

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2017-0387

The State of New Hampshire

v.

Foad Afshar

---

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
MERRIMACK COUNTY SUPERIOR COURT

---

---

BRIEF FOR THE STATE OF NEW HAMPSHIRE

---

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald  
Attorney General

Sean R. Locke  
NH Bar ID No. 265290  
Assistant Attorney General  
Criminal Justice Bureau  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301-6397  
603-271-3671

(15 minutes)

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
ISSUE PRESENTED.....	1
STATEMENT OF THE CASE AND FACTS .....	2
SUMMARY OF THE ARGUMENT .....	12
ARGUMENT .....	13
THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER THE JURORS HAD ANSWERED DISHONESTLY AND WHAT MOTIVATED THEIR CHALLENGED ANSWERS AND INSTEAD, ATTEMPTED TO USE HINDSIGHT TO DETERMINE WHETHER IT WOULD HAVE EXCUSED THE JURORS GIVEN THE ADDITIONAL INFORMATION PRESENTED POST-VERDICT. ....	13
CONCLUSION .....	27
CERTIFICATE OF SERVICE .....	28
APPENDIX.....	29

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. United States</i> , 411 U.S. 223 (1973).....	13
<i>Commonwealth v. Amirault</i> , 506 N.E.2d 129 (Mass. 1987).....	19
<i>Commonwealth v. Harrison</i> , 331 N.E.2d 873 (Mass. 1975).....	19
<i>Dall v. Coffin</i> , 970 F.2d 964 (1st Cir. 1992).....	17
<i>Gonzalez v. Thomas</i> , 99 F.3d 978 (10th Cir. 1996) .....	18
<i>McDonough Power Equip. v. Greenwood</i> , 464 U.S. 548 (1984) .....	passim
<i>Sampson v. United States</i> , 724 F.3d 150 (1st Cir. 2013) .....	17, 20
<i>State v. Buckorn</i> , 485 S.E.2d 319 (N.C. Ct. App. 1997).....	20
<i>State v. Cannata</i> , 130 N.H. 545 (1988).....	20
<i>State v. Chesnel</i> , 734 A.2d 1131 (Me. 1999) .....	18
<i>State v. Cho</i> , 30 P.3d 496 (Wash. Ct. App. 2001) .....	19
<i>State v. Cross</i> , 128 N.H. 732 (1986) .....	15, 20
<i>State v. Funk</i> , 799 N.W.2d 421 (Wis. 2011).....	14
<i>State v. Maske</i> , 591 S.E.2d 521 (N.C. 2004) .....	19, 20
<i>State v. Mayo</i> , 945 A.2d 846 (Vt. 2008) .....	19
<i>State v. Sawtelle</i> , 66 N.H. 488 (1891).....	14

<i>State v. Tabaldi</i> , 165 N.H. 306 (2013).....	15
<i>State v. Thomas</i> , 830 P.2d 243 (Utah 1992) .....	19
<i>State v. Town</i> , 163 N.H. 790 (2012) .....	14, 15
<i>State v. Weir</i> , 138 N.H. 671 (1994).....	14, 15
<i>United States v. Edmond</i> , 43 F.3d 472 (9th Cir. 1994).....	18
<i>United States v. Powell</i> , 469 U.S. 57 (1984) .....	17
<i>United States v. Stewart</i> , 433 F.3d 273 (2d Cir. 2006) .....	17
<i>United States v. Williams-Davis</i> , 90 F.3d 490 (D.C. Cir. 1996).....	18

#### **Statutes**

RSA 21-M:8-k (2012).....	22
RSA 330-A:23 (Supp. 2017).....	2
RSA 500-A:12, II (2010) .....	14
RSA 631:2-a (2016) (amended 2018).....	2
RSA 632-A:2 (2016) (amended 2018).....	2

#### **Other Authorities**

Caitlin Andrews, <i>Jurors from Foad Afshar Trial Recount Deliberations</i> , Concord Monitor, February 23, 2017, <a href="http://www.concordmonitor.com/Arguments-for-Foad-Afshar-s-retrial-heard-in-Merrimack-County-Superior-Court-8229132">http://www.concordmonitor.com/Arguments-for-Foad-Afshar-s-retrial-heard-in-Merrimack-County-Superior-Court-8229132</a> .....	22
H.B. 106 (2017) .....	22, 25

Jeremy Blackmun, <i>Child Psychologist Found Guilty of Molesting Boy</i> , Concord Monitor, June 20, 2016, <a href="http://www.concordmonitor.com/Concord-psychologist-guilty-molesting-patient-2914963">http://www.concordmonitor.com/Concord-psychologist-guilty-molesting-patient-2914963</a> .....	21
Jeremy Blackmun, <i>Therapist's Conviction Sends Shockwave through Psychiatric Community</i> , Concord Monitor, June 26, 2016, <a href="http://www.concordmonitor.com/criminal-conviction-highlights-duel-risk-of-therapeutic-setting-2998604">http://www.concordmonitor.com/criminal-conviction-highlights-duel-risk-of-therapeutic-setting-2998604</a> .....	21
John V. Kjellman, <i>My Turn: Is an Innocent Doctor Sitting Behind Bars</i> , Concord Monitor, August 18 2016, <a href="http://www.concordmonitor.com/Case-of-Foad-Afshar-Concord-NH-4038068">http://www.concordmonitor.com/Case-of-Foad-Afshar-Concord-NH-4038068</a> .....	21
Mike Cronin, <i>Psychologist Convicted of Sexual Assault Seeks New Trial</i> , WMUR, February 22, 2017, <a href="http://www.wmur.com/article/psychologist-convicted-of-sexual-assault-seeks-new-trial/8966561">http://www.wmur.com/article/psychologist-convicted-of-sexual-assault-seeks-new-trial/8966561</a> .....	22

### **Constitutional Provisions**

N.H. Const. pt. 1 art. 35 .....	13
---------------------------------	----

## **ISSUE PRESENTED**

Whether the trial court erred when it concluded that two jurors had been biased against the defendant because they were victims of sexual assault as children instead of considering whether the jurors had given false answers during *voir dire* and their motivations for providing any allegedly false answers.

Issue preserved by: the defendant's motion for a new trial, App.<sup>1</sup> 1-29, the State's objection, App. 56-94, the hearing on the motion for a new trial, MHT 1-87, the trial court's order granting the defendant's motion, Supp. 3-15, the State's motion for reconsideration, App. 95-114, and the trial court's order on the motion for reconsideration, Supp. 1-2.

---

<sup>1</sup> Supp. refers to the supplement attached at the end of this brief.  
App. refers to the separately bound appendix filed with this brief.  
MHT refers to the transcript of the February 22, 2017 motion for new trial hearing transcript.  
JTT refers to the "designation of record" transcript from day seven of the June 2016 jury trial.

### **STATEMENT OF THE CASE AND FACTS**

On June 17, 2016, a jury found the defendant, Foad Afshar, guilty of one count of aggravated felonious sexual assault (“AFSA”), two counts of unlawful mental health practice, and one count of simple assault. Supp. 3; RSA 632-A:2 (2016) (amended 2018); RSA 631:2-a (2016) (amended 2018); RSA 330-A:23 (Supp. 2017). The AFSA and simple assault convictions stemmed from allegations that the defendant, during a therapy session with the victim, E.R., put his hand under the victim’s pants and rubbed his genitals. App. 2-3. The unlawful mental health practice convictions stemmed from evidence presented that detailed how the defendant had failed to renew his license to work as a mental health practitioner at the time he was treating the victim. App. 2-3. The trial court sentenced the defendant to three to six years in the New Hampshire State Prison. Supp. 3.

During jury deliberations, one juror expressed concern about convicting the defendant because he did not fit the profile of a person who sexually assaulted boys. Supp. 12. In response, Juror 14 disclosed that she had been the victim of sexual assault and explained that a profile does not exist for people who commit sexual assault. Supp. 12. In support of her, Juror 6 also disclosed that he had been the victim of sexual assault. Supp. 12. Another juror also disclosed that her dentist had touched her chest during some exams. Supp. 12. Neither Juror 6 nor Juror 14 discussed details of their assaults. Supp. 12. Nothing further came of this discussion, and in fact, at least one juror, Juror 2, did not reference Juror 6 and Juror 14’s disclosures when interviewed by the defendant’s investigator about the jury deliberations. App. 71-78.

On January 3, 2017, the defendant filed a motion for new trial in which he claimed that his trial counsel was ineffective and that two jurors, Jurors 6 and 14, failed to disclose that they had been victims of sexual assault during *voir dire*, which violated his right to a fair and impartial jury. App. 1-55. The trial court bi-furcated the two claims and held a hearing to address the juror misconduct claims before addressing the ineffective assistance of counsel claim. Supp. 3. The State objected and argued that both jurors provided reasonable explanations for their failure to disclose to the trial court that they had been victims of sexual assault. App. 56-70. It also noted that both repeatedly asserted that they remained fair and impartial throughout the trial and in rendering a verdict. App. 56-70.

On February 22, 2017, the trial court held a hearing in an open courtroom filled with 60-70 of the defendant's supporters. MHT 1-87; App. 97. The hearing began with questioning Juror 6, who was also the foreperson. MHT 7-47. The trial court initially questioned Juror 6 at the bench, MHT 7-13, but most of his questioning comprised of examination by defense counsel in open court, MHT 13-47. Juror 6 acknowledged that he had been sexually assaulted at 5 years old by a male babysitter whose age was not disclosed but based upon the description was also likely a minor. MHT 8-9. When asked why he answered "No" to the question "Have you or has any member of your family been a victim of a crime?" he explained that he believed that he was being truthful and that a crime meant someone who was held up at gun point or stabbed or something similar. MHT 8. He also articulated that he considered a crime to be a situation where a person was prosecuted. MHT 8. He acknowledged that he did not remember the follow

up question that explained that being a victim did not mean that a person was prosecuted, or police were called. MHT 10. He stated that he did not consider his assault when he was in the jury pool and heard these questions. MHT 10.

Upon questioning by defense counsel, Juror 6 acknowledged that as an owner of a business (or several businesses), employees had stolen money from him, which he explained was often the cost of doing business. MHT 15-16. He further acknowledged that one employee had stolen a car and broken into a safe, for which that employee was prosecuted and jailed. MHT 16-18. He explained that he did not consider himself the victim of that crime, but instead his company was the victim, and that the offense had not come to mind during the *voir dire*. MHT 29-31. He also admitted that “long before” the trial he had read a book about a survivor of sexual assault and had reached out to her and spoken with her about her experiences. MHT 27-29. He described himself as an “advocate for the people.” MHT 28. He was also questioned about his post-trial efforts to prevent the passage of a bill introduced, in direct response to the defendant’s conviction, that would have required corroboration for sexual assault allegations made against a person who had never been convicted of sexual assault in the past. MHT 32-34. Juror 6 maintained that he reached his verdict “based on the evidence and the evidence alone.” MHT 47.

During the questioning of Juror 14, defense counsel inadvertently disclosed Juror 6’s full name. MHT 43. As a result, the trial court stated to the courtroom full of the defendant’s supporters and the media

I would hope everyone in the courtroom would not broadcast the names of either of the jurors. This is obviously a difficult thing for anyone to speak

of and we should show them our respect for their service to this Court by not revealing their identities.

MHT 47.

After Juror 6 had testified, the trial court brought forth Juror 14 for questioning. Juror 14's questioning all occurred at the bench, but it was still in a courtroom full of the defendant's supporters. MHT 49-67. Juror 14 disclosed that she had been the victim of sexual assault as a child and had been assaulted by an older girl, who was still a minor, in her neighborhood. MHT 50, 53. She did not consider herself a victim of a crime because the case was never prosecuted. MHT 50-51. When asked this question she did not think of her earlier assault. MHT 50. She acknowledged, however, that her parents may have reported the assault but she had difficulty recalling whether she had spoken with police. MHT 51-52, 56-57. She also acknowledged that, since the trial, she considered what was done to her a crime. MHT 51-52.

She consistently explained that she was unbiased and looked at things from every angle. MHT 55, 64. She considered how a conviction could impact the defendant. She explained that she was passionate about the trial and trying to determine the truth. MHT 64. She also explained that the disclosure was very simple and that it did not have any impact on deliberations or recalling that any jurors changed their views after the disclosure. MHT 60-62. At one point during the questioning, the trial court took a brief recess because Juror 14 had started crying and was having difficulty responding to questions. MHT 59. Juror 14 had not become upset in that manner during her interviews with the defendant's investigator or the State's investigator. App. 80-88, 93-94. Juror 14 also maintained that she was "fair and impartial from beginning to end." MHT 67.

On March 28, 2017, the trial court issued an order in which it granted the defendant's motion for a new trial. Supp. 3-15. It limited to the issue to the narrow contention "that the sharing of the assaults during deliberations provides further evidence that the two jurors should have and would have been excused had . . . their experiences been disclosed to the Court." Supp. 5. The trial court described the questions on the juror questionnaire and those that were asked at the *voir dire* and that neither juror had answered "yes" to any of the questions and that both had said they could be fair and impartial. Supp. 5-6.

The trial court indicated that simply being a victim of sexual assault was not sufficient for the court to dismiss the juror, and cited the example of one juror who was only dismissed after indicated she could not be fair and impartial. Supp. 6-7. "The fitness of the jurors was decided on a case-by-case basis." Supp. 7. The trial court then explained that

[T]his Court's experience of almost ten years on the trial bench and many more as a litigator is that people who have suffered sexual assault victimization are generally greatly impacted by the trauma, such that the subject matter alone is obviously anxiety producing. Absent an objection, to be cautious for the defense and the State, and to be sensitive to jurors, it is true the Court errs on the side of excusing jurors.

Supp. 7.

Next, the trial court recounted Juror 6's testimony and explanations. The trial court made several determinations about the juror's explanations. Supp. 7-10. It found that his explanation for why he became upset when he recovered the buried memory of the sexual assault was not "convincing." Supp. 8. It questioned why the juror would have difficulty being neutral if the victim had been female rather than male because the

defendant has both a son and daughter—he had claimed that this difficulty was due to his close relationship with his daughter. Supp. 8-9. The trial court discussed the other potential crimes Juror 6 testified about and why he did not disclose those. Supp. 9-10.

The trial court also considered the juror's conduct post-trial and issues that were not germane to his being a victim of a crime. Supp. 8. It cited his discussions, from an unknown period, with an author of a book about a female survivor of sexual assault. Supp. 8. It also cited his involvement in trying to prevent the passage of the bill introduced in response to the defendant's conviction. Supp. 8.

Ultimately, the trial court found that Juror 6 was not credible “about his ability to have been fair and impartial.” Supp. 10. The trial court then went on to editorialize that “perhaps he has not come to terms with his own experience, an assault he repressed for some 50 years.” Supp. 10. It also found that his

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.

Supp. 10. In support of this conclusion, the trial court cited his refusal to speak with the defendant's investigator—which Juror 6 had explained was because the investigator came by unannounced while he was with his daughter, “his aversion to accepting that he is a victim,” his offense at use of the term “alleged,” and his use of the term “victim,” which the trial court found “presumes that a person who reports s/he was sexually assaulted is

credible.”<sup>2</sup> Supp. 10. The trial court also found that “[t]he juror’s demeanor at times was defensive and his explanation for not reporting . . . the criminal conduct he experienced were not internally consistent or completely logical.” Supp. 10.

The trial court then went on to compare Juror 6’s assault to the case at bar and determined that it was similar. Supp. 10. It stated “[a]lthough Juror 6 was much younger, the assault was by a caretaker in a position of authority; a teenager to a 5-6-year-old is likely as powerful as an adult to a twelve-year old.” Supp. 10. The trial court also found that “[t]he fact that Juror 6’s memory was so deeply repressed suggest that it was more traumatic than maybe he recognizes.” Supp. 11.

Next, the trial court addressed Juror 14’s testimony. Supp. 11-13. It noted that “the decision on Juror 14’s impartiality is a much closer call.” Supp. 11. It detailed her assault and her statement that

[s]he agreed that she now believes the incident was legally a crime, but did not think of it that way when asked by the Court during selection and would not answer the question differently even in light of the investigation.

Supp. 11. The trial court acknowledged that Juror 14 “was excited to be a juror and thought of herself as thinking in ‘grey areas,’ having strong morals, and being able to see problems ‘from a million angles.’” Supp. 11. It also acknowledged that “[s]he was equally concerned with . . . arriving at the correct outcome for the youth, if he had been victimized, as the defendant, if he did not perpetrate the offense.” Supp. 11.

---

<sup>2</sup> This reasoning appears to be internally inconsistent. The trial court concludes that the juror was a victim even though no trial or investigation of his allegations had occurred. But the trial court then concludes that referring to a person as a victim implied support, even after the defendant had been convicted of AFSA, and the jury had concluded that the victim was a victim.

The trial court found that Juror 14 was “extremely emotional” while testifying and that “[s]he did not want to talk about the details of her assault.” Supp. 12. It was because of this emotional response that the trial court had her testify at the bench rather than in open court. Supp. 12. It found that it “absolutely believed Juror 14 was honest and perceives herself as neutral, the Court is concerned that the emotional response suggest otherwise.” Supp. 12. The trial court concluded that “[h]ad she been interviewed prior to selection and presented as she did at the post-trial hearing, the Court would have excused her for cause.” Supp. 12-13.

The trial court suggested that the disclosure “may have prompted jurors to go along with the views of Jurors 6 and 14 subconsciously to support them.” Supp. 12 n1. It went on to discuss the Pulse Nightclub shooting that had occurred in Orlando in the middle of the trial—the trial court conducted a *voir dire* of each juror to determine whether the attack had affected their ability to remain neutral and impartial because of the defendant’s ethnicity. Supp. 12 n1; JTT 19-21, 36-39.

After recounting the testimony over ten pages, the trial court spent approximately two pages addressing the legal analysis. Supp. 13-15. It cited the State Constitution and a series of cases that detailed the trial court’s discretion to dismiss jurors for cause in a pre-trial context. Supp. 13. It then concluded that the jurors were not able to be fair and impartial and that had it known this information it would have excused them for cause. Supp. 13. It also found that “the bias went to the heart of the matter in dispute, the credibility of the complainant.” Supp. 14. Accordingly, it granted the motion for a new trial. Supp. 15.

The State sought and was granted the trial court's permission to file a late motion for reconsideration due to scheduling conflicts for the assistant county attorneys. App. 95-105. It filed a motion for reconsideration on April 17, 2017. App. 105. In its motion, the State argued that the trial court had essentially led the jurors into an ambush where they were forced to testify about deeply personal matters in front a courtroom full of the defendant's supporters. App. 95-105. The trial court had not explained to the jurors why they were being called to testify or that the defendant's supporters and the media would be present.<sup>3</sup> App. 96-100.

At the hearing, the explanation provided to Juror 6 was that the hearing was about how he answered his juror questionnaire. App. 98-99. The trial court inquired about the nature of the sexual assault, including details of the assault itself, and then ordered Juror 6 to submit to further questioning from defense counsel. App. 99. Defense counsel's questioning was confrontational and condescending and lasted for nearly an hour. App. 99. Juror 14 was provided with a similar explanation at the hearing and only became upset after defense counsel began cross-examining her regarding the details of her sexual assault. App. 99.

On June 2, 2017, the trial court denied the motion for reconsideration. Supp. 1-2. The trial court disagreed that the emotional response was based on how the jurors had been treated during the hearing. Supp. 2. Nevertheless, the trial court acknowledged that “[a]lthough one unfortunately cannot undo the past, this judge will always keep in mind

---

<sup>3</sup> Both jurors sent complaints to Chief Justice Tina Nadeau regarding their experience at the February 22, 2017 hearing. App. 107-14. Those complaints were included in the State's pleading. App. 106-14.

the negative impacts [the jurors] suffered from [the] process employed and will seek to minimize any such harm in future proceedings to the extent possible.” Supp. 2.

This appeal followed.

## **SUMMARY OF THE ARGUMENT**

The trial court erred when it ignored well-established case law that set out how trial courts should review claims of juror dishonesty raised post-verdict: by examining whether the jurors had given dishonest answers, what motivated the dishonest answers, and whether it would have excused the jurors considering the correct answers. Instead, the trial court engaged in unsupported speculation and tried to turn back time to determine whether the jurors' prior victimization made them biased against the defendant. This is not an analysis that jurisdictions have widely recognized, if any have recognized this analysis at all. The trial court made no findings regarding the appropriate factors. In fact, to the extent it did make findings, those findings supported denying the defendant's motion because it showed that the trial court credited the jurors' claims that their answers were not dishonest or not motivated by bias against the defendant or a desire to affect the outcome. Accordingly, this Court must reverse.

## ARGUMENT

### **THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER THE JURORS HAD ANSWERED DISHONESTLY AND WHAT MOTIVATED THEIR CHALLENGED ANSWERS AND INSTEAD, ATTEMPTED TO USE HINDSIGHT TO DETERMINE WHETHER IT WOULD HAVE EXCUSED THE JURORS GIVEN THE ADDITIONAL INFORMATION PRESENTED POST-VERDICT.**

Review of alleged juror dishonesty post-verdict does not permit the trial court to use hindsight to recreate the *voir dire* process, but instead, the trial court must look at why the jurors gave the challenged answers and whether their answers were influenced by bias or a desire to affect the outcome of trial. The trial court's analysis was focused on the exact issues it should not have considered: recreating the pre-trial *voir dire* process and focusing its inquiry and analysis on perceived juror bias rather than on the question of whether the jurors answered dishonestly and why they provided the challenged answers when they did not disclose their prior sexual assaults. Both jurors explained that they did not consider their sexual assaults to have been crimes because no one was prosecuted or arrested because of the assaults. The trial court did not consider these explanations but instead determined that the jurors had bias because of the sexual assaults they had experienced as children. This was not the correct analysis to apply, which merits reversal.

Part I, article 35 of the New Hampshire Constitution provides that “[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.”<sup>4</sup> This Court has extended this principle to jurors as well as judges. *See State v. Town*, 163

---

<sup>4</sup> A defendant is not entitled, however, to perfection in the trial process. *See Brown v. United States*, 411 U.S. 223, 231-32 (1973) (“A defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” (Quotation and brackets omitted.)).

N.H. 790, 794 (2012) (“[I]t is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury.”); *State v. Sawtelle*, 66 N.H. 488, 503 (1891). “Generally, a juror is presumed to be impartial.” *Id.* “Indifference or impartiality is not a technical conception. It is a state of mind.” *State v. Weir*, 138 N.H. 671, 673 (1994) (quotation omitted). “A juror is considered impartial if the juror can lay aside her impression or opinion and render a verdict based on the evidence presented in court.” *Town*, 163 N.H. at 794. A juror may reveal subjective bias by an explicit assertion of bias or through the juror’s demeanor. *See Weir*, 138 N.H. at 673-74; *see also State v. Funk*, 799 N.W.2d 421, 435 (Wis. 2011). Because “the trial court’s determination of the impartiality of the jurors selected, essentially a question of demeanor and credibility,” this Court reviews the trial court’s determinations for an unsustainable exercise of discretion. *Weir*, 138 N.H. at 673-74.

In the context of pre-trial examination of jurors where potentially disqualifying information comes to light, RSA 500-A:12, II (2010) provides that “[i]f it appears [after examination] that any juror is not indifferent, he shall be set aside on that trial.” “Once the trial court on *voir dire* has made a determination as to whether a prospective juror is free from prejudice, it is then [this Court’s] duty on appeal to evaluate the *voir dire* testimony of the empanelled jury to determine whether an impartial jury was selected.” *Town*, 163 N.H. at 794 (citations omitted). This Court “will not disturb the trial court’s ruling absent an unsustainable exercise of discretion or a finding that the trial judge’s decision was against the weight of the evidence.” *Id.* This Court has acknowledged that simply being the victim of a crime, even one similar to the charged offense, is insufficient

to disqualify a juror. *Cf. id.* (explaining that in the context of an AFSA trial, the challenged juror had been a victim of sexual assault). Instead, the inquiry turns on whether the juror can “lay aside her impression or opinion and render a verdict based on the evidence presented in court.” *Id.* (quotation omitted).

Considering this, this Court has granted new trials in situations where a juror was empanelled over a pre-trial objection after stating that she could “try” to be impartial.

*See id.* At the same time, this Court has affirmed convictions where a retained juror had potentially “come into the trial with . . . information or impression[s] of the nature of the case,” *Weir*, 138 N.H. at 376, or had initial reservations about being impartial but clarified that she could remain impartial, *State v. Tabaldi*, 165 N.H. 306, 313 (2013). In each of these cases, the key to whether the trial court had sustainably exercised its discretion was whether the juror manifested an ability to remain impartial and judge the defendant based upon the evidence. *See Town*, 163 N.H. at 794; *Weir*, 138 N.H. at 376; *Tabaldi*, 165 N.H. at 313; *see also State v. Cross*, 128 N.H. 732, 737 (1986) (“Although it is clearly within the court’s discretion to excuse a panelist whose answer to the first question indicates a belief that a charge of crime implies some evidence of guilt, disqualification is not required unless the panelist answers the second question by indicating an inability or unwillingness to apply the correct constitutional standards described in the court’s instructions.”).

In the context of a situation where additional information about a juror comes to light after the jury has reached a verdict, the considerations upon review change. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554-556 (1984). In

*McDonough*, the United States Supreme Court addressed the question of whether a party is entitled to a new trial because a juror withheld information during the *voir dire* process that would have led to his disqualification or being struck for cause. *Id.* at 554. The case was a personal injury suit and during *voir dire*, the jurors were asked about “injuries . . . that resulted in any disability or prolonged pain and suffering.” *Id.* (quotation omitted). One juror related a minor incident where his son got his finger caught in a bike chain and another, upon further questioning, acknowledged that her husband had been injured in a machinery accident. *Id.* The juror at issue, however, did not answer affirmatively to the question even though his son had broken his leg in a tire explosion because he did not believe the injury was serious enough to qualify. *Id.* This information was uncovered post-trial and formed the basis for a motion for new trial.<sup>5</sup> *Id.* at 550.

In addressing the varied responses to the *voir dire* question, the Court found that “[t]he varied responses to respondents’ question on *voir dire* testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.” *Id.* at 555. It went on to explain that “[t]o invalidate the result of a 3-week trial because of a juror’s mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give.” *Id.* It explicitly rejected the idea of attempting to “recreate the peremptory challenge process because counsel lacked an item of information which objectively he

---

<sup>5</sup> Given the context of the case, the State presumes that the Court’s rationale was that if the parties had this information either the trial court would have excused the juror or the attorneys would have struck the juror.

should have obtained from a juror on *voir dire* examination.” *Id.* The Court also rejected having the focus of the review “on the bias of the juror and the resulting prejudice to the litigant.” *Id.* at 557-58 (*Brennan*, J. concurring).

It held that “to 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.” *Id.* (emphasis added). It noted that “[t]he motives for concealing information may vary, but *only those reasons that affect a juror’s impartiality* can truly be said to affect the fairness of a trial.” *Id.* at 556 (emphasis added). In later decisions, the Court has indicated that this analysis applies in criminal cases as well. *See United States v. Powell*, 469 U.S. 57, 67 (1984) (citing the analysis in *McDonough* as a basis for obtaining relief after a jury has rendered a verdict).

Since *McDonough*, federal appellate courts have established a binary test that requires the moving party to “show, first, that the juror failed to answer honestly a material *voir dire* question” and then establishing “that a truthful response to the *voir dire* question would have provided a valid basis for a challenge for cause.” *Sampson v. United States*, 724 F.3d 150, 165 (1st Cir. 2013); *see also United States v. Stewart*, 433 F.3d 273, 303 (2d Cir. 2006) (applying a similar test and noting that in the twenty plus years since *McDonough*, the court had never overturned a verdict based upon claims of juror nondisclosure). Additionally, in the United States Court of Appeals for the First Circuit, the “party seeking a new trial based on nondisclosure by a juror must demonstrate actual prejudice or bias.” *Dall v. Coffin*, 970 F.2d 964, 970 (1st Cir. 1992).

Failure to answer a question honestly means more than simply giving a wrong answer on *voir dire*, however; it requires intentionally giving an incorrect answer in a manner that calls into question the jurors impartiality. Federal appellate courts have stuck closely to the language in *McDonough* that instructs them to look to whether the juror's justification for giving an inaccurate answer called into question the juror's impartiality. *See, e.g., United States v. Williams-Davis*, 90 F.3d 490, 503 (D.C. Cir. 1996); *United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994). Simply forgetting or not thinking about a prior victimization is not sufficient to overturn a guilty verdict. *See Gonzalez v. Thomas*, 99 F.3d 978, 984-85 (10th Cir. 1996) (concluding that a trial court had not erred when it found that a juror had not acted dishonestly when she failed to disclose her prior sexual assault when asked if she or anyone in her family had experienced something similar during a trial where the defendant was accused of sexual assault); *Edmond*, 43 F.3d at 473-74 (concluding that the trial court unsustainably exercised its discretion when "it concluded that [the juror's] simple forgetfulness fell within the scope of dishonesty as defined by *McDonough*"). Trivial omissions or errors are not sufficient to overturn a guilty verdict. *See Williams-Davis*, 90 F.3d at 503 (highlighting the trivial nature of the omission when concluding that the trial court unsustainably exercised its discretion when it granted the defendant a new trial).

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 and that intent called into question the juror's impartiality. *See, e.g., State v. Chesnel*, 734 A.2d 1131, 1140 (Me. 1999) (applying *McDonough* to post-verdict claims regarding a

juror's disclosure during *voir dire*) *Commonwealth v. Amirault*, 506 N.E.2d 129, 135 (Mass. 1987) ("But, as *McDonough* makes clear, the crucial inquiry is whether the juror's answer was honest; that is, whether the juror was aware that the answer was false."); *Commonwealth v. Harrison*, 331 N.E.2d 873, 878 (Mass. 1975) ("It would surely be required that the falsehood be not only unmistakable but material and knowing."); *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992) (noting that it had previously ordered the trial court to apply *McDonough* and discussing that analysis); *State v. Mayo*, 945 A.2d 846, 853-54 (Vt. 2008) (applying *McDonough* to post-verdict claims regarding a juror's disclosure during *voir dire*); *State v. Cho*, 30 P.3d 496, 500 (Wash. Ct. App. 2001) (finding that *McDonough* applies in Washington).

Even in jurisdictions that have not adopted *McDonough*, those jurisdictions place a high bar that requires defendants to show, among other things, that bias influenced a juror's incorrect answer on *voir dire*. *See, e.g., State v. Maske*, 591 S.E.2d 521, 526-27 (N.C. 2004) (refusing to grant a new trial to a defendant where a juror had failed to disclose prior victimization because the crime occurred in the past and the juror had forgotten about the crime). For example, North Carolina requires

a party moving for a new trial grounded upon misrepresentation by a juror during *voir dire* [to] show: (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

*Id.* (quotation omitted). The rationale underlying this test is the principle that "an honest mistake by a potential juror [is] less likely to undermine the fairness of a trial than a

deliberate evasion, [and] an intentional misrepresentation is more likely to be a symptom of juror bias.” *Id.*

North Carolina also looks to the totality of the circumstances to determine whether a misrepresentation was influenced by bias. *See State v. Buckorn*, 485 S.E.2d 319, 328 (N.C. Ct. App. 1997). The courts there look to at least three factors to determine whether a juror was influenced by bias

(1) the nature of the juror’s misrepresentation, including whether a reasonable juror in the same or similar circumstance could or might reasonably have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made.

*Id.* Although different in format, these analyses are like *McDonough* and its progeny in what they consider and how they determine whether to grant a new trial.

This Court has cited to *McDonough* with approval in the context of newly disclosed information about jurors, but has not yet held that its two-part test applies under the New Hampshire constitution. *See, e.g., State v. Cannata*, 130 N.H. 545, 548 (1988); *State v. Cross*, 128 N.H. 732, 738 (1986). Given this positive prior reliance on *McDonough* and the application of its principles in other jurisdictions, this Court should adopt its analysis and approach to reviewing post-verdict allegations of juror misconduct. This would require the trial court to determine whether a juror intentionally provided a wrong answer in a manner that calls into question the juror’s impartiality and whether a truthful answer would have given rise to dismissal for cause. *See Sampson*, 724 F.3d at 165.

Yet, should this Court fashion its own analysis, it must look to why a juror gave an incorrect answer during *voir dire*. If bias or a desire to influence the outcome of a trial did not affect the juror's answer to the questions on *voir dire* and the defendant cannot show that he would have had a valid basis to challenge the juror had he received a correct answer, then the trial court cannot grant a new trial.

Here, the trial court ignored the correct framework for reviewing post-verdict allegations of juror dishonesty during *voir dire*: examining the challenged answers and the juror's motivations for providing them. Application of the correct analysis would show that the jurors may not have provided incorrect answers at all, and to the extent they did those answers were not motivated by bias or a desire to influence the outcome of the trial. Thus, the trial court's ruling was error and this Court must reverse.

As a threshold matter, the trial court makes several suspect credibility determinations based the jurors' reasonable reactions to being ambushed by an adversarial proceeding. This was a well-publicized trial and the jury's verdict prompted immediate outcry from certain segments of the public. *See, e.g.*, Jeremy Blackmun, *Child Psychologist Found Guilty of Molesting Boy*, Concord Monitor, June 20, 2016, available at <http://www.concordmonitor.com/Concord-psychologist-guilty-molesting-patient-2914963>; Jeremy Blackmun, *Therapist's Conviction Sends Shockwave through Psychiatric Community*, Concord Monitor, June 26, 2016, available at <http://www.concordmonitor.com/criminal-conviction-highlights-duel-risk-of-therapeutic-setting-2998604>; John V. Kjellman, *My Turn: Is an Innocent Doctor Sitting Behind Bars*, Concord Monitor, August 18 2016, available at <http://www.concordmonitor.com/Case-2998604>.

of-Foad-Afshar-Concord-NH-4038068. In direct response to the jury's verdict, members of the New Hampshire House of Representatives introduced House Bill 106 to make it more difficult to initiate bring sexual assault charges against individuals who have no prior sexual assault convictions.

In the midst of all of this, the trial court summoned Jurors 6 and 14 to appear in court and discuss the case with the trial court. Neither juror had been advised that their testimony would be given in an open courtroom filled with the media and the defendant's supporters. Neither juror had been advised that they would be cross-examined by defense counsel. Neither juror had been advised that they would be asked to recount details of their own experiences with sexual assault for a room full of people. Neither juror had been advised that the details of their sexual assaults would be publically broadcast in the media. *See, e.g., Caitlin Andrews, Jurors from Foad Afshar Trial Recount Deliberations, Concord Monitor, February 23, 2017, available at <http://www.concordmonitor.com/Arguments-for-Foad-Afshar-s-retrial-heard-in-Merrimack-County-Superior-Court-8229132>; Mike Cronin, Psychologist Convicted of Sexual Assault Seeks New Trial, WMUR, February 22, 2017, available at <http://www.wmur.com/article/psychologist-convicted-of-sexual-assault-seeks-new-trial/8966561>.* Rather than holding the hearing in chambers or a sealed courtroom, the trial court exposed the jurors, who it construed as victims, to public harassment and ridicule. *See MHT 57 ("This is humiliating."); RSA 21-M:8-k (2012) (detailing the rights of victims including "[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process").* The trial court then faulted the jurors for becoming defensive or emotional in

response to questioning after having been ambushed. It blamed trauma or bias instead of acknowledging the harm it had inflicted upon jurors who did nothing more than their civic duty. Given the nature of the hearing that occurred, the trial court's conclusions were unsupportable and merit reversal.

The trial court also made a series of suspect findings where it faulted jurors for making reasonable decisions or applied its own speculative psychological analysis that had no basis in the record. For example, the trial court faulted Juror 6 for refusing to meet with the defendant's investigator to discuss deliberations and his personal history. Supp. 5, 10. Absent a court order, nothing requires jurors to discuss their service with investigators for the State, defense, or any other party. Juror 6 explained that he initially declined the interview because he was with his daughter and when he learned he had no obligation to discuss the case with an investigator, he declined further interviews. He exercised his rights, and the trial court used that to make a negative inference regarding his credibility.

Other examples arise when the trial court performs its own psychological analysis of the jurors. Supp. 6, 10, 13-14. It relied upon its own experience to conclude that "people who have suffered sexual assault victimization are generally greatly impacted by the trauma, such that the subject matter is obviously anxiety producing." Supp. 6. From this point, it concluded, without any support in the record, that Juror 6 had still "not come to terms with his own experience, an assault he repressed for some 50 years." Supp. 10. It found that Juror 14 was biased because she had not come to terms with her own victimization. Supp. 13-14. None of these answers has any support in the record. The

defendant did not present any evidence regarding how trauma affects victims or whether victims of sexual assault can remain neutral during a jury trial. The jurors maintained their neutrality and nothing, aside from the trial court's armchair psychology, contradicted that. Accordingly, the trial court's conclusions were unsupportable and warrant reversal.

The trial court's problematic procedure and speculative findings aside, the fact that the trial court applied the incorrect standard supports reversal. Additionally, the trial court's relevant findings, viewed through the lens of *McDonough*, show that it should have denied the defendant's motion for a new trial.

Juror 14 acknowledged that she now believes she was a victim of a crime, but she did not believe that before trial. The trial court credited the testimony as honest, but instead, granted the motion for new trial based upon its own conclusions about the impact of sexual assault and whether that would make Juror 14 a biased juror. These findings focused on what the trial court would have done had it had this information pre-trial. This is not the correct analysis. The trial court did not find, nor did the defendant present evidence, that Juror 14 gave a challenged answer because of bias or a desire to influence the outcome of the trial. In fact, the trial court credited her answer that she was truthful when she did not disclose that she had been a victim of a crime because she was not aware of that fact until after trial. Thus, the trial court's rulings regarding Juror 14 were error and warrant reversal.

The defendant limited his challenge to Juror 6 and the scope of the defendant's motion related solely to whether Juror 6's failure to disclose his prior sexual assault

entitled the defendant to a new trial. At the time the defendant made his motion, he was aware that Juror 6 had told the State's investigator that his business had been robbed in the past. The defendant could have incorporated this into his motion, but he declined to do so. He chose to focus on the sexual assault Juror 6 has experienced. Accordingly, he waived challenges based upon other rationales.

Regarding the sexual assault, Juror 6 acknowledged that he did not consider himself a victim of a crime because he did not realize that a crime had necessarily occurred. The trial court's findings appeared to credit this conclusion, but the trial court went on to incorporate its own experience into its analysis. This experience was not based upon any evidence presented by either party. The trial court also relied upon acts taken by Juror 6 after the trial had ended.<sup>6</sup> Those acts were irrelevant to the question of whether Juror 6 had been dishonest during *voir dire* and what had motivated any such dishonesty.<sup>7</sup> These considerations taint the trial court's conclusion that bias motivated any aspect of Juror 6's decision making, let alone provide an answer to questions that the trial court never sought to answer. Accordingly, the trial court's rulings regarding Juror 6 warrant reversal.

---

<sup>6</sup> These acts related to expressing opposition to a bill introduced in the legislature that would alter the evidence needed to bring a sexual assault charge against an individual who had not been previously convicted of sexual assault. *See H.B. 106, 2017 Sess.* The sponsors of this bill introduced it in direct response to the defendant's conviction. Juror 6's involvement with the trial that led to this bill clearly influenced his opposition to the bill. That involvement had no bearing on the answer's he provided during *voir dire* and were irrelevant for the trial court to consider.

<sup>7</sup> The scope of the hearing and issues raised at the hearing went well beyond the question of *voir dire*, the trial court probed issues that were not raised or addressed in the motion or *voir dire* to reach its conclusions. MHT 31 (State's objection to scope of defendant's questions). Many of these issues were not germane to the question of whether the jurors had answered honestly when they failed to disclose their prior sexual assaults. And, as discussed above, some of the issues related to conduct after trial that has no bearing upon the juror's bias or honesty, pre-trial.

Ultimately, the trial court sought to recreate the *voir dire* process and redetermine whether it would have excused the jurors with the benefit of the hindsight the additional information it uncovered at the hearing provided. This is not the correct inquiry in the context of a post-conviction challenge of juror misconduct. Instead, the trial court needed to determine whether the jurors had answered honestly, in the sense that they were not deliberately withholding information or misleading the court and motivated by bias and doing so, when they answered the questions during *voir dire*. From there, it would determine whether it would have excused those jurors for cause considering that additional information. Then, it would need to determine whether the error actually prejudiced the defendant. The trial court's ruling did none of these things. Accordingly, this Court must reverse.

## CONCLUSION

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

The State requests a fifteen-minute oral argument.

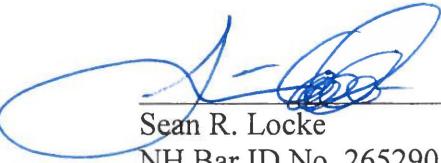
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald  
Attorney General

January 8, 2018



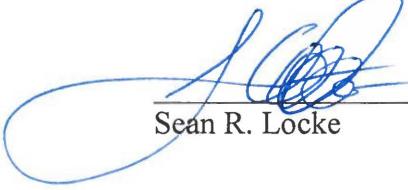
\_\_\_\_\_  
Sean R. Locke  
NH Bar ID No. 265290  
Assistant Attorney General  
Criminal Justice Bureau  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301-6397  
603-271-3671

**CERTIFICATE OF SERVICE**

I, Sean R. Locke, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Theodore Lothstein, Esquire, by first-class mail postage prepaid, at the following address:

Theodore Lothstein, Esquire  
Lothstein Guerriero, PLLC  
3 North Spring Street, Suite 101  
Concord, NH 03301

January 8, 2018

  
Sean R. Locke

**APPENDIX**

Notice of Decision-State's Motion for Reconsideration-June 2, 2017.....	1
Notice of Decision-March 28, 2017.....	3

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT

Merrimack Superior Court  
163 North Main St./PO Box 2880  
Concord NH 03302-2880

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

NOTICE OF DECISION

File Copy

Case Name: **State v. FOAD AFSHAR**  
Case Number: **217-2015-CR-00588**

Enclosed please find a copy of the court's order of May 23, 2017 relative to:

RE: State's Motion for Reconsideration

June 02, 2017

Tracy A. Uhrin  
Clerk of Court

(486)

C: Joseph A. Cherniske, ESQ; Kristin I. Vartanian, ESQ; Theodore M. Lothstein, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

State of New Hampshire

SUPERIOR COURT

v.

Foad Afshar

Docket No. 217-2015-CR-588

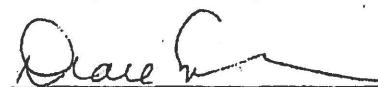
ORDER

The State's motion for reconsideration is denied. The motion raises no facts or points of law that were overlooked or misapprehended, with the exception of the impact the presence of defendant's supporters and his proximity had on the jurors. The court has carefully considered the State's new argument that the emotional presentation of the jurors, and particularly juror 14, resulted from the manner in which the process was conducted. Having done so, the court is not persuaded that its conclusion was erroneous or should be changed. The ultimate decision was based on the totality of the evidence, not just on the demeanor of the jurors.

The court also reviewed the letters from the jurors written to the Chief Justice of the Superior Court. Although one unfortunately cannot undo the past, this judge will always keep in mind the negative impacts they suffered from process employed and will seek to minimize any such harm in future proceedings to the extent possible.

SO ORDERED.

Date: 5/23/2017

  
Diane M. Nicolosi  
Presiding Justice

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT

Merrimack Superior Court  
163 North Main St./PO Box 2880  
Concord NH 03302-2880

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF DECISION**

**File Copy**

Case Name: **State v. FOAD AFSHAR**  
Case Number: **217-2015-CR-00588**

Enclosed please find a copy of the court's order of March 28, 2017 relative to:

Court Order - Motin for New Trial - GRANTED

March 28, 2017

Tracy A. Uhrin  
Clerk of Court

(486)

C: Joseph A. Cherniske, ESQ; NH Department of Corrections; Theodore M. Lothstein, ESQ; New Hampshire State Prison

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

State of New Hampshire

v.

Foad Afshar

Docket No. 217-2015-CR-588

ORDER

On June 17, 2016, Defendant was convicted of one count of Aggravated Felonious Sexual Assault, two counts of Unlawful Mental Health Practice, and one count of Simple Assault. On August 26, 2016, Defendant was sentenced to three to six years, stand committed, at the New Hampshire State Prison for the Aggravated Felonious Sexual Assault.

On January 3, 2017, Defendant filed a motion for a new trial, claiming that he was denied effective assistance of counsel and his right to a fair and impartial jury. On January 30, 2017, the State filed an Assented-to Motion to Bifurcate Issues, which was granted; therefore, this Order will address only the issue of juror misconduct.

The juror issue arose as a result of defendant's post-trial lawyer discovering that two jurors, Numbers 6 and 14, had not disclosed on their juror questionnaires or during jury selection that they had been child victims of sexual assault, which they shared with the other jurors during deliberations. Juror 14 was interviewed by a defense investigator, Rebecca Dixon, and later by a County Attorney investigator, Jennifer Adams, the latter being audio-recorded. The only correction at hearing as to Dixon's

interview was that Dixon reported that the juror had destroyed notes she kept during the trial, but the juror indicated the notes still existed. Neither party requested the notes be viewed or produced. The pleadings reflected one other change to the Dixon report, which is that the juror did not mention God putting her in the position to serve, because she is in fact an atheist, but she did feel she was well-suited to serve in the case because of her natural objectivity. Juror 6 refused an interview with the defense investigator, and then sought advice from the prosecutor as to whether he was required to speak with her. He declined the interview initially with Dixon, because she showed up at his home unannounced and at an inconvenient time. After speaking with the prosecutor, he refused her follow up request for an appointment. This decision to cooperate with the State, but not the defense, was consistent with his somewhat defensive posture when questioned about his possible bias towards victims.

A hearing was held on February 22, 2017, at which both jurors testified. The defense clarified in a letter dated March 15, 2017, in lieu of filing a memorandum on an issue raised by the Court, that the defendant does not complain that the jury may have considered facts not in evidence, the sexual assaults, but contends only that the sharing of the assaults during deliberations provides further evidence that the two jurors should have and would have been excused had their experiences been disclosed to the Court. See Letter from T. Lothstein to the Superior Court Clerk, dated March 15, 2017. Therefore, this Court will limit its consideration to the issue raised.

Both jurors filled out juror questionnaires before selection. In response to the question, "Have you or has any member of your family been the victim of a crime?", both jurors indicated, "No." The Court began jury selection by reading the charges to

the panel, so the prospective jurors would be fully aware of the allegations. The Court reminded the jurors, who had participated in jury selection in weeks prior, that if a juror's name were selected and the juror answered "yes" to any of the questions read to the jury pool, s/he should approach the bench to discuss the answer. 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. The jurors were also advised that counsel conducted *voir dire* would occur after an appropriate number of jurors were qualified to sit, and the jurors would be expected to answer questions posed by the lawyers in open court.

The following question was asked to the entire pool, and then clarified:

Have you or a close member of your family or a close friend ever been a victim of a crime?

And when I ask that question, I don't mean whether somebody has been prosecuted or identified or charged, I just mean have you ever been victimized.

Neither Juror 6 nor Juror 14 approached the bench when his or her name was called. Both specifically answered that they had no "yes" answers to any of the questions when individually asked by the Court, and both said they could be fair and impartial.

The defense claims that the undersigned judge excused every juror that identified himself or herself as a victim of sexual assault, which is not correct. In fact, the second juror called indicated among other things that she had been a victim of child molestation. The undersigned judge posed a follow up question as

as to whether the experience would interfere with her ability to be fair, and the juror was excused when she answered affirmatively. What the record does not reflect is the demeanor of the jurors when they approached the bench. Most times it is obvious that a juror is not capable of serving just by their affect, and there is no need to retraumatize a victim by follow-up questions. The fitness of the jurors was decided on a case-by-case basis. Nonetheless, this Court's experience of almost ten years on the trial bench and many more as a litigator is that people who have suffered sexual assault victimization are generally greatly impacted by the trauma, such that the subject matter alone is obviously anxiety producing. Absent an objection, to be cautious for the defense and State, and to be sensitive to jurors, it is true the Court errs on the side of excusing jurors.

At hearing, Juror 6, the elected foreperson of the jury, noted that he had become friendly with several members of the jury over the course of the almost three-week trial and jury deliberation. He confirmed he had been sexually assaulted by a babysitter when he was approximately five or six years old. The incident stopped only because the babysitter's mother returned home while it was in process. After, the juror did not immediately complain of the assault, but later told his mother that he did not want to go back to that babysitter and she acceded to his request, so the abuse ended. He never explained to his mother or anyone else why he would not go back, and, therefore, no follow up occurred.

Juror 6 explained that he had not remembered the sexual assault until he was fifty-five years old when the perpetrator came into his service station one morning to book an appointment. He is now 64 years old, so it has been almost ten years since he

recovered his "buried" memory. After encountering the perpetrator, he was disabled to the point of not being able to breathe or function for several days. He claimed that his distress was the result of being upset that he had buried the memory, not because of the assault itself, which the Court did not find convincing.

During deliberations, one young male juror was expressing his concern about being able to make the decision whether or not the defendant was capable of committing the charged offense. Juror 14 expressed her view that there was no profile of an offender, and shared that she herself was a victim of sexual assault. Juror 6 then in support revealed that he too had been the victim of a 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. He seemed to have difficulty with the term even applying to him, as though it would be some kind of unacceptable vulnerability. 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. He also indicated 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.

Juror 6, however, 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.

During the hearing, it came to light that Juror 6 had been the victim of numerous other crimes while he owned and operated service stations, which he also did not disclose. In fact, one employee stole a company vehicle, burned a hole in a safe, escaped, and then ultimately was convicted and sentenced to a year in jail. He reported that he was not a victim of that crime either, because it was "the cost of doing business," despite the fact that the perpetrator has been convicted of the crime and jailed. When addressing the reason he did not report his sexual assault, however, he told Investigator Adams that he did not disclose his victimization in part because no one was convicted or found guilty beyond a reasonable doubt. When pressed about not disclosing the thefts, he 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. He indicated that if the judge had asked whether he had been a victim of sexual assault, he would have revealed the childhood incident. He also failed to disclose that he had many friends in law enforcement.

The details provided about the outcome of the theft conflicts his explanation of why he did not come forward to report his victimization as a child: When someone was arrested and convicted of theft, his measure of a crime, he still did not reveal the thefts. He reiterated that he did not consider himself to be a victim of a crime, that being a victim was "not [his] lifestyle." When the Court confronted him with the clarification provided, that it did not matter whether the offending party had been prosecuted, charged or even identified, Juror 6 represented that either he did not hear

think it pertained to him. Despite all of these feelings and actions regarding victims of sexual assault, Juror 6 maintained that he believed he had been fair and impartial during Defendant's trial.

In short, the Court does not find Juror 6 to be credible about his ability to have been fair and impartial, perhaps because he has not come to terms with his own experience, an assault he repressed for some 50 years. 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. This was demonstrated by his refusal to speak with the defense investigator, his aversion to accepting that he is a victim, and by his offense at the use of the term, "alleged," when referring to a complaining witness, which simply reflects the presumption of an accused's innocence unless and until a jury evaluates a witness' testimony and finds guilt. The automatic use of the term "victim" presumes that a person who reports s/he was sexually assaulted is credible. 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.

The Court also notes that the assault Juror 6 describes is quite similar to that described by the youth in the case at bar. Although Juror 6 was much younger, the assault was by a caretaker in a position of authority; a teenager to a 5-6 year old is likely as powerful as an adult to a twelve-year old. Both children did not report

immediately, but refused to return to the situation. The fact that Juror 6's memory was so deeply repressed suggests that it was more traumatic than maybe he recognizes.

Juror 14 testified at the hearing about why she did not report her childhood assault. The decision on Juror 14's impartiality is a much closer call. When Juror 14 was in middle school, she was assaulted by another girl younger than she, whose teenage brother was watching and involved. When the jury questions were propounded, she also said 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. She also told the investigator she did not disclose it because it was "private," and she never shared it with anyone. She did note that her parents called the police regarding the incident, so a formal report was made. She also was interviewed, but she became aware of this only after asking her father. At the hearing, she agreed that she now believes the incident was legally a crime, but did not think of it that way when asked by the Court during selection and would not answer the question differently even in light of the investigation.

Juror 14 acknowledged that when she heard the charges involved in the trial, she thought immediately of her own experience. She knew that the charges were "a big deal" and "wanted to be a part of it." She was excited to be a juror and thought of herself as thinking in "gray areas," having strong morals, and being able to see problems "from a million angles." She was equally concerned with the arriving at the correct outcome for the youth, if he had been victimized, as the defendant, if he did not perpetrate the offense.

During jury deliberations, [she offered that she had been a victim, as did Juror 6, without providing details. She could not recall the context of the discussion. She said "three or four" other people mentioned similar things had happened to them or relatives, including Juror 6, one juror whose niece had been molested, and one who changed her dentist, because she was uncomfortable with his practice of placing instruments on her chest. Juror 14 did not believe her disclosure impacted the discussions, and thought she was just adding to the conversation because she related, as others did, due to her life experience. However, the Court notes that according to Juror 6 it came up in response to another juror's doubt about the defendant's guilt, and whatever the belief, the information aligned the disclosing jurors with the youth in the Afshar case.<sup>1</sup>

Juror 14 was extremely emotional during the questioning at the bench. She did not want to talk about the details of her assault, and shared very little. Because she needed time to compose herself, the Court took a fairly long break and chose to continue the discussion at the bench rather than have her sit in the witness box. She remained upset, but was able to answer questions. Although the Court absolutely believed Juror 14 was honest and perceives herself as neutral, the Court is concerned that the emotional response suggests otherwise. Had she been interviewed prior to

---

<sup>1</sup> The Court has some concern as well that the disclosure may have prompted jurors to go along with the views of Jurors 6 and 14 subconsciously to support them. During the trial our country also suffered a tragedy at a Florida night club that raised an issue about possible prejudice about the ethnicity of the terrorist and defendant, which caused another lengthy delay. This trial was long, with lots of interruptions that left the jurors together. Jurors bond during emotionally difficult trials, which this one was. "Due process does not require a new trial every time a juror has been placed in a potentially compromising situation." State v. Rideout, 143 N.H. 363, 365-66 (1999) (citing Smith v. Phillips, 455 U.S. 209, 217 (1982)). "When a juror is exposed to extraneous information sufficiently related to the issues presented at trial, a presumption of prejudice is established, and the burden of proof shifts to the State to prove that the prejudice was harmless beyond a reasonable doubt." State v. Lamy, 158 N.H. 511, 522-23 (2009). However, the defense has chosen not to raise this issue. Therefore, it was not factually or legally explored, and the Court makes no ruling on it.

selection and presented as she did at the post-trial hearing, the Court would have excused her for cause.

Part I, Article 35 of the New Hampshire Constitution states, "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." The same impartiality is required of jurors. State v. Town, 163 N.H. 790, 793 (2012). "Generally, a juror is presumed to be impartial." Id. at 794. "A juror is considered impartial if the juror can lay aside her impression or opinion and render a verdict based on the evidence presented in court." Id. "When a juror's impartiality is questioned, however, the trial court has a duty to determine whether the juror is indifferent." Id. "If it appears that any juror is not indifferent, he shall be set aside on that trial." RSA 500-A:12, II; Town, 163 N.H. at 794. "Indifference or impartiality is not a technical conception. It is a state of mind." State v. Weir, 138 N.H. 671, 673 (1994). The New Hampshire Constitution "provides at least as much protection as the Federal Constitution on this issue" so the Court will only consider this issue under the New Hampshire Constitution, using federal cases only for guidance. State v. Tabaldi, 165 N.H. 306, 313 (2013) (citing Weir, 138 N.H. at 673).

For the reasons discussed above, the Court concludes that Jurors 6 and 14 were not "impartial as the lot of humanity will admit." The Court recognizes that a person who has been offended in a similar way as a complainant can be fair and neutral, See Town, 163 N.H. at 794, but this is not the case with the jurors at issue, most particularly Juror 6. 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.

The Court wants to be clear that a post-trial decision such as this is not an easy one. The Court is cognizant that the trial was very difficult for the youth and his family. The complainant was aggressively cross-examined for days, and was forced to testify to his story many times in excruciating detail and in response to questions that were repetitive, sometimes confusing, and followed by constant often insulting commentary. The Court does not hold any view that the two jurors were untruthful in a willful manner, nor does it express any opinion as to the correctness of the verdict. The Court believes both jurors intended to do their sworn duty. Sometimes, however, intention and capability are not joined, which the Court finds true in the case. The integrity of our legal system, for a defendant, a victim and our community, requires confidence in the verdict, delivered by fair and neutral people, who could objectively base a decision on the evidence, free of bias that cannot be set aside.

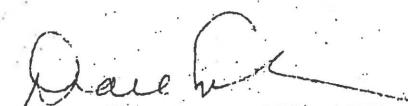
The juror misconduct in this case is not similar to the misconduct addressed in State v. Gordon, 141 N.H. 703, 707 (1997), where a juror looked up the criminal statute at issue in a library, or State v. McLain, 2016 N.H. Lexis 47, where a juror failed to disclose a connection to law enforcement, but the law enforcement testimony was limited and on an undisputed issue. In both cases, the jurors were not recalled, because the trial judge concluded the misconduct could not have effected the verdict. Gordon, 141 N.H. at 506; McLain, 2016 N.H. Lexis 47 \*2. In this case, the 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

Court concludes that justice was not done, and the equities require a new trial. See RSA 526:1.

Defendant's Motion for a New Trial is GRANTED. All of Defendant's convictions resulting from the jury's verdicts are vacated. The post-trial bail order is vacated, and the pretrial bail order is reinstated. The audio-tape of the County Attorney investigator is sealed, as are the jury questionnaires, which are made part of the record. A status conference will be scheduled after thirty (30) days.

**SO ORDERED.**

Date: 3/28/2017

  
Diane M. Nicolosi  
Presiding Justice