a subjective standard requiring intentional nondisclosure as a prerequisite for a new trial, misses the mark in several respects. First, the State did not preserve that argument, because it advocated for a different, inconsistent legal standard in the proceedings below. Second, the State's brief does not accurately portray the state of the law in either federal or state court jurisdictions. And finally, because a subjective standard does not sufficiently promote the ultimate goal of protecting the right to a fair and impartial jury.

Accordingly, this Court must affirm the trial court's ruling granting a new trial.

ARGUMENT

I. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN GRANTING THE DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE JUROR BIAS VIOLATED THE FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY AND PRODUCED THE VERDICTS.

Part I, Article 35 of the State Constitution provides: "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." This applies to jury trials as well. *State v. Town*, 163 N.H. 790, 793 (2012); *see also* U.S. Const., 6th and 14th Amends. "*Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." *State v. VandeBogart*, 136 N.H. 107, 110 (1992) (quotations omitted). *Voir dire* examination, conducted by both the trial court and counsel in this case, also serves to protect the defendant's right to exercise peremptory challenges. *Shulinsky v. Boston & Me. R.R.*, 83 N.H. 86, 87-88 (1927); RSA 500-A:12-a. These fundamental principles have roots all the way back to the very beginnings of our justice system.

> It is highly important, that the conflicting rights of individuals should be adjusted by jurors as impartial as the lot of humanity will admit. That their minds should be free as the 'unsunned snow' from any previous impressions, and should receive no hue but what the law and the evidence at the trial may impart.

Rollins v. Ames, 2 N.H. 349, 351 (1821).

However, if the process does not provide "sufficient information" regarding the jurors' "lack of impartiality," "counsel cannot use their challenges in an intelligent and meaningful manner, and the *voir dire* is rendered an empty ritual." *State v. Goding*, 124 N.H. 781, 783 (1984) (quotations omitted). Unfortunately, the *voir dire* process that is so fundamental to the success of our justice system failed in this case because two jurors did not provide accurate answers to the court's written and oral questions.

The trial court did not, however, grant a new trial merely because jurors failed to provide

accurate answers during *voir dire*. The trial court based its ruling on the fact that the post-trial hearing revealed the jurors to be "unsuitable to serve in [this] case," because Juror 6 manifested a "clear bias favoring a complainant" and because of Juror 14's "emotionality and difficulty with her own victimization." App. 84-85. The court held that the seating of these jurors "deprived the defendant of an impartial jury." App. 85. The trial court further based its ruling on its finding that the jurors' bias, and their disclosure of their victimization during deliberations, "produced the jurors' verdicts," such that "justice was not done, and the equities require a new trial." App. 85, 86.

The State, relying solely upon cases decided under the federal constitution, claims that a new trial cannot be granted upon the discovery that jurors were actually biased, in violation of the right to an impartial jury, unless the jurors intentionally lied during jury selection with the purpose of getting selected to serve. *See* SB. at 15, 17, 18. The State is mistaken. The trial court's ruling was correct under both state and federal constitutional law.

A. Standard of Review.

"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." RSA 526:1. On appeal from the trial court's ruling on a motion for new trial, this Court applies the unsustainable exercise of discretion standard. *Anderson v. Smith*, 150 N.H. 788, 790 (2004). Under this standard, the appealing party cannot prevail unless it "demonstrate[s] that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Lambert*, 147 N.H. 295, 296 (2001). Federal courts employ a similar standard of review. *See, e.g., Zerka v. Green*, 49 F.3d 1181, 1184 (6th Cir. 1995) ("[A] district court's determination on a motion for either a new trial or relief from judgment because a juror failed to fully disclose information during *voir dire* is

reversible only for either an abuse of discretion…or a clear error of law in the exercise of this discretion.").

B. The Trial Court Granted a New Trial Not Merely Because Jurors 6 and 14 Failed to Disclose Material Facts on *Voir Dire*, But Because the Hearing Revealed Them to Be Biased and Unfit to Serve, Depriving the Defendant of His Right to a Fair and Impartial Jury.

The trial court was well within its discretion in granting a new trial, based on its findings that Juror 6 was actually biased, that both jurors were incapable of rendering a fair and impartial verdict, and that they disclosed their victimization to other jurors, contaminating the deliberations. "An impartial jury is one in which all of its members, not just most of them, are free of interest and bias." *United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015). "[T]rying an accused before a jury that is actually biased not only transgresses the express guarantee of the Sixth Amendment but also violates even the most minimal standards of due process." *Id*. at 110 (quotations and formatting omitted).

"The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). For example, if a trial court, after the jury's verdict, had reason to believe that someone had attempted to improperly influence a juror, it would schedule a hearing and determine whether a new trial should be granted. *Id*. at 215-16 (citing *Remmer v. United States*, 347 U.S. 227 (1954)); *see also State v. Cross*, 128 N.H. 732, 738 (1986) (trial court may "reconvene a jury to enquire into a colorable claim of jury error"); *Eichel v. Payeur*, 106 N.H. 484, 486 (1965) ("the Trial Court may in its discretion recall and interrogate the jurors concerning the ground upon whey they proceeded in reaching their verdict, in order to ascertain whether the case has been properly tried.").

In its brief, the State places most of the focus on *McDonough Power Equip. v.*

Greenwood, 464 U.S. 548, 554-556 (1984), a civil case where a party claimed that its right to make peremptory challenges was violated when a juror provided incorrect responses during *voir dire*. However, the trial court based its ruling on the actual bias of Juror 6 and both jurors' inability to remain impartial, invoking a distinct legal doctrine that is not governed or limited by the *McDonough* decision. As a federal circuit court recently explained:

> This claim of 'actual bias' (sometimes called 'bias in fact') is, as we have made clear, distinct from a *McDonough* claim. The *McDonough* test is not the exclusive test for identifying bias, and while a *McDonough* claim requires a showing of juror misconduct, an actual bias claim may succeed regardless of whether the juror was truthful or deceitful.

Porter v. Zook, 803 F.3d 694, 698 (4th Cir. 2015); *see also Fitzgerald v. Greene*, 150 F.3d 357, 363 (4th Cir. 1998) ("regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred…"); *Burton v. Johnson*, 948 F.2d 1150, 1156 (10th Cir. 1991) ("A party who seeks a new trial because of non-disclosure by a juror during voir dire must show actual bias…, either by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.") (quotations and citation omitted), *cert. denied*, 113 S. Ct. 1879 (1993); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir. 1988) ("[A] juror's dishonesty is not a predicate to obtaining a new trial. The focus is on bias.").

Under these principles of law, the trial court sustainably exercised its discretion in granting the accused's motion for a new trial. The record overwhelmingly supports the trial court's finding that a very serious mistake occurred, which prevented justice from being done in this trial. RSA 526:1 ("accident or misfortune" may justify granting of new trial). Jurors 6 and 14, in their written questionnaires and their (lack of) oral responses during *voir dire*, failed to

disclose that they had been childhood victims of sexual assault. App. 75-84. The record demonstrates that other jurors, filling out the same questionnaires and hearing the same *voir dire* questions, came forward to disclose their prior experiences relating to sexual assault, and most of them were excused. App. 77-78. The fact that other jurors came forward in response to the trial court's *voir dire* questions regarding past victimization illustrates that what happened here fits within the "accident or misfortune" framework of RSA 526:1. The court flagged the relevant issues for prospective jurors, and the prosecutor and defense lawyer reasonably relied on the lack of affirmative responses from Jurors 6 and 14.

Further, the record overwhelmingly supports the trial court's determination that justice was not done, necessitating the granting of a new trial, for three reasons: (1) the information withheld by Jurors 6 and 14 during jury selection was material to whether they could be fair and impartial; (2) Jurors 6 and 14 were not, in fact, capable of being impartial in this trial; and (3) Jurors 6 and 14 disclosed their victimization as children to the rest of the jury, at a time when one or more jurors were not convinced of the defendant's guilt, inflicting prejudice and preventing justice from being done.

1. Jurors 6 and 14 Withheld Information Material to Their Ability to Be Fair and Impartial.

First, the information withheld by Jurors 6 and 14 during jury selection was material to whether they could be fair and impartial. This Court has recognized that the specific scenario here, the selection of a juror in a child sexual abuse trial who was the victim of child sexual abuse, may result in the denial of the defendant's right to a fair and impartial jury. *State v. Town*, 163 N.H. 790 (2012). In *Town*, the trial court "asked the prospective jurors whether they or a close friend or relative had ever been the victim of sexual abuse." *Id*. at 791. A juror came forward and disclosed that she had been the victim of sexual assault. *Id*. The juror committed to

the trial judge that she would "try" to be fair and impartial, but then told defense counsel she was "unsure" about her ability to remain fair and impartial. *Town*, 163 N.H. at 791-92. The trial judge then asked questions designed to rehabilitate the juror, and in response, the juror again committed to try to "put aside her personal situation" and "do the best" that she could. *Id*. at 792. The trial judge denied the defendant's for-cause objection, ruled the juror qualified, and the jury convicted the defendant of aggravated felonious sexual assault. *Id*. at 791, 792. This Court, however, held that Town's right to a fair and impartial jury had been violated by the qualification of that juror, and reversed the defendant's conviction. *Id*. at 791, 795.

2. The Record Supports the Trial Court's Findings that Juror 6 was Actually Biased, and Both Jurors Were Unfit to Serve.

Second, the record provides ample support for the trial court's findings that Juror 6 was actually biased, and both Jurors 6 and 14 were "unsuitable to serve." App. 78-84. With respect to Juror 6, the trial court reasonably concluded that he had not credible in his claim to have been capable of being impartial, based on a number of considerations, which include:

- The court found that the assault suffered by Juror 6 as a child, inflicted by a "caretaker in a position of authority," was "quite similar to that described by the youth in the case at bar…." App. 81.
- Juror 6 had been forced to relive his childhood trauma much closer in time to the trial, when he found himself face-to-face with the perpetrator at his own place of business, causing him to be "disabled to the point of not being able to breathe or function for several days." App. 79; T-MH. 21, 23. The court, however, found "unconvincing" Juror 6's attempt to minimize the impact of his experience on his ability to be impartial by claiming that "his distress was the result of being upset that he had buried the memory, not because of the assault itself." App. 79; *see* T-MH. 25.

- The court determined that Juror 6 provided inconsistent and illogical explanations, not only for his failure to disclose the childhood sexual assault, but also for his failure to disclose other information during jury selection that should have been disclosed based on the contents of the *voir dire* questions, including being the victim of other crimes, and having many friends in law enforcement. App. 79; *see* M-TH. 15, 16-17.
- The court noted that Juror 6 also demonstrated an inability to reconcile his simultaneous claims that he could not be impartial on a sexual assault trial where the victim was a girl, because he had a daughter; but he had been impartial in a sexual assault trial where the victim was a boy, despite the fact that he had a son. App. 79-80; M-TH. 25, 26, 27.
- The court surveyed Juror 6's advocacy activities before and after trial that further supported its conclusion that he was biased in favor of a complainant. App. 81; *see* T-MH. 28, 32-33.

Further, the court reasonably concluded that Juror 14 was incapable of being impartial in this case based on the assault inflicted upon her as a child, her failure to disclose any of its circumstances during jury selection, her admitted reluctance to talk with the Judge about what had happened to her, her characterization of having to talk about her victimization at the bench as "humiliating," and the fact that she was "extremely emotional during the questioning," despite the precautions the court took to protect her privacy and set her at ease. App. 76, 77, 82, 83, 84.

3. <u>The Court Correctly Determined that the Jurors' Bias Contaminated the Jury Deliberations and Produced the Verdicts</u>.

Third, the trial court sustainably determined that the defendant suffered actual prejudice, not just because Jurors 6 and 14 should not have been seated, but because they also disclosed their victimization to other jurors, contaminating the deliberations and producing the verdicts.

The court based its ruling on the following: According to Juror 6, during deliberations, a juror expressed doubt about the defendant's guilt. App. 83; T-MH. 12. In direct response, Juror 14 disclosed she had been a victim of childhood sexual assault. App. 83; T-MH. 12. Immediately thereafter, Juror 6 revealed to the entire jury that he, too, had been a victim of childhood sexual assault. App. 83; T-MH. 12. At some point after that, the jury united in unanimous verdicts of guilty on all charges. This caused the trial court to express "concern" in its Order "that the disclosure may have prompted Jurors to go along with the views of Jurors 6 and 14 subconsciously to support them." App. 83 n. 1. The court concluded: "In this case, the [jurors'] bias went to the heart of the matter in dispute, the credibility of the complainant. Such a bias necessarily produced the jurors' verdicts and deprived the defendant of an impartial jury." App. 85.

C. The State, in Challenging the Trial Court's Factual Findings, Mistakes Allegations for Facts and Misconstrues the Governing Standard of Review.

The State, recognizing that the trial court has made credibility findings regarding the jurors that support the conclusion that justice was not done in this case, attacks those credibility findings in a manner that cannot be reconciled with the governing standard of review. First, the State claims that the trial court "ambushed" the jurors, "expos[ing] the jurors…. to public harassment and ridicule," such that the trial court itself produced the jurors' defensive or emotional demeanor. SB. 21-22. The State's entire basis for making this claim consists of: unsworn letters written by Jurors 6 and 14 to another Judge after the hearing, the credibility of which were never tested in an adversarial proceeding; unsworn allegations by the prosecuting attorneys in a motion to reconsider, unsupported by affidavit or any actual evidence; and Concord Monitor articles that were never made part of the record below. SB. 3-5, 10 n. 3, 22. The State acknowledges the trial court did not credit the jurors' unsworn explanation for their

demeanor and emotionality. SB. 10 ("The trial court disagreed that the emotional response was based on how the jurors had been treated during the hearing."). Nevertheless, the State contends that this Court should reject the trial court's factual findings and conclusions that were based on the trial court's observation of the jurors' testimony, and credit instead the jurors' unsworn letters,[2] unsworn allegations in a post-hearing pleading, and newspaper articles.

This Court has explained the unsustainable exercise of discretion standard as follows: "When we determine whether a ruling made by a judge is a proper exercise of judicial discretion, we are really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *Lambert*, 147 N.H. at 296. As discussed above, the record more than establishes an objective basis, grounded in the testimony and demeanor of the witnesses, to justify the discretionary judgment made.

The State, however, selectively combs through the record in search of allegations unsupported by affidavit or witness testimony, and then urges this Court to second-guess the trial court's fact and credibility determinations. As this Court explained, a litigant that argues on appeal "that this court ought to reach conclusions different from those of the trial court" misapplies the unsustainable exercise of discretion standard:

> Findings of fact by a trial court are binding on us unless they are not supported by the evidence or are erroneous as a matter of law. An integral part of the process of decision-making includes resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given to testimony. We defer to the trial court's judgment on such issues.

McCabe v. Arcidy, 138 N.H. 20, 24 (1993) (citations omitted).

In a different line of attack, the State claims the trial court should not have considered

[2] Those letters include Juror 14's claim that the trial court, prior to the evidentiary hearing, "locked [her] in the jury room, by [her]self, for nearly an hour," a wild accusation which even the State does not embrace on appeal. S-S. App. 111; SB.. (State does not allege on appeal that trial court improperly detained Juror 14).

Juror 6's failure to disclose that he had been the victim of numerous other crimes, and failure to disclose that he had many friends in law enforcement, because the defendant did not "incorporate[] this into his motion…." SB. 25. The State misperceives the purpose of this evidence, as introduced by the defense, and as relied upon by the trial court. The purpose of this evidence was not to support a separate ground for new trial, but to demonstrate that Juror 6's explanation for why he failed to disclose his childhood sexual assault lacked credibility and to provide further evidence of Juror 6's bias. *See* T-MH. 71-72 (oral argument at motion hearing). It was entirely appropriate for the trial court to rely in part on this evidence in finding that Juror 6 was "not … credible about his ability to have been fair and impartial…." App. 81.

Indeed, Juror 6's admissions as to other information he failed to disclose directly rebut a claim made by the State prior to the hearing as to Juror 6's motivation for nondisclosure. The State had twice claimed in its Objection to Motion for New Trial that the reason Juror 6 didn't disclose was because "no one was ever arrested or charged." App. 59, 62. The State represented that Juror 6 thought that "a crime is when something is proven beyond a reasonable doubt or found guilty of something" and therefore he did not need to disclose his victimization as a child. App. 59, 63. The State's own argument elicited and opened the door to Juror 6's failure to disclose the incident where his employee burned a hole in his company safe, stole a vehicle, was arrested, convicted, and sent to jail for a year. T-MH. 17, 18, 30.

D. In the Alternative, the Trial Court's Order Must Be Affirmed Under *Shulinsky*.

In the alternative, the trial court's order must be affirmed under precedent of this Court that, although directly on-point and strongly supportive of the trial court's reasoning and conclusion, was not cited in the proceedings below, and not cited by the State in its brief on appeal. *Shulinsky v. Boston & Me. R.R.*, 83 N.H. 86, 87-88 (1927). Although the trial court did

not rely on the *Shulinsky* decision and neither party cited to it below, it is appropriate for this Court to rely upon it. *State v. Cook*, 158 N.H. 708, 713 (2009) ("We will not reverse a trial court decision … when it reaches the correct result and valid alternative grounds exist to reach that result.") (quotations omitted).

In *Shulinsky*, this Court held a new trial should be granted if a juror failed to provide accurate answers during *voir dire* as to factual issues relating to her ability to remain impartial, reasoning that the seating of such a juror violates the defendant's right to exercise peremptory challenges. 83 N.H. at 87, 88. During jury selection in a civil negligence case, the trial court asked if any member of the jury pool had "business relations or was a creditor or debtor of the plaintiff." *Id*. at 86. The juror in question "remained silent," and was seated on the jury. *Id*. After a plaintiff's verdict, it was discovered that the juror had borrowed money from the plaintiff and still owed $200. *Id*. The defendant filed a motion to set aside the verdict, which the trial court denied. *Id.*

This Court reversed and remanded for a new trial, holding that the defendant's right to meaningfully exercise peremptory challenges was violated by the juror's nondisclosure of these facts. *Id.* at 90. The court analogized to a situation where the trial court denied a cause-based challenge after the juror provided misinformation: "If the [trial] court by reason of false information found a juror indifferent, the illegality of the verdict would be unquestioned." *Id*. at 88. Because the defendant never had reason to make a cause-based challenge due to the juror's nondisclosure, however, this Court addressed it as a violation of the right to peremptory challenges, continuing: "A verdict is equally illegal when a peremptory challenge is not exercised by reason of such information given as incident to the drawing of the jury and to the court's undertaking to secure a fair trial." *Id*. The Court explained:

> The right to challenge implies its fair exercise, and if a party is misled by erroneous information obtained through application to the court, the right of rejection is impaired. False information thus obtained and relied on is as destructive of a fairly constituted jury in its application to a peremptory challenge as to a challenge for cause.

Shulinsky, 83 N.H. at 88. Thus, the court made clear that, although it focused on the appealing party's right to meaningfully make peremptory challenges, the trial is rendered equally unfair when the trial court fails to dismiss the offending juror for cause because the trial court also relied on the erroneous information provided by the juror.

The *Shulinsky* Court also set forth additional principles of law that guided its decision and are germane to this appeal. First, the Court held that to prevail, the appealing party need not show that the juror intentionally provided false information. *Id*. at 89. Second, the Court held that the aggrieved party need not show that the seating of the juror in question brought about the adverse verdict. *Id*. ("If due diligence has been used and there is no waiver of rights, the fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that the fact accounts for the verdict."). Third, the Court made clear that although a party's waiver or lack of due diligence may preclude relief on appeal, parties are entitled to rely on information "furnished under the court's authority," including information learned from the juror's responses to questions asked on *voir dire* by the trial court. *Id*. at 88. And finally, the *Shulinsky* Court did not require the moving party to show that the undisclosed facts would have provided the basis for a cause-based challenge. *Id.* It only required the moving party to show that the undisclosed facts went to the juror's ability to be impartial and thus impacted the moving party's ability to meaningfully exercise its peremptory challenges. *Id*.

Under the legal principles established in *Shulinsky*, the trial court's ruling granting a new trial was correct as a matter of law. It is undisputed that during jury selection, the trial court

relied upon false information in finding Jurors 6 and 14 qualified. App. 77; T-JS. 59, 72, 124-25; *Shulinsky*, 83 N.H. at 88 ("If the [trial] court by reason of false information found a juror indifferent, the illegality of the verdict would be unquestioned."). Further, the trial court sustainably placed its focus on the nature of the information withheld by the jurors, and the extent to which the jurors were capable or incapable of being impartial, rather than the subjective intent of the jurors in withholding the information. *Shulinsky*, 83 N.H. at 89-90.

Indeed, this case presents a much stronger record for relief on appeal than is required by the *Shulinsky* decision for two reasons. First, as discussed above, *Shulinsky* did not require the moving party to show that the undisclosed information rendered the juror actually biased or otherwise unfit to serve. *Id.* at 89-90. The trial court in this case, however, sustainably found that Jurors 6 and 14 "were not [as] 'impartial as the lot of humanity will admit,'" and would have been "excused… as being unsuitable to serve" at the time of jury selection if the information and circumstances learned during the post-trial hearing had been disclosed at the time. App. 84-85. Second, although the *Shulinsky* Court held that the aggrieved party need not show that the juror's nondisclosure produced the verdict, the trial court here sustainably held, as discussed above, that the conduct of Jurors 6 and 14 during trial prejudiced Dr. Afshar by influencing the verdict. Thus, the legal principles set forth in *Shulinsky* present an alternative ground to uphold the trial court's ruling.

It is also important to note that the State, on appeal, advocates that this Court should adopt legal principles that would effectively overrule *Shulinsky*. SB. 15, 20. Thus, as further discussed in the next section, the State contends that this Court should adopt a legal standard barring the granting of a new trial absent intentional juror dishonesty during jury selection. *Id.* Moreover, the State asks this Court to adopt a requirement that can only be described as 'extreme

bad faith' on the part of the juror, as the State advocates that it is not even enough to show that the juror intentionally lied. Rather, the State advocates that the aggrieved party must also show that the juror's "bias or a desire to influence the outcome of a trial" motivated the juror's nondisclosure. SB. 20, 21.

The *Shulinsky* Court, however, expressly held that the juror's subjective intentions are irrelevant:

> Nor is there any force in argument that the information although false was unintentionally so, and that there was therefore no bad faith. The harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant. While willful falsehood may intensify the wrong done, it is not essential to constitute the wrong. The injury is brought about by falsehood regardless of its dishonesty, and the effect of the information as misleading rather than a purpose to give misleading information is the gist of the injury.

83 N.H. at 89-90.

Further, the State asks this Court to hold that a party seeking a new trial based on nondisclosure by a juror "'must demonstrate actual prejudice or bias,'" but as discussed above, that is not a requirement of *Shulinsky*. SB. 17 (citing *Dall v. Coffin*, 970 F.2d 964, 970 (1st Cir. 1992)). Thus, in two important respects, the State's argument would require this Court to overrule *Shulinsky*.

"The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *State v. Quintero*, 162 N.H. 526, 532 (2011) (quotations omitted). The starting point for a *stare decisis* analysis is to determine whether the questioned precedent is "poorly reasoned," which signals whether the doctrine is in play. *Id*. at 539. Subsequently, the Court employs a principled four-factor analysis. *Id*. at 532-33. None of this is addressed in the State's brief. *State v. Smith*, 166 N.H. 40, 45

(2004) ("Having failed to brief the four stare decisis factors, the defendant has not persuaded us that [a controlling precedent] must be overruled."). Accordingly, this Court must apply the controlling legal standard, *Shulinsky*, and reject the State's overture to overrule settled law.

E. The State Did Not Preserve Its Argument Under Federal law that a New Trial Cannot Be Ordered Absent Intentional Juror Dishonesty.

The State contends, citing to law from various federal and state jurisdictions, that this Court should adopt law that the State claims would preclude the award of a new trial for juror nondisclosure, absent proof that the jurors intentionally lied. SB. 17, 18. As discussed in the next section, the State's brief does not present an accurate or complete picture of the state of the law, both in the federal courts and in other state court jurisdictions. This Court, however, need go no further, because the State has failed to preserve this argument.

In the trial court, the State asserted in its Objection to Motion for New Trial: "Moreover, in New Hampshire, the relevant standard is not whether the juror misbehaved, but rather whether the conduct produced the verdict." App. 64. In oral argument at the hearing, the State began by stating: "You Honor, the standard before the Court today is whether the jurors' conduct produced the verdict." T-MH. 75. Later in oral argument, the prosecutor stated: "I think that the standard that's relevant in this case is the New Hampshire standard, not the United States Supreme Court standard…." T-MH. 85. Yet on appeal, the State claims that juror misbehavior in the form of intentional dishonesty is a necessary predicate to the awarding of a new trial. SB. 17, 18, 21. The State, by contending below that juror misconduct is not the standard, has waived that argument. Furthermore, the State, by representing in the trial court that the case should be decided under New Hampshire law, has waived the argument that this Court should adopt different, foreign law and use it to reverse the trial court's order. SB. 15, 20 (citing *McDonough*, 464 U.S. at 554-556, and its progeny).

F. The State's Brief Mischaracterizes Legal Standards from other State and Federal Jurisdictions.

The State, in advocating that this Court should adopt a standard barring the granting of a new trial absent intentional juror dishonesty, provides an incomplete and inaccurate portrayal of legal standards from other jurisdictions. The primary case relied on by the State, *McDonough*, merely sets forth the bare bones legal standard employed by federal courts when a defendant seeks a new trial based on juror nondisclosure of facts potentially relating to bias or impartiality during jury selection: "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556.

The State's brief falters, however, when it claims that the *McDonough* standard, as construed by federal and state courts, bars the granting of a new trial unless the juror *intentionally* lied during jury selection. Contrary to representations in the State's brief, the *McDonough* decision did not resolve whether the defendant must show that the juror intentionally deceived the court during jury selection. While it is true that the lead opinion authored by Justice Rehnquist in *McDonough* implies that a juror's inadvertent nondisclosure during *voir dire* should not result in a new trial, it is only a plurality opinion on this particular issue. Five justices signed off on concurring opinions that would hold that the moving party need not demonstrate that the juror intentionally lied. *See Cannon*, 850 F.2d at 440 (The *McDonough* "concurrences modify the Court's statement in that they held that whether the juror's nondisclosure 'is honest or dishonest' it is still within a trial court's option in determining bias to hold a post-trial hearing."); *McDonough*,. 464 U.S. at 556-57 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) ("Regardless of whether a juror's answer is honest or dishonest, it

remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred."); *McDonough*, 464 U.S. at 558 (Brennan, J., joined by Marshall, J., concurring in the judgment) ("I therefore cannot agree with the Court when it asserts that a new trial is not warranted whenever a prospective juror provides an honest answer to the question posed.").

The split of opinions, with only a minority of justices appearing to embrace an intentional lie standard, has led to a split of authorities across federal circuits and across those state courts that employ some version of the *McDonough* standard. In its brief, the State cites to several federal circuit courts that have mandated an intentional lying standard, SB. 17-18, but fails to acknowledge the circuit split. Specifically, it fails to acknowledge the existence of decisions from the 2d, 4th, 5th, 6th, 8th and 10th Circuits that hold that relief may be predicated upon inadvertent nondisclosure as well as intentional lying. *United States v. Langford*, 990 F.2d 65, 68 (2d Cir. 1993) ("We read this multi-part test as governing not only inadvertent nondisclosures but also nondisclosures or misstatements that were deliberate."); *Fitzgerald*, 150 F.3d at 363 (4th Cir. 1998) ("regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred"); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (Court declined to interpret the *McDonough* rule to require intentional dishonesty on the part of the juror); *Zerka*, 49 F.3d at 1185 & n. 7 (Court states that *McDonough* standard applies both to cases of intentional nondisclosure by juror during voir dire, and inadvertent nondisclosure); *Cannon*, 850 F.2d at 440 ("[A] juror's dishonesty is not a predicate

to obtaining a new trial. The focus is on bias."); *Burton*, 948 F.2d at 1158.

The State correctly cites to a panel decision from the First Circuit as an example of a federal court that requires intentional lying by the juror as a prerequisite to post-trial relief. SB. at 17 (citing *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013)). However, further examination of another panel decision from the same Circuit shows that even within the First Circuit, there is disagreement, not unanimity on this issue. *Amirault v. Fair*, 968 F.2d 1404, 1405-6 (1st Cir. 1992) ("We read [*McDonough*] to require a further determination on the question of juror bias even where a juror is found to have been honest…."), *cert. denied*, 121 L. Ed. 2d 538, 113 S. Ct. 602 (1992). The State also exaggerates the strength of its position by representing that the Second Circuit made the point in 2006 that "in the twenty plus years since *McDonough*, the court had never overturned a verdict based upon claims of juror nondisclosure." SB. 17 (citing *United States v. Stewart*, 433 F.3d 273, 303 (2d Cir. 2006)). But the State fails to mention that in more recent years, the Second Circuit has overturned a verdict based upon claims of juror nondisclosure. *Parse*, 789 F.3d at 120.

The State also misconstrues the manner in which state courts have addressed these issues. Thus, the State's brief represents: "Courts in other jurisdictions have adopted a similar analysis and consideration of what *McDonough* requires: a showing that the juror intended to give a false answer…." SB. 18 (citing decisions from Maine, Massachusetts, Utah, Vermont, and Washington). But two of those five decisions cited in the State's brief stand for the opposite principle: that under the state court's interpretation of *McDonough*, the aggrieved party need not show that the juror intentionally lied. *State v. Chesnel*, 734 A.2d 1131, 1140 (Me. 1999) ("To obtain a new trial on an allegation that a juror did not accurately answer a voir dire question, a party must demonstrate that (i) the juror failed to honestly *or correctly* answer a material

question, and (ii) a correct response would have provided a valid basis for a challenge for cause.") (emphasis added), *cert. denied*, 528 U.S. 1126 (2000); *State v. Thomas*, 830 P.2d 243, 246 (Utah 1992) ("The emphasis should be on the juror's lack of partiality rather than on her intent."); *see* SB. 18, 19 (mis-citing *Chesnel* and *Thomas*).

Thus, far from supporting the monolithic position advanced by the State, the five State cases cited in the State's brief are almost evenly divided on the issue of juror intent, as are many other jurisdictions. An article in the American Journal of Criminal Law explained:

> States using an objective test will look to see whether a reasonable juror would have disclosed the information during voir dire. States using a subjective test will look to see whether the juror in question acted honestly and in good faith.

Robert G. Loewy, *When Jurors Lie: Differing Standards for New Trials*, 22 Am. J. Crim. L. 733, 736 (1995).

In addition to the *Chesnel* and *Thomas* decisions mis-cited by the State, other state jurisdictions have construed *McDonough* to allow the granting of a new trial based on a juror's inadvertent nondisclosure of facts related to bias, or have formulated their own legal standard distinct from *McDonough* that is not predicated upon intentional lying by the juror. These include: *Williams v. State*, 904 A.2d 534, 543-44 (Md. 2006) ("We hold that, where there is a non-disclosure by a juror of information that a *voir dire* question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial."); *Franklin v. State*, 138 S.W.3d 351, 355 (Tex. Ct. Crim. App. 2004) ("The fact that the juror did not intend to intentionally withhold information is largely irrelevant when considering the materiality of information withheld.") (quotations omitted); *Ex parte Dobyne*, 805 So. 2d 763, 772 (Ala. 2001) (The "prospective juror's inadvertence or willfulness in falsifying or failing to answer" is just one of several factors that are weighed to determine if the

complaining party was prejudiced by the nondisclosure); *Doyle v. Kennedy Heating & Serv., Inc*., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) ("If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such a concealment…. Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice.") (quotations omitted); *State v. Buckom*, 485 S.E.2d 319, 328 (N.C. App. 1997) (factors governing whether litigant may receive new trial for juror nondisclosure of material facts during voir dire include "whether the misrepresentation was intentional or inadvertent" and "whether a reasonable juror in the same or similar circumstances could or might reasonably have responded as did the juror in question").

The State has not preserved its argument that this Court should adopt law from other jurisdictions requiring a subjective standard. But if this Court were to consider the matter, it should adopt an objective standard, for two reasons. First, a subjective standard would necessarily require precisely the sort of aggressive, confrontational, public scrutiny of the juror's true motive that the State decries as being unfair and prejudicial to the juror in its brief. Second, an objective standard looks past a juror's intentions to determine whether the juror was, in fact, impartial.

First, the State's contention that this Court should adopt a subjective standard cannot be reconciled with its position as to how jurors should be treated in these hearings. In its brief, the State attacked the trial court for "expos[ing] the jurors… to public harassment and ridicule" by conducting a public proceeding and allowing the parties to cross-examine the jurors about their motives. SB. 22. The State even went so far as to insinuate that the trial court, in allowing confrontation in a public proceeding, violated the *jurors'* rights under the Victims' Rights Act

since they, themselves, are victims of sexual assault. SB. 22 (citing to RSA 21-M:8-k). As discussed above, the State's reading of the record misses the mark, as the trial court employed appropriate procedures to protect the dignity and privacy of the jurors, which included explaining to the jurors why they had been summoned, conducting most of the questioning at the bench, and turning the microphones off so only the Judge and parties could hear their testimony about the details of prior sexual assaults. *See infra*, pgs. 5, 9-10.

But more importantly, the State's argument is fundamentally at odds with itself. Few, if any jurors are ever going to voluntarily come forward and admit in a post-trial hearing that they intentionally lied to a superior court judge with the purpose of getting selected for the jury. Anyone in the position of having so lied would understand that admitting their true motivation would provide a one-way ticket to the penitentiary. The universally accepted and, indeed, revered tool for discovering a person's true, subjective motivation is wide-ranging, probing cross-examination in open court. 5 J. Wigmore, Evidence § 1367, p. 32 (J. Chadbourn rev. 1974) (Cross examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

Thus, the State seeks to have it both ways – it wants a juror who has failed to disclose his childhood sexual assault in a sexual assault jury trial to be handled with the special sensitivity and consideration afforded to crime victims under the victims' rights act, but it wants to preclude relief to the defendant unless the defendant can prove that the juror intentionally lied to get on the jury. The State's conflicting positions demonstrate that the standard it would have this Court adopt is both impractical and unjust.

Second, the ultimate goal of safeguarding the right to a fair and impartial jury is better served by the objective test, which focuses on whether the juror's bias prejudiced the defendant,

rather than the subjective test which focuses on the juror's misconduct. As the Sixth Circuit explained, "[t]he nature of the undisclosed information is more probative than the juror's particular state of mind; a well-intentioned juror omitting a material fact can do more damage than one who deliberately conceals an inconsequential fact." *Zerka*, 49 F.3d at 1185. By deemphasizing a juror's intentions and motivations, the objective test cuts to the very heart of the matter – the defendant's right to an impartial jury. "[B]ecause the right to an impartial jury is guaranteed by the United States Constitution, as well as many state constitutions, the existence of juror bias should be determinative regardless of whether there is juror misconduct or not." *When Jurors Lie: Differing Standards for New Trials*, 22 Am. J. Crim. L. 733, 760 (1995).

Accordingly, if this Court does overlook the State's failure to preserve its arguments, this Court should adopt an objective standard. And under that standard, the trial court's ruling must be affirmed, based on its findings that two jurors failed to disclose material facts during jury selection, and that the court would have excused both jurors as being "unsuitable to serve in the Afshar case" had the information that came to light in the post-trial hearing been known at the time of jury selection. App. 84.

Accordingly, this Court must affirm the judgment below.

CONCLUSION

WHEREFORE, Dr. Afshar respectfully requests that this Court affirm the trial court's ruling.

Undersigned counsel requests 15 minutes oral argument.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, we filed an original and eight copies of the Brief and Appendix, and hand-delivered two copies to Sean Locke, Esq., New Hampshire Attorney General's Office, and sent one copy to the Merrimack County Superior Court.

_____
Theodore Lothstein