**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2022-0433, State of New Hampshire v. Richard Ellison, the court on January 14, 2026, issued the following order:**

The court has reviewed the written arguments and the record submitted on appeal, has considered the oral arguments of the parties, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(3). The defendant, Richard Ellison, appeals his conviction of reckless second degree murder for causing the death of the victim in a December 2005 house fire in Concord, see RSA 630:1-b, I(b) (2016). On appeal, the defendant argues that the Superior Court (Kissinger, J.) erred in: (1) restricting cross-examination of a witness; and (2) admitting certain expert opinion testimony of a forensic video analyst. The defendant also asserts that the trial court may have erred in not disclosing records the trial court reviewed in camera. We conclude that the trial court did not err in restricting cross-examination, and that any purported error in admitting the expert opinion testimony was harmless beyond a reasonable doubt. Having reviewed the records examined in camera by the trial court, we find no error in its decision not to disclose additional records. Accordingly, we affirm.

I. Factual and Procedural Background

The jury could have found the following facts. In the early morning hours of December 9, 2005, Concord police and firefighters responded to a fire at a duplex on North State Street, across from the New Hampshire State Prison for men. Firefighters extracted the owner of the duplex, an elderly disabled man, from one side of the duplex. He later died from burns suffered in the fire.

On the date of the fire, Stephen Carter resided on the other side of the duplex. The victim had an agreement with Carter that, in lieu of rent, Carter would take care of the victim and the house. Carter purchased a cell phone for the victim into which Carter entered his phone number and the phone numbers of the victim's children, friends, doctors, and other contacts. The victim kept his phone at his bedside. After the victim suffered a stroke in November 2005, he lost his ability to speak, was bedridden, and required care around the clock.

For a few months in the summer of 2005, Carter let the defendant live in the finished basement on Carter's side of the duplex in exchange for helping Carter with maintenance and repair projects. After the defendant's girlfriend,

Robin Theriault, moved in with the defendant, Carter told them they needed to leave because the victim had not agreed to let two people live in the basement. Thereafter, the defendant and Theriault moved between hotels and the homes of friends, and slept in Theriault's car. Eventually, they moved in with Theriault's sister, who had an apartment on Loudon Road in Concord.

On the evening of December 8, the victim was running a low-grade fever and Carter was not at home. Shortly after midnight on December 9, while patrolling the perimeter of the prison, two corrections officers saw a fire at the duplex. Upon arriving at the scene, both smelled gasoline and observed that there was a clear linear fire in a hallway on Carter's side of the duplex. Other first responders who arrived at the scene smelled gasoline coming from the building. Based upon these observations and other evidence, experts called by the State at trial opined that the fire had been intentionally set in Carter's kitchen by a person using a gasoline jug and that the fire spread through the hallway and then throughout the victim's side of the duplex.

On December 26, 2005, the victim's cell phone was found in a puddle of water by a path near the apartment building in which the defendant and Theriault were living at the time of the fire.

Sometime after the fire, the defendant and Theriault moved out of her sister's apartment. In January 2006, Theriault and the defendant committed robberies in Concord, and sometime thereafter, Theriault and the defendant moved to Berlin, New Hampshire. In December 2006, the defendant told the police that he and Theriault had committed the Concord robberies, and the police then arrested Theriault. While she was being interviewed by the police about the robberies, Theriault mentioned the fire, and suggested that the defendant might have been involved. Following a lengthy investigation, the State charged the defendant in 2018 with first and second degree murder for causing the death of the victim in a house fire. The defendant stood trial in 2021, but during jury deliberations the court declared a mistrial.

The defendant was tried again in April and May 2022. Over the course of the twenty-nine day trial, the State presented testimony from a number of firefighters, police officers, lay witnesses, and experts. The jury found the defendant not guilty of first degree murder, but guilty of second degree murder for recklessly causing the death of the victim by starting a fire at the victim's residence that resulted in his death. This appeal followed.

## II. Analysis

According to the defendant, at the 2022 trial, the defendant disputed that the fire was arson, suggesting, through cross-examination of the State's witnesses, that the fire could have resulted from an interaction between the oven's pilot light and gas vapors from a fuel jug Carter stored in his kitchen.

He also disputed the State's claim that he started the fire. On appeal, the defendant argues that the trial court erred when it limited defense counsel's live cross-examination of Matthew York and admitted certain opinion testimony from a forensic video analyst, and that the trial court may have erred in not disclosing information contained in records the trial court reviewed in camera.

A. Cross-Examination of Matthew York

The State called a number of witnesses to testify about statements the defendant had made to them. One of those witnesses, York, had traveled from Florida to testify and was called on the tenth day of the twenty-nine day trial. York had been housed at the same dormitory as the defendant at the Coos County House of Corrections in 2006, and had testified at the defendant's 2021 trial. When called at the 2022 trial, York testified that due to a traumatic brain injury he suffered in 2013, he was unable to recall much about the time he spent incarcerated with the defendant, and was unable to identify the defendant in the courtroom.

The State sought to refresh York's memory by asking him to review, among other things, a transcript of his testimony from the 2021 trial. When that proved unsuccessful, the State moved to introduce York's testimony from the 2021 trial. Over the defendant's objection, the trial court ruled that York's testimony from the prior trial was admissible under an exception to the rule against hearsay because York was unavailable. See N.H. R. Ev. 804(a), (b)(1). Following that ruling, defense counsel argued that the defendant was entitled to present his cross-examination as he wished, and

> that would be to cross Mr. York in front of this jury, who has the opportunity to see him answer the questions under oath, to be able to judge his demeanor, his candidness, his pauses, and I think that this jury has the right and the ability to do so. And to limit us, when Mr. York is physically here, to being able to present that, and to be able to present it perhaps in a more cohesive, coherent way so that it is understandable and digestible by this jury that has to cast this decision -- if the State gets to choose how it's going to present Mr. York's testimony, I think it's only fair that the Defense had the opportunity to present its case and be able to ask Mr. York questions as well.

Thereafter, the trial court ruled that the defendant would be allowed to ask York some questions, but that his "request to do a full-on sweeping cross-examination of Mr. York in front of this jury is denied."

Following this ruling, defense counsel asked to delay cross-examining York until after the presentation of York's prior testimony. In response, the State noted that it did not know whether that would be "feasible . . . in the

sense that [York had] driven up from Florida," that he was taken out of order because he was present that day, and that there were "some other issues trying to put together the audio and have it redacted properly for the jury to hear," which would take "a couple . . . of days." The trial court denied defense counsel's request, York returned to the courtroom, and defense counsel cross-examined him. Defense counsel asked York about his memory regarding his testimony from the first trial, a conversation he had with the police in 2007, and the conversation York "supposedly had" with a person at the Coos County House of Corrections. Defense counsel also asked York about his inability to identify the defendant in the courtroom that day, and at the 2021 trial. Defense counsel also elicited York's testimony that he was on parole until 2028 and that his presence in the courtroom was compelled.

An audio recording of York's direct and cross-examination testimony from the 2021 trial was played to the jury fifteen days later, on the twenty-first day of trial. In that recorded testimony, York stated that the defendant had admitted to him that the defendant "and his girlfriend burnt the house down across the street from the prison," that "a guy in a wheelchair . . . died in there," and that he had been in the house to "[s]teal[] some coins or something like that." York also testified that the defendant had said that he had "beat[en] the man [who] . . . was in his bed or something like that or he didn't find what he was looking for." He also claimed not to remember much else about his conversation with the defendant, and gave a general description of the defendant, but could not identify him in the courtroom.

On appeal, the defendant contends that the trial court erred when it limited the scope of his cross-examination of York and required it to occur before the State presented York's 2021 testimony. We review these evidentiary rulings for an unsustainable exercise of discretion. See State v. Alwardt, 164 N.H. 52, 60 (2012). We will reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. State v. Gross-Santos, 169 N.H. 593, 598 (2017). When determining whether an evidentiary ruling constitutes a proper exercise of judicial discretion, we consider whether the record establishes an objective basis sufficient to sustain the discretionary judgment. Id. The defendant bears the burden of demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

The defendant argues that the trial court's ruling regarding the scope of cross-examination was unreasonable because "[n]o consideration justified the court in limiting the live cross-examination" of a witness who had not invoked a privilege or otherwise refused to answer questions, had not been deemed incompetent, and who was physically present and willing to testify. We disagree. New Hampshire Rule of Evidence 403 authorizes a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of, among other things, undue delay, wasting time, or needless

presentation of cumulative evidence. See N.H. R. Ev. 403. This rule contemplates the principle that there are circumstances that may justify the exclusion of evidence even when the evidence is "not otherwise specifically inadmissible." N.H. R. Ev. 403 Reporter's Notes. In addition, New Hampshire Rule of Evidence 611 provides, in part, that a trial court "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence." N.H. R. Ev. 611(a).

We conclude that the trial court did not unsustainably exercise its discretion when it limited the live cross-examination of York because the trial court could have reasonably concluded, as the State asserts, that allowing the defendant to ask York more questions would likely have resulted in York simply repeating that he could not remember. Any additional live testimony would therefore have been needlessly cumulative. York was reluctant to testify at both trials, he had little memory in 2022 of the substance of his 2021 testimony, and he claimed to recall less in 2022 than he did at the 2021 trial.

At oral argument, defense counsel stated that trial counsel was trying to "foster an indelible impression that York was not worthy of belief," and that, to do so, "they needed the jury to see him as well as hear him." The defendant argues that because the jury did not see, but only heard, the full cross-examination, it did not have the opportunity to "see enough of him to know not to believe him." We disagree. The jury had the opportunity to see, as well as hear, from York. The trial court did not preclude the defendant from conducting live cross-examination of York in 2022, but simply limited the scope of that cross-examination. The defendant does not contend that he was deprived of a full and fair opportunity to cross-examine York at the 2021 trial. The audio recording of the 2021 cross-examination combined with the limited cross-examination of York in 2022 provided the defendant a full and fair opportunity to argue to the jury why it should give little weight to York's testimony.

Furthermore, while it might have been preferable for the defendant to cross-examine York after his 2021 testimony was played for the jury, the court could have concluded based on the State's proffer that it would have taken "a couple . . . of days" for the State to redact York's 2021 testimony so that it could be played for the jury, which would have required York to remain available for an indeterminate number of days until after the testimony was played. As we have noted, York was a reluctant witness who had been compelled to travel from Florida to testify. Given the circumstances, we cannot conclude that the trial court's ruling allowing York's 2021 trial testimony to be played after his limited live cross-examination was untenable or unreasonable. See Gross-Santos, 169 N.H. at 598.

B. Expert Opinion Testimony of the Forensic Video Analyst

The State called Grant Fredericks, a certified forensic video analyst, as an expert witness. Fredericks worked for a business that examined video evidence for criminal and civil trials. As the defendant acknowledges, the essential aim of Fredericks' testimony was to demonstrate that a car was parked outside of the duplex for a short time just before the fire started and that the car's appearance was consistent with that of Robin Theriault's car.

Prior to trial, the defendant moved to preclude the State from introducing the expert testimony, arguing that certain of the expert's opinions were inadmissible. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-94 (1993); Baker Valley Lumber v. Ingersoll-Rand, 148 N.H. 609, 614 (2002) (adopting Daubert standard under New Hampshire Rule of Evidence 702); see also RSA 516:29-a (2021) (codifying the Daubert standard). Following a five-day evidentiary hearing, the trial court denied the motion.

At trial, Fredericks testified that he had examined surveillance videos obtained from cameras at two locations: the state prison and a gas station approximately a mile south of the prison. Based upon his analysis of the videos and experiments he conducted, Fredericks opined that: (1) lights that appeared in the prison video were consistent with the headlights of a sedan; (2) the headlights appeared at 11:59:45 p.m. on the night of the fire, stopped in front of the duplex in the northbound lane, facing southbound, disappeared, and then reappeared at 12:20:46 a.m.; (3) the headlights of the vehicle began to move, traveling southbound; (4) smoke appeared at the duplex almost immediately after the vehicle left; (5) a vehicle that appeared in the gas station video shortly thereafter was "consistent in class" with a two-door Ford Escort; and (6) based on a "traffic pattern analysis," the vehicle that appeared on the gas station video was "consistent with the traffic pattern of the position of the vehicle that left the front of the . . . [duplex]." Fredericks acknowledged on cross-examination that he did not know if the car at the gas station was the same car that had stopped in front of the duplex. He allowed that it was possible that the car that had appeared in front of the duplex could have turned onto another street before reaching the gas station, and also that it was possible that another car could have turned into traffic and then appeared at the gas station.

The defendant acknowledges that both the testimony describing the work the expert performed, and the images he created, including those obtained from the prison and gas station surveillance videos, were admissible. He objects only to the opinion testimony that "purported to provide objective support for the State's theory that [the defendant] was in Theriault's car at [the victim's] house just before the fire started." The defendant argues that the trial court erred in admitting Fredericks' opinions about the consistency of the cars in the images because: (1) to the extent that the opinions depended upon a

claim of expertise in comparing images with each other, that claim was not based on sound methodology under the RSA 516:29-a, II factors; and (2) the opinions amounted to statements about whether the two images contained visible dissimilarities and therefore were unhelpful, as a jury could itself compare the images. The State disputes both arguments, and, alternatively, argues that any error was harmless beyond a reasonable doubt. Because we agree with the State that any error was harmless, we need not decide whether the trial court erred by admitting the opinion testimony. See State v. Papillon, 173 N.H. 13, 28 (2020).

To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict. State v. Boudreau, 176 N.H. 1, 11 (2023). This standard applies to both the erroneous admission and exclusion of evidence. Id. To determine whether the State has proved beyond a reasonable doubt that the error did not affect the verdict, we must evaluate the totality of the circumstances at trial. Id. at 11-12. In making this determination, we consider a number of factors, including but not limited to: (1) the strength of the State's case; (2) whether the admitted or excluded evidence is cumulative or inconsequential in relation to the strength of the State's case; (3) the frequency of the error; (4) the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; (5) the nature of the defense; (6) the circumstances in which the evidence was introduced at trial; (7) whether the court took any curative steps; (8) whether the evidence is of an inflammatory nature; and (9) whether the other evidence of the defendant's guilt is of an overwhelming nature. Id. at 12. No one factor is dispositive, and not all factors may be implicated in a given case. Id. In light of the nature of the defense and given: (1) the strength of the State's case; (2) that the other evidence of the defendant's guilt is overwhelming; and (3) that the testimony was not inflammatory in nature, we conclude beyond a reasonable doubt that any error in admitting the expert testimony did not affect the verdict.

At trial, the defendant disputed both that the fire was arson and that he was the arsonist. The evidence overwhelmingly established that the fire was not accidental. Multiple police officers and firefighters who responded to the scene testified that there was a strong odor of gasoline. The State also presented the testimony of experts, one of whom explained that he ruled out accidental causes for the fire and concluded that the fire was started by igniting gasoline in the kitchen on Carter's side of the duplex which then traveled down the hallway and into the side of the duplex occupied by the victim. The defense sought to advance its theory that the fire was an accident only through cross-examination of the State's witnesses, suggesting that the fire could have resulted from ignition by the oven's pilot light of gas vapors from a fuel jug the defense posited Carter had stored in the kitchen. This was a theory explicitly rejected by the State's expert, and the defense provided no expert testimony to support its alternative theory.

The evidence that the defendant was the arsonist was likewise overwhelming. Several witnesses provided testimony in support of this conclusion. One of the lay witnesses, Robin Theriault, testified at the defendant's first trial in 2021, but died before the second trial. Her testimony was played for the jury at the second trial. She testified that on the night of the fire she and the defendant were watching movies in their bedroom at her sister's apartment, when she fell asleep. When she awoke, both the defendant and the keys to her Ford Escort were missing. She fell asleep again, but awoke when the defendant returned. Theriault testified that the defendant seemed very shaken up and smelled like gasoline. According to Theriault, the defendant also possessed a cell phone that had contact information in it for Carter and the victim.

Theriault also testified that in response to her questions, the defendant said that he went to Carter's house to retrieve his belongings and also to see if Carter had any money there because he believed Carter owed him money. The defendant told her that he took Carter's cell phone and some roofing shovels and "an array of different things." According to Theriault, the defendant also stated that he "pour[ed] fuel around the back side of the house" and started a fire to "cover up his tracks," that he "saw flames shoot up as he was driving away," and that "he didn't think that the house would've caught on fire and gone up like it did from what he had lit on fire." The defendant told Theriault that it was a "mistake," wondered aloud why he could not control himself, and later expressed remorse.

Theriault testified that because the defendant's clothes and shoes smelled like gasoline, she and the defendant put them in a trash bag, drove to a remote road where they had slept while they were homeless, and buried in the snow the clothes along with some other items the defendant had taken from Carter's home. Theriault was unable to recall whether the defendant buried roofing equipment he had taken from the home, but testified that when she and the defendant moved to Berlin, the defendant brought the roofing equipment with them. After the defendant and Theriault broke up, Theriault gave the equipment to a friend. Theriault also testified that the defendant discarded the cell phone after they returned to her sister's apartment, by throwing it out onto the street.

Theriault's testimony was corroborated by testimony and other evidence presented at the 2022 trial. Theriault's sister testified that the defendant left the apartment the night of the fire and returned later that night, carrying Theriault's keys. The victim's cell phone was later found near Theriault's sister's apartment, near where Theriault testified the defendant threw the cell phone he had taken from the duplex that the defendant had identified as Carter's. Another witness testified that sometime after the fire the defendant told him that he had some roofing jacks to sell and the witness traveled with the defendant to a place in the woods to check on them. And yet another

witness testified that when Theriault moved in with him in Berlin in the spring of 2006, she brought roof rakes with her which she later left with him.

York testified that the defendant confessed to burning the house down across the street from the prison, that "a guy in a wheelchair . . . died in there," and that he had "beat[en] the man [who] . . . was in his bed or something like that." The testimony regarding the beating of the victim was corroborated by the testimony of the medical examiner who conducted the victim's autopsy, who testified that three of the victim's ribs were fractured.

Theriault's testimony supporting that the defendant was the arsonist, and York's testimony that the defendant admitted he was the arsonist, were corroborated by two other witnesses. An acquaintance who met the defendant in Berlin in 2006 testified that she had a series of conversations with the defendant during which he expressed concern that Theriault would "dime him out," and that he would go to prison for life. While the defendant did not tell the acquaintance exactly what he had done, the defendant conveyed that he went in a house, got money, and set the house on fire. Additionally, a witness who had an intimate relationship with the defendant in 2006 testified that the defendant had told her that he could not return to Concord because he had hurt someone and could go to prison for life.

Considering the factors set forth in Boudreau, we conclude that any error in admitting the opinion testimony was harmless beyond a reasonable doubt. See Boudreau, 176 N.H. at 11-12. The State's case was strong, the evidence of the defendant's guilt was overwhelming, and the challenged testimony was not inflammatory in nature. See id. We conclude that the State has proven beyond a reasonable doubt, based upon the totality of the circumstances, that admission of the testimony did not affect the verdict. See id.

C. Documents Reviewed In Camera

Lastly, we address the defendant's argument that the trial court may have erred in failing to disclose certain emails exchanged between the forensic video analyst expert and the Attorney General's Office. The State withheld a number of emails from the discovery disclosed to the defense, citing the work-product doctrine, and filed a motion asking the trial court to review the emails in camera. The trial court reviewed the emails in camera and issued an order ruling that some should be disclosed to defense counsel, and others kept under seal. The defendant asks that we review the materials examined by the trial court and withheld from the defense to determine whether any document or portion of any document should have been disclosed.

Work product "is not beyond pretrial discovery." State v. Chagnon, 139 N.H. 671, 674 (1995). "The determination whether to compel disclosure of work product is a matter for the trial court, which should consider the reasons

which motivate the protection of the work product of the lawyer together with the desirability of giving every plaintiff and defendant an adequate opportunity to prepare his case." Id. As the defendant notes in his brief, we have long held that "reports obtained by a lawyer from his experts are almost always considered to be part of his work product." State v. Drewry, 139 N.H. 678, 682 (1995) (quotation and brackets omitted). However, we have also recognized that "[f]actual information in an expert's report is not privileged." Id. Therefore, "[a] report that merely analyzes facts and renders an opinion as to what occurred without reflecting or discussing the theories, mental impressions, or litigation plans of the . . . attorneys should not be considered work product." Id.; see also State v. Jette, 174 N.H. 669, 676-77 (2021) (notes taken by New Hampshire State Police Laboratory employee were work product not subject to disclosure).

We have reviewed the records at issue with these principles in mind. We conclude that the trial court did not err when it ruled that certain of the emails were properly withheld from the discovery disclosed to the defense pursuant to the work-product doctrine.

For the foregoing reasons, we conclude that the trial court did not err in limiting the defendant's live cross-examination of York, that any purported error in admitting the expert opinion testimony was harmless beyond a reasonable doubt, and that the trial court did not err in ruling that certain emails exchanged between the expert and the Attorney General's Office were properly withheld from the defense. Any issues raised in the notice of appeal but not briefed are deemed waived. See State v. Blackmer, 149 N.H. 47, 49 (2003).

Affirmed.

DONOVAN, COUNTWAY, and GOULD, JJ., concurred.

**Timothy A. Gudas,**
**Clerk**