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TEXT OF RELEVANT STATUTES

159:21 Possession by Felons Prohibited. – Any person who has been convicted of a felony in this or any other state who possesses an electronic defense weapon away from the premises where he resides shall be guilty of a class B felony. Neither the whole nor any part of a sentence of imprisonment imposed for a violation of this section shall be served concurrently with any other term of imprisonment.

159:20 Self-Defense Weapons Defined. – In this subdivision:
I. "Electronic defense weapon'' means an electronically activated non-lethal device which is designed for or capable of producing an electrical charge of sufficient magnitude to immobilize or incapacitate a person temporarily.

500-A:12 Examination. –
I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:
(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.
II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

606:3 Challenges; Defendant. – Every person arraigned and put on trial for an offense may, in addition to challenges for cause or unless he stands wilfully mute, peremptorily challenge:
I. 20 jurors for capital murder.
II. 15 jurors for murder in the first degree.
III. 3 jurors in any other case.

QUESTIONS PRESENTED

1. Whether the trial court erred when it admitted unfairly prejudicial photographs that were irrelevant for any purpose other than propensity?

Issue preserved by Defendant's Motion in Limine, I, defense argument, State's objection, and trial court's ruling. A 23-59; T 75-77.*

2. Whether the trial court erred when it admitted testimony that the "buy money" was recovered from Tabaldi?

Issue preserved by defense objection, State's response, and trial court's ruling. T 145-48, 214-16.

3. Whether the State presented sufficient evidence to prove the charges of possession by felons prohibited – electronic defense weapon and possession of a narcotic drug?

Issue preserved by defense motion to dismiss, State's objection, and trial court's ruling. T 453-64.

4. Whether the trial court erred in denying Tabaldi's challenge for cause of prospective juror H.S.?

Issue preserved by defense objection and trial court's ruling. T 30-32.

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* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"T" refers to the consecutively-paginated transcript of the jury trial held from November 14, 2011 through November 18, 2011; and
"NOA" refers to the Notice of Appeal.

STATEMENT OF THE CASE

A Rockingham County Grand Jury indicted Matthew Tabaldi on one count of sale of a narcotic drug, two counts of possession of a narcotic drug (one alleging cocaine and the other alleging crack cocaine), one count of possession by felons prohibited – electronic defense weapons, one count of receiving stolen property, one count of possession of a controlled drug with intent to sell, and one count of felon in possession of a deadly weapon. T 92-94; A 1, 5, 9, 13, 17. The crimes were alleged to have occurred on March 25, 2009. T 92-94; A 1, 5, 9, 13, 17. Tabaldi stood trial (Lewis, J.) during the week of November 14, 2011. T 1, 57, 180, 382, 536. At the close of trial, the jury found Tabaldi not guilty on the charges of possession of a controlled drug with intent to sell and felon in possession of a deadly weapon. T 539; A 21-22. The jury found Tabaldi guilty on the remaining five charges. T 539; A 2, 6, 10, 14, 18.

On two charges, the trial court sentenced Tabaldi to a total of 6 to 12 years at the State Prison, stand committed. A 3, 19. Three additional sentences of 3 ½ to 7 years were suspended for ten years upon Tabaldi's release from the State Prison. Each of these three sentences would run consecutively to the stand committed charges and to each other if they are ever imposed. A 7, 11, 15.

STATEMENT OF THE FACTS

On March 25, 2009, Heather Taylor was the target of a drug investigation conducted by the State Police Narcotics Investigation Unit ("NIU"). T 119-20, 129-30. Police suspected that Taylor was transporting large quantities of heroin and cocaine into New Hampshire. T 184.

Law enforcement officers planned for Amy Paradise, a confidential informant, to go to Taylor's residence in Rochester, accompany Taylor to her drug source in Massachusetts, and then purchase drugs from Taylor. T 129-132. Paradise was working as a confidential informant for the NIU because she had engaged in previous unrelated criminal activity and was attempting to avoid criminal charges. T 187, 189. Due to her background, officers did not fully trust her. T 189, 191, 193, 327-28.

At approximately 9:00 a.m. that day, three officers met with Paradise in a parking lot prior to the planned controlled buy. T 133, 185. Sergeant Ellen Arcieri, the field supervisor of the NIU, searched Paradise for money and contraband. T 133, 294, 296-97. Arcieri found neither, although she did not ask Paradise to remove her clothes, nor did she examine Paradise's undergarments. T 297, 329. Trooper Bryan Trask searched Paradise's vehicle for money and contraband. T 133. He likewise found neither. T 133. Trask then provided Paradise

with $300.00 in currency, the serial numbers of which had been previously recorded. T 133.

At approximately 11:40 a.m., Paradise drove to Taylor's residence, went inside, and remained there for approximately an hour to an hour and a half. T 133-34. Paradise did not wear a body wire or a camera. T 138, 193-94. While Paradise was inside Taylor's residence, the focus of the investigation changed to Matthew Tabaldi. T 135.[1] Paradise and Taylor then left Taylor's residence, although Paradise was not searched again. T 135, 199-200.

Instead of driving to Massachusetts as planned, Taylor and Paradise went to 22 Post Green Road in North Hampton, a residence shared by Tabaldi and Kenneth Vaillancourt. T 135, 238-39, 317. They arrived shortly after 2:00 p.m. T 200. At approximately 2:43 p.m., Paradise left the residence and drove to meet Trask at a predetermined location. T 138-39, 200, 284. She produced a small bag containing three grams of cocaine. T 139-40, 143. Paradise no longer had the $300.00. T 139.

After Paradise left 22 Post Green Road, Tabaldi and Taylor left in a gray BMW leased by Vaillancourt. T 143, 253, 285, 298-99. Arcieri arranged to have uniformed troopers stop the car. T 144, 299. When stopped, Tabaldi was in the driver's

[1] The record is unclear as to precisely how or why this change came about.

seat and Taylor was in the front passenger seat. T 143, 300. Both were taken into custody and taken to the Greenland Police Department, as was the car. T 144, 299. Trask applied for search warrants for the car, for the residence at 22 Post Green Road, and for Tabaldi and Taylor themselves. T 144, 148, 299, 301.

Inside the car, police found several items. A cigarette pack with a quantity of crack cocaine in it was found between the driver's seat and the center console. T 355-57. Seized from inside the glove box were Tabaldi's wallet, as well as approximately $4000.00 in a Bank of America envelope. T 312, 314. A black case with a Patriot's logo containing drug paraphernalia was found under the driver's seat. T 359-60. A scale was found in a canvas guitar case behind the driver's seat. T 439.

A computer bag containing two laptop computers that appeared to be Tabaldi's was found under the back passenger seat. T 149, 152, 162. The bag also contained drug paraphernalia, T 149, 155-58, Malitol powder (which can be used as a cutting agent), T 161, a composition book with various writings inside, the cover of which indicated "Matthew Tabaldi's usernames and passcodes," T 153, and paperwork addressed to Tabaldi. 152-53. Also in the bag was what Trask referred to as a "Taser." T 158-161.

Additionally, two other backpacks and a purse were found. T 323-24. The purse was Taylor's, and it contained a number of items, including drug paraphernalia, crack pipes, brass knuckles, and a digital scale. T 325, 352. A crack pipe was also found in the pocket of a jacket that was on the front passenger seat. T 353.

When police went to 22 Post Green Road to execute the search warrant, they learned that Vaillancourt had just gone to the Greenland Police Department to pick up Taylor. T 330. He returned to the residence and unlocked the door for the police. T 330.

During the search, a duffle bag containing marijuana was found behind a detached garage. T 330. Police believed that the bag had just been moved to that location, as the bag was room temperature despite the cold weather. T 331. Inositol powder, which could be used as a cutting agent, and unused needles were found in a kitchen cabinet. T 307, 309. An empty laundry bottle containing used hypodermic needles was found on the floor of the detached garage. T 310.

Various items of drug paraphernalia were found in Tabaldi's bedroom. T 361-64. Also, white powder was found on a desk in Tabaldi's bedroom, and this was scraped into a baggie. T 365. It later tested positive for cocaine. Id. Also in Tabaldi's bedroom, in the trash can, was a catalog about growing

marijuana, although the catalog had no pictures of marijuana in it. T 366, 377.

A Marlin rifle was found, wrapped in Hefty bags, in Vaillancourt's bedroom. T 331. Also found in Vaillancourt's bedroom was a scale of the type used for weighing marijuana. T 333.

On August 20, 2009, Tabaldi met with Trask and Arcieri at the State Police barracks in Epping. T 171, 319. Tabaldi admitted that he bought the Marlin rifle and that he knew it was stolen when he bought it. T 173, 204, 230. While Tabaldi identified two people that he had sold drugs to in the past, T 319-20, he never admitted that he sold cocaine to Paradise. T 204.

On October 2, 2011, Trask listened to a recorded phone call between Tabaldi and Taylor. T 174. The phone call referred to drug dealing "on the date in question." T 175. In the call, Tabaldi said that "We had to stick around to sell to that girl." T 175. Trask later expressed doubt as to whether Tabaldi used the word "we" or "I," T 176, and then indicated that Tabaldi did use the word "I." T 233; see also T 237. Taylor replied "Don't be hating me. Don't be hating me." T 176, 235-37. Tabaldi then replied "Don't – I'm in here. I'm in here a long time for this." T 176, 237.

At trial, the parties stipulated that the Marlin rifle found in Vaillancourt's bedroom was stolen, that the owners did not know Tabaldi, that the Marlin rifle was a deadly weapon, and that it was functioning properly. T 449-450. The parties further stipulated that Tabaldi was a convicted felon. T 449. Neither Paradise nor Taylor testified at trial.

SUMMARY OF THE ARGUMENT

1. The trial court erred when it admitted two photographs, as they were not relevant for any purpose. Even if relevant, any probative value was substantially outweighed by the danger of unfair prejudice. Moreover, the pictures were not admissible under New Hampshire Rule of Evidence 404(b). Thus, this Court must reverse.

2. The trial court erred when it permitted testimony identifying Tabaldi as the person from whom the "buy money" was recovered. The testimony was inadmissible hearsay, and its admission violated the confrontation clause of both the State and federal Constitutions. Thus, this Court must reverse.

3. The State failed to present sufficient evidence that the object that was presented to the jury was in fact an electronic defense weapon. Moreover, the State failed to present sufficient evidence that Tabaldi constructively possessed crack cocaine. Thus, this Court must vacate the convictions of "possession by felons prohibited – electronic defense weapons" and one charge of possession of a narcotic drug.

4. The trial court erred by not excusing a prospective juror for cause when that prospective juror expressed clear reservations about her ability to remain impartial. Thus, this Court must reverse.

I. THE TRIAL COURT ERRED WHEN IT ADMITTED UNFAIRLY PREJUDICIAL PHOTOGRAPHS THAT WERE IRRELEVANT FOR ANY PURPOSE OTHER THAN PROPENSITY.

The trial court erred when it admitted two photographs that unfairly prejudiced the jury. Accordingly, this Court must reverse.

When the search warrant was executed at 22 Post Green Road, a photograph was found tucked into the frame of a mirror in Tabaldi's bedroom. T 75, 366; A 57 (State's exhibit 16). The photograph depicts Tabaldi, wearing a white t-shirt and baseball cap. He is sitting in a car, leaning back and holding fanned-out currency in his right hand. A 57. Police documented its location by taking a photograph of it *in situ*. T 75-6, 367-68; A 59 (State's exhibit 65). Depicted in the police photograph is State's exhibit 16 - the photograph of Tabaldi - as well as two photographs depicting his son. T 76; A 59.

Defense counsel moved to exclude these two photographs. A 24, 27-28.[2] He argued that the photographs were not relevant under New Hampshire Rule of Evidence 401, and that they therefore should have been excluded under Rule 402. A 27-28. Further, counsel argued that the photographs would also be inadmissible under Rules 403 and 404(b). A 28.

[2] In Defendant's Motion in Limine I, the photographs are incorrectly identified as item (t). However, the body of the argument clearly refers to the pictures at issue here.

> The State objected, arguing that the photographs were
>
> relevant to the charges the defendant faces related to drug-dealing and is also evidence that proves the defendant's occupancy of the bedroom in question, a material issue in a case where the possession charges at issue must be proven by circumstantial evidence.

A 53. After hearing argument, the trial court admitted the evidence. T 59, 75-77.

"Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Town, 163 N.H. 790, 795 (2012)(citations and quotations omitted). "Evidence that is not relevant is inadmissible." Id. (citation omitted). "The admissibility of evidence is committed to the sound discretion of the trial judge, and such a ruling will not be disturbed on appeal unless there has been an unsustainable exercise of discretion." State v. Cook, 148 N.H. 735, 741 (2002)(citation omitted). "To show an unsustainable exercise of discretion, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." Town, 163 N.H. at 795 (citation omitted).

Here, the photographs were not relevant to any issue actually in dispute. There was no testimony regarding when the photograph of Tabaldi was originally taken, where it was taken, or who took it. Moreover, there was no testimony as to the

origins of the currency in the photograph. Tabaldi never denied that there were two bedrooms at 22 Post Green Road, that he and Vaillancourt each occupied one of the bedrooms, or that the room in which the photograph was found was his bedroom. T 75, 111, 115, 240-41, 243-44, 271, 361, 363, 429, 476, 483, 501-03. Moreover, documents belonging to Tabaldi were found in his bedroom. T 367.

Even if marginally relevant, the two photographs were inadmissible under Rule 403. This rule states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.H. R. Ev. 403. In examining the scope of Rule 403, this Court has noted that

> [e]vidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Unfair prejudice is not, of course, a mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.

State v. Cassavaugh, 161 N.H. 90, 98 (2010)(citation omitted).

Defense counsel expressed concern that the State would focus on the photographs to urge the jury that Tabaldi was a drug dealer. T 76. Defense counsel's concern was well-founded. In its closing argument, the State emphasized the importance of the photographs:

> There are even photographs of him in that bedroom, it's clearly his bedroom, this Defendant holding large amounts of money. Someone who's got all the indicia of a drug selling operation, taking fun pictures of himself with large amounts of cash. What do you think he's doing out of that room? Selling drugs.

T 502. The prejudice was manifest. The *in situ* photograph captured, in addition to the original photograph of Tabaldi holding money, two other photographs of Tabaldi's son. T 76, A 59. The juxtaposition of images in this photograph served to elicit a sense of sympathy for the child who was somehow connected to an alleged drug dealer, and to provoke the jury's instinct to punish Tabaldi in an effort to protect the child. Cf. Cook, 148 N.H. at 741. As any probative value of the photographs was substantially outweighed by the danger of unfair prejudice, the photographs should have been excluded under Rule 403.

The photographs were likewise inadmissible under New Hampshire Rule of Evidence 404(b). This rule states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes,

> such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

N.H. R. Ev. 404(b). As this Court has explained,

> [t]he purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs. . . . Thus, in order for evidence to be admissible under Rule 404(b), it must be relevant for a purpose other than proving the defendant's character or disposition; there must be clear proof that the defendant committed the act; and the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant.

State v. Davidson, 163 N.H. 462, 469 (2012)(citations and quotations omitted).

> To admit evidence over a defendant's Rule 404(b) objection, the State is required to state the specific purpose for which the evidence is offered and articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity.

Id. (citation and quotations omitted). "The trial court then must articulate for the record the theory upon which the evidence is admitted." State v. Glodgett, 144 N.H. 687, 690-691 (2000)(citation and quotations omitted). "Whether the court adopts the State's theory, a variation, or an alternative, the court must explain precisely how the evidence relates to the disputed issue, without invoking propensity." State v. McGlew, 139 N.H. 505, 510 (1995).

The first prong of the Rule 404(b) analysis is whether the photographs were relevant for a purpose other than proving Tabaldi's character or disposition. As explained previously, the photographs were not relevant. Nevertheless, the State's closing argument embraced the photographs, apparently as evidence of Tabaldi's propensity to sell drugs. T 502. The State did not articulate a precise chain of reasoning justifying the admission of the photographs under Rule 404(b). However, the State's argument in the trial court seemed to be that because (1) Tabaldi held money at some point in the past, (2) someone took a photograph of him holding the money, and (3) the photograph was hung up in his bedroom, then one must conclude that Tabaldi is predisposed to deal drugs. T 502. This is an inferential leap that relies solely on propensity.[3]

The second prong of the Rule 404(b) analysis is whether there is clear proof that Tabaldi committed the act. It is conceded that Tabaldi apparently posed for the photograph, and the photographs depict him holding money. However, there is no proof as to any "act" beyond what is depicted in the photographs. No nexus was ever established between the photographs and drug-related activity. Specifically, there was

[3] The State also argued that the photographs were relevant to prove "the defendant's occupancy of the bedroom in question." A 53. As noted above, however, this was not an issue that was genuinely disputed.

no proof that the money Tabaldi held in the photographs was related to drug sales. Moreover, there was no proof as to when the original photograph was taken. T 75 (defense counsel pointing out defendant's youth in the photographs).

The third prong of the Rule 404(b) analysis is whether the probative value of the photographs is substantially outweighed by its prejudice to Tabaldi. This is similar to the test for admissibility under Rule 403. See, e.g., State v. Belonga, 163 N.H. 343, 360 (2012). As previously explained, the photographs should have been excluded under the third prong as well.

As the photographs were inadmissible under New Hampshire Rules of Evidence 401, 402, 403, and 404(b), this Court must reverse.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED TESTIMONY THAT THE "BUY MONEY" WAS RECOVERED FROM TABALDI.

The trial court erred when it permitted testimony identifying Tabaldi as the person from whom the "buy money" was recovered. The testimony was inadmissible hearsay, and its admission violated the confrontation clause of both the State and federal Constitutions. As the admission of this testimony was improper, this Court must reverse.

Before Paradise went inside Taylor's residence, Trask provided Paradise with $300.00, the serial numbers of which had been previously recorded. T 133. Paradise later left Taylor's residence, drove to 22 Post Green Road with Taylor, and went inside. T 135, 199-200, 238-39, 317. When Paradise exited that residence, she had a small bag of cocaine, but no longer had the $300.00. T 139-40, 143.

The charge of sale of a narcotic drug alleged that Tabaldi sold the cocaine to Paradise. A 1; T 92, 524-525. Paradise did not wear a body wire or a camera, so there was no recording of the events inside each of the two residences. T 138, 193-94. Neither Taylor nor Paradise testified at trial.

In an effort to connect the "buy money" to Tabaldi, the State asked Trask, "When the defendant is seized, is anything of note or any currency discovered on his person?" T 145. Defense counsel objected that the question called for a hearsay

response, because Trask was not the officer who booked Tabaldi, and therefore did not have independent knowledge to support the answer. T 145. Defense counsel also asserted Tabaldi's right to cross-examine the State's witnesses. T 145 ("And we have the right to confirm [sic] any adverse witnesses that were there as officers."). The trial court overruled the objection, and permitted the testimony that Trask was told that someone had taken the "buy money" from Tabaldi. T 147, 214. Defense counsel renewed his objection, and was again overruled. T 147-48. The State elicited this testimony once more, and the trial court again admitted the testimony over defense counsel's objection. T 214-216.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.H. R. Ev. 801(c). The testimony of Trask that the $300 in "buy money" was recovered from Tabaldi was offered to prove the truth of the matter asserted. Thus, the statement was hearsay. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority." N.H. R. Ev. 802. As there was no exception that justified the admission of the challenged testimony, it should have been excluded. See N.H. R. Ev. 803, 804. This Court "review[s] a trial court's rulings on the admissibility of

evidence under an unsustainable exercise of discretion standard, and [will] reverse only if the defendant demonstrates the rulings are clearly untenable or unreasonable to the prejudice of his case." State v. Connor, 156 N.H. 544, 546 (2007) (citation omitted).

Here, the testimony was critical to the State's case, because without it, the jury would not have known that the buy money was found on Tabaldi. Without it, the jury could have reasonably concluded that the $300 was found in the car, either as part of the sum found in the glove box or elsewhere. In turn, the jury could reasonably have concluded that it was Taylor, and not Tabaldi, who conducted the sale.

Moreover, the State relied on the testimony during its closing argument. T 497 (defense counsel's objection to a slideshow which "says as a fact that the money was found on Tabaldi."), 500 (State's argument that "$300 in buy money, let's be clear, was obviously found with the Defendant as part of the $582 that he had on him," "The only person that conducted that sale is sitting right over there. That's why he had the $300 in buy money."). The erroneous admission of the testimony was clearly untenable or unreasonable to the prejudice of Tabaldi's case.

Admission of this testimony was likewise prohibited by the confrontation clause of the federal and State constitutions.

The Sixth Amendment to the United Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. The New Hampshire Constitution likewise provides that "[e]very subject shall have a right . . . to meet the witnesses against him face to face. . . ." N.H. CONST. pt. I, art. 15.

"A witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) (citation omitted). Here, the officer who actually recovered the "buy money" did not testify at trial. The record does not reveal that the officer was unavailable or that Tabaldi had a prior opportunity to cross examine the officer.

"Although the United States Supreme Court has modified its Confrontation Clause analysis, see Crawford v. Washington, 541 U.S. 36 (2004), [the New Hampshire Supreme Court has] not adopted . . . Crawford under the State Constitution." State v. Ata, 158 N.H. 406, 409 (2009) (citation omitted). The State constitutional analysis is thus confined to the standard under Ohio v. Roberts, 448 U.S. 56 (1980). Id.

> Under the Roberts standard, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. If a witness is determined to be unavailable, a prior statement may be admitted if it bears adequate indicia of reliability. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. (citations and quotations omitted). Here, the State did not demonstrate the unavailability of the officer, the statement did not fall within "a firmly rooted hearsay exception," and there was no showing of "particularized guarantees of trustworthiness."

The testimony should have been excluded under New Hampshire Rules of Evidence 801 and 802 and under the confrontation clauses of both the State and federal Constitutions. Accordingly, this Court must reverse.

III. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE RELATIVE TO THE CHARGES OF POSSESSION BY FELONS PROHIBITED – ELECTRONIC DEFENSE WEAPON AND POSSESSION OF A NARCOTIC DRUG.

To prevail on appeal when challenging the sufficiency of the evidence, "[t]he defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Fandozzi, 159 N.H. 773, 782 (2010)(citation omitted). Since Tabaldi opted to put on a case after the denial of his motion to dismiss, this Court must view the entire trial record to determine whether the evidence was sufficient to support the conviction. State v. Shepard, 158 N.H. 743, 745 (2009). Moreover, "[w]hen the evidence presented to prove an element of the offense is solely circumstantial, that evidence 'must exclude all rational conclusions except guilt.'" State v. Duguay, 142 N.H. 221, 225 (1997)(citing State v. Laudarowicz, 142 N.H. 1, 5 (1997)); see also State v. Wilmot, 163 N.H. 148, 154 (2012).

a. There was insufficient evidence as to the charge of possession by felons prohibited – electronic defense weapon.

The State failed to present sufficient evidence that the object presented to the jury was in fact an electronic defense weapon. Thus, this Court must vacate the conviction of "possession by felons prohibited – electronic defense weapon."

Trask testified that he found a device that he referred to as a "Taser" inside the black computer bag that was found underneath the rear passenger seat of the car driven by Tabaldi. T 149-50, 152, 158. The relevant exchange between the State and Trask is as follows:

> Q: Okay. And there's one final item there. Can you explain to what that is and hold it up so we can make sure everyone can see it?
>
> A: Yes. This is a Taser. Again, this --

T 158. At this point, defense counsel objected to the officer's characterization of the device as a Taser. T 158 ("[The jury] has to decide whether or not it's an actual electronic defense weapon. There's no validation for [Trask] to say that it's a Taser.") The trial court overruled the objection, and the testimony continued:

> Q: And that, just so we're clear, I -- you yourself carry a Taser, I imagine?
>
> A: Yes.
>
> Q: As part of your work?
>
> A: Yes.
>
> Q: Okay. That obvious -- what's in front of us here is part of State's 6 obviously differs from the weapon you carry?
>
> A: Correct.
>
> Q: Okay. But when you characterized it as a Taser, did you take a look at it all on the day you discovered it -- on the day you found it back on March 25th of 2009?

A: I did. I actually activated it.

Q: What happened when you activated it?

A: When I activated it, there were blue sparks that arched between the two electrodes, both here and here and here and here. Depending on you use it, there would be electricity that would flow from one side to the other side.

Q: And you could see that?

A: I could see that.

Q: Okay.

A: And you could hear the crackling of the electricity going back and forth.

Q: Okay. And how does it appear to be powered?

A: By a nine-volt battery.

Q: Okay. And this was obviously some time ago that this was discovered. As far as you're aware, is the battery still working or is it out?

A: No, it's dead at this point.

Q: Okay. Okay. And if we can here, let's put this back in 6. Thank you.

T 160-61. The trial court thereafter denied defense counsel's motion to dismiss the charge at the close of the State's case. T 453-54, 462-64.

RSA 159:21 sets forth the definition of this crime:

> Any person who has been convicted of a felony in this or any other state who possesses an electronic defense weapon away from the premises where he resides shall be guilty of a class B felony. Neither the whole nor any part of a sentence of imprisonment imposed for a violation of this section shall be served concurrently with any other term of imprisonment.

RSA 159:21. An "electronic defense weapon" is defined as

> an electronically activated non-lethal device which is designed for or capable of producing an electrical charge of sufficient magnitude to immobilize or incapacitate a person temporarily.

RSA 159:20, I.

Thus, whether an object is an electronic defense weapon turns in part on its capability or design. There was no testimony that the device was capable of producing an electrical charge of "sufficient magnitude to immobilize or incapacitate a person temporarily." The State pointed out, undoubtedly correctly, that "the legislature didn't want to force us to have to shock people with one of these to prove this element at trial." T 458.

Certainly, this variant of the definition would include situations where an electronically activated non-lethal device was actually employed to incapacitate or immobilize another person at some point before trial. "It is proper to presume that the legislature was aware of the difference between . . . words and chose to use them advisedly . . . ." City of Concord v. State, ___ N.H. ___ (decided August 31, 2012)(slip op. at 23-24)(citation and quotation omitted). Nevertheless, there was no way for the jury to conclude what the device's actual capabilities were.

Furthermore, there was no testimony that the device was designed for producing an electrical charge of "sufficient magnitude to immobilize or incapacitate a person temporarily." Although Trask called the device a "Taser," no definition of the word "Taser" was ever provided to the jury. Moreover, Trask acknowledged that the device was different from the tool he carries in his line of work. There was no testimony about what his Taser was designed to do, or how it differed from the device displayed to the jury. The State did not introduce any owner's manual, maintenance manual, or operator's manual for the device, nor did the State elicit any testimony about the design specifications of the device.

The jury never learned how much voltage or amperage was required to incapacitate or immobilize a person. While the jury learned that the device appeared to be powered by a nine-volt battery, there was no testimony as to if or how such a power source could generate sufficient voltage or amperage to immobilize or incapacitate someone. Likewise, there was no way to determine whether the device was non-lethal. T 454 (defense counsel's argument). The jury did learn that the device produced sparks when activated, but the capability of those sparks was left to conjecture.

As the evidence was insufficient to permit the jury to conclude beyond a reasonable doubt that the device was an

electronic defense weapon as defined by RSA 159:20, I, this Court must vacate the conviction.

b. There was insufficient evidence of the charge of possession of a narcotic drug.

The circumstantial evidence that the State advanced to establish that Tabaldi constructively possessed the crack cocaine inside the cigarette box did not exclude all other rational conclusions consistent with innocence. Therefore, this Court must vacate this conviction of possession of a narcotic drug.

Trooper Richard Spaulding testified that he participated in the search of the car. T 355. During the search, he found a Newport cigarette box located between the center console and the driver's seat. T 355, 371-72. The box contained a substance that later tested positive for crack cocaine. T 356-57. No direct evidence linked Tabaldi to the cigarette box. At the close of the State's case, defense counsel moved to dismiss this charge, arguing that the evidence of possession was insufficient. T 453. The Court subsequently denied the motion. T 464.

This Court has stated that

> [t]o gain a conviction for possession of a controlled substance, the State must prove beyond a reasonable doubt that a defendant: (1) had knowledge of the nature of the drug; (2) had knowledge of its presence in his vicinity; and (3) had custody of the drug and exercised dominion and control over it. If the drug

> was not in the defendant's physical possession when the police found it, the State must prove constructive possession.

State v. Turmelle, 132 N.H. 148, 155 (1989) (citations and quotations omitted). "A conviction for illegal possession may be based upon evidence that [drugs], while not found on the person of the defendant, [were] in a place under his dominion and control. . . ." State v. Nickerson, 114 N.H. 47, 52 (1974) (citation and quotations omitted). Nevertheless, "[w]hen more than one person occupies the premises where drugs are found, mere proof that a defendant is one of those occupants is insufficient to prove his constructive possession." State v. Smalley, 148 N.H. 66, 69 (2002) (citation omitted).

Here, the evidence could have just as likely supported the conclusion that the cigarette box, and thus the crack cocaine, belonged to Taylor. While the car was leased by Vaillancourt, he permitted both Tabaldi and Taylor to drive it. T 254, 266. Vaillancourt denied that the crack cocaine was his, T 255, but he admitted that he smoked menthol cigarettes, and he acknowledged that Newport cigarettes are menthol. T 272.

The original target of the investigation was Taylor, and she was in the front passenger seat of the car when it was stopped. T 129-30, 300. Plastic tubes that were suspected of being crack pipes were found on the front passenger seat and inside a jacket that was on the passenger seat. T 447. A purse

was also found in the car, and a search of the purse revealed drug paraphernalia including crack pipes. T 324-25. Taylor also claimed that two other backpacks in the car were hers. T 323.

Taylor did not testify at trial. Tabaldi made no statements regarding ownership of the cigarette box or its contents. As pointed out by defense counsel, there was no evidence that Tabaldi was even a cigarette smoker. T 453; see also Smalley, 148 N.H. 66 (evidence of constructive possession sufficient where cocaine was found in close proximity to a pack of cigarettes that was the same brand smoked by defendant). No fingerprint evidence was admitted that tied the cigarette box to Tabaldi. No witness testified that the crack cocaine found in the cigarette box was owned by Tabaldi. Moreover, there was no testimony regarding the origins of the crack cocaine or the specific identity of the person who placed the box in the crevice between the center console and the driver's seat.

As the evidence was insufficient to permit the jury to conclude beyond a reasonable doubt that Tabaldi possessed the crack cocaine inside the cigarette box, this Court must vacate the conviction.

IV. THE TRIAL COURT ERRED IN DENYING TABALDI'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR H.S.

During the jury selection process, prospective juror H.S. explained that she was concerned that Tabaldi was a convicted felon. When asked if she could put that concern aside, she indicated that she would "do [her] best." The trial court erred by not excusing H.S. for cause. Accordingly, this Court must reverse.

When H.S.'s name was called during the jury selection process, the following exchange took place at the bench:

> H.S.: Oh, yes. Good afternoon, Your Honor. I would like to think that I am able to be fair and impartial but – I guess I think of myself as kind of a straight and narrow person, and hearing that a gentleman in the defendant's chair is a convicted felon[4] just makes me a little – somewhat concerned for the charges brought against him.
>
> The Court: Well, but that's the challenge.
>
> H.S.: I understand.
>
> The Court: That's why you were told that in advance and --
>
> H.S.: Yeah.
>
> The Court: -- I'm glad you're coming forward, but you need to put that aside.

[4] At the beginning of the jury selection process, the jury venire was told: "Now, you will hear in this case that Mr. Tabaldi is a convicted felon. Will this factor cause you to believe that it is more likely that he committed the crime – criminal acts charged?" T 26. His felony status was announced to the jury as a stipulation during trial. T 449.

H.S.: Okay. I will do my best.

The Court: That's all we can always ask.

H.S.: Okay.

The Court: And you're going to hear about this, but you're going to need to expressly and affirmatively be able to say to me that's -- I'm not trying this case on the basis of someone's reputation or his past.

H.S.: Yes, sir.

The Court: Whether or not the State has proven the case here, beyond a reasonable doubt.

H.S.: Okay.

The Court: So you need to be focused in on the evidence here.

H.S.: Yes, sir. Okay.

The Court: You can do that?

H.S.: Yes, sir.

The Court: Please be seated in the jury box.

Defense counsel: Your Honor? . . .

I think -- you know, she said that she would do her best. That's not that she's able to do so; it means she'll try. But I think that because she has those reservations in her, and they seem to be pretty deeply rooted, that she should be struck for cause.

The Court: I didn't think so deeply rooted it required a conversation. I think she assured me that she – she will do what is right and ignore that to the agreeable (indiscernible). Thank you.

T 30-32. After the initial jury panel was selected, H.S. was struck while the parties were exercising their peremptory challenges. T 52. The defense exhausted all three of its peremptory challenges. T 52-53.

The Sixth Amendment to the United States Constitution and Part I, Articles 15, 17, 21, and 35 of the New Hampshire Constitution guarantee the right to a fair and impartial jury. U.S. CONST. amend. VI; N.H. CONST. pt. I, arts. 15, 17, 21, and 35; see also State v. Town, 163 N.H. 790, 793 (2012) (Part I, Article 35 provision for judicial impartiality equally applicable to jurors). This Court has reiterated this principle: "It 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. Addison, 161 N.H. 300, 303 (2010) (citations omitted).

"Ordinarily, a juror is presumed impartial." State v. Rideout, 143 N.H. 363, 365 (1999) (citation omitted). "When a juror's impartiality is questioned, however, the trial court has a duty to determine whether or not the juror is indifferent." Id. (citation omitted). "If it appears that any juror is not indifferent, he shall be set aside on that trial." RSA 500-A:12, II (emphasis added). The standard of review on appeal is whether the trial judge's decision was against the weight of the

evidence or whether it amounted to an unsustainable exercise of discretion. Town, 163 N.H. at 794 (citation omitted).

Here, H.S. expressed concern that Tabaldi was a convicted felon. T 31. When told by the trial court to set aside her feelings, H.S. responded that she would "do [her] best." T 31. The trial court responded that "[t]hat's all we can always ask." T 31. H.S. expressed her concern about Tabaldi's status as a convicted felon, and, in so doing, she revealed her concerns regarding her ability to remain impartial.

Once H.S. revealed her concerns, the trial court had a duty to determine whether or not she could be truly impartial. Where the possibility of juror bias arises, "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976) (citation omitted). The trial court did not question H.S. about her bias, but did seem to attempt to elicit an "express[] and affirmative[]" response from H.S. regarding her ability to remain impartial. T 31. While the trial court appeared to direct H.S. to disregard Tabaldi's "reputation" or "past," the record does not clearly reveal that H.S. was in fact able to remain impartial. T 30-32. When the issue was raised by defense counsel, the trial court did not feel that it "required a conversation." T 32. In view of H.S.'s entire *voir dire*, her indication that she would "do

[her] best" was insufficient to establish that she could "lay aside her impression or opinion and render a verdict based on the evidence presented in court." State v. Weir, 138 N.H. 671, 676 (1994)(citation and brackets omitted).

Moreover, in this case, Tabaldi was statutorily entitled to exercise three peremptory challenges, in addition to his challenges for cause. RSA 606:3. As noted previously, he exhausted all of them.

As the Supreme Court of Kentucky has observed,

> prejudice is presumed, and the defendant is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause. When a defendant does exhaust all of his peremptory challenges, he has been denied the full use of peremptory challenges by having been required to use peremptory challenges on jurors who should have been excused for cause.

Shane v. Commonwealth, 243 S.W.3d 336, 339 (Ky. 2007)(citation omitted). Other states are in accord. The Supreme Court of Louisiana has held that "[p]rejudice is presumed when a district court erroneously denies a challenge for cause and the defendant ultimately exhausts his peremptory challenges." State v. Dorsey, 74 So.3d 603, 623 (La. 2011); see also People v. Macrander, 828 P.2d 234, 244 (Colo. 1992).

As the trial court erroneously denied Tabaldi's cause challenge to H.S., this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Tabaldi respectfully requests that this Court vacate his convictions of possession by felons prohibited – electronic defense weapon and possession of a narcotic drug (crack cocaine). Further, Mr. Tabaldi respectfully requests that the remaining convictions be reversed.

Undersigned counsel requests 15 minutes of oral argument before a full panel of this Court.

Respectfully submitted,

_____
James B. Reis, #14236
Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

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

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301

_____
James B. Reis, #14236

DATED: October 15, 2012