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THE SUPREME COURT OF NEW HAMPSHIRE

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Grafton  
Case No. 2024-0509  
Citation: State v. Rosen, 2026 N.H. 15

THE STATE OF NEW HAMPSHIRE

v.

RICHARD ROSEN

Argued: December 18, 2025  
Opinion Issued: April 9, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Sam M. Gonyea, assistant attorney general, on the brief and orally), for the State.

Hinckley, Allen & Snyder LLP, of Manchester and Boston, Massachusetts (Michael J. Connolly and Cassandra T. Desjourdy on the brief, and Michael J. Connolly orally), for the defendant.

DONOVAN, J.

[¶1] The defendant, Richard Rosen, appeals his conviction, following a jury trial, for voting in more than one state. See RSA 659:34-a (2016). The defendant argues that the Superior Court (MacLeod, J.) erred by: (1) allowing

the State to introduce evidence of his voting history; (2) precluding him from introducing evidence pertaining to an alleged third-party perpetrator; and (3) denying his motion for a Richards hearing, see State v. Richards, 129 N.H. 669 (1987). He also challenges post-trial rulings of the Superior Court (Bornstein, J.) denying: (1) his motion to dismiss based upon lack of territorial jurisdiction; and (2) his motion for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict. Although we conclude that the trial court properly denied the defendant's post-trial motions, we further conclude that the trial court erred by admitting evidence of the defendant's voting history and excluding evidence of the alleged third-party perpetrator. Accordingly, we reverse and remand.

### I. Facts

[¶2] The jury could have found, or the record otherwise reflects, the following facts. The defendant, who maintained residences in both Holderness, New Hampshire and Belmont, Massachusetts, was charged with allegedly voting in both New Hampshire and Massachusetts in the November 8, 2016 general election.

[¶3] Prior to trial, the State filed a motion in limine seeking to admit records of the defendant's voter registration and voting history in both states. The defendant objected on the ground that the proposed evidence would serve no purpose other than to show a propensity to commit the crime charged. Following a hearing, the trial court ruled that historical evidence of the defendant's voter registration and voting records was admissible.

[¶4] The State also moved to preclude evidence relating to William Botelho, an acquaintance of the defendant who had previously worked at the defendant's Belmont property. During multiple interviews, Botelho had admitted to voting in the defendant's name in Belmont during prior elections. The State posited that the defendant intended to use Botelho's statements to assert an alibi defense for which the defendant had failed to provide notice. The defendant disputed the State's characterization of Botelho's statements as alibi evidence and, instead, asserted that Botelho's statements constituted evidence of an alternative perpetrator. The defendant further contended that Botelho's statements were admissible and requested a Richards hearing to address Fifth Amendment issues relating to Botelho's potential testimony. The State responded that even if Botelho's statements constituted alternative perpetrator evidence, the defendant had failed to provide notice of his intent to admit New Hampshire Rule of Evidence 404(b) prior bad acts evidence.

[¶5] The trial court ruled that the evidence relating to Botelho was inadmissible propensity evidence under Rule 404(b). The court also determined that the defendant had failed to comply with the notice provisions

set forth in the New Hampshire Rules of Criminal Procedure. Therefore, it granted the State's motion to exclude Botelho's statements and denied the defendant's motion for a Richards hearing.

[¶6] At trial, Belmont town clerk Ellen Cushman testified about Belmont's voter registration and election procedures. Cushman testified that the defendant's name was checked off on the November 8, 2016 voter checklist, indicating that the defendant received a ballot on election day in Belmont. Another checklist indicated that the defendant had cast his vote by placing the ballot in the voting box. Cushman acknowledged that, if a person has active voter registration status in Massachusetts, there is no requirement that the voter present photo identification when checking in to vote.

[¶7] The State also called Ellen King, who worked as the Holderness town clerk during the November 2016 election. King testified that the defendant requested an absentee ballot at Holderness town hall on November 3, 2016 and that she assisted the defendant with filling out his ballot because she noticed that he was "having issues with his eyesight." King also testified that Holderness secured completed absentee ballots in a safe until counting them on election day. She further testified that the defendant's name was checked off on the town's voter checklist, which noted that the defendant voted by absentee ballot in the November 2016 general election.

[¶8] The jury also heard testimony regarding the State's investigation into the defendant's conduct. The State's investigator testified that the State had identified the defendant through its participation in an interstate program that compiles states' voter databases for the purpose of identifying potential duplicates and irregularities. The investigator also testified that during an interview, the defendant stated that he was legally blind and explained that, although he had previously voted in both New Hampshire and Massachusetts, he never voted in both states during the same election.

[¶9] After the State rested, the defendant moved to dismiss the charge, arguing that New Hampshire lacked territorial jurisdiction because any allegedly unlawful conduct occurred in Massachusetts. He also moved for a directed verdict based upon the insufficiency of the evidence. The trial court denied the motion for a directed verdict and reserved ruling on the motion to dismiss pending the jury's verdict.

[¶10] The jury returned a verdict of guilty. The defendant thereafter moved for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict. The trial court denied the defendant's motion to dismiss and his motion for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict. This appeal followed.

## II. Analysis

### A. Defendant's Voting History

[¶11] We first consider whether the trial court erred by allowing the State to introduce evidence of the defendant's voting history under Rule 404(b). We review challenges to the trial court's evidentiary rulings under our unsustainable exercise of discretion standard. State v. Warren, 177 N.H. 196, 207 (2025), 2025 N.H. 5, ¶35. For the defendant to prevail under this standard, he must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case. Id. When applying our unsustainable exercise of discretion standard of review, we determine only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. Id. Because the trial court ruled on the admissibility of the challenged evidence before trial, we consider only the arguments and evidence presented at the pretrial hearing. Id.

[¶12] "The purpose of Rule 404(b) is to ensure that an accused is tried on the merits of the crime charged and to prevent a conviction that is based upon propensity and character inferences drawn from evidence of other crimes or wrongs." State v. Tufano, 175 N.H. 662, 665 (2023) (quotation omitted). Rule 404(b) provides:

Evidence 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)(1). Evidence of other crimes, wrongs, or acts is admissible only if: (1) "it is relevant for a purpose other than proving the person's character or disposition"; (2) "there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them"; and (3) "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." N.H. R. Ev. 404(b)(2). "The State bears the burden of demonstrating the admissibility of prior bad acts." Tufano, 175 N.H. at 665.

[¶13] Prior to trial, the State moved to admit records of the defendant's voter registration and voting history from 1996 to 2018 for both Belmont and Holderness under Rule 404(b). The State asserted that, when viewed as a whole, the evidence "presents clear proof of prior bad acts" — specifically, six "prior elections in which the Defendant voted in both New Hampshire and Massachusetts" between 1996 and 2014. The State asserted that this evidence was "relevant to show opportunity, intent, knowledge, identity, and absence of

mistake or accident; there is clear proof; and there is no unfair prejudice.” The trial court agreed with the State’s relevance arguments, determined that there was clear proof authenticating the records, and concluded that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

[¶14] The defendant challenges the trial court’s rulings with respect to each prong of the Rule 404(b) analysis. However, we need not address each prong here. Even if the evidence “is relevant for a purpose other than proving the [defendant’s] character or disposition,” N.H. R. Ev. 404(b)(2)(A), and the State’s evidence satisfies the “clear proof” requirement, N.H. R. Ev. 404(b)(2)(B), we conclude that the admission of the evidence violated the third prong of the Rule 404(b) analysis. Under the third prong, we determine whether the danger of unfair prejudice substantially outweighed the probative value of the evidence. See State v. Howe, 159 N.H. 366, 377 (2009). Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury’s sympathies, arouse its sense of horror, or provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision upon something other than the established propositions in the case. Id. at 377-78. “It is not, however, evidence that is merely detrimental to the defendant because it tends to prove his guilt.” Id. at 378. Among the factors that we consider in weighing the evidence are: (1) whether the evidence would have a great emotional impact upon a jury; (2) its potential for appealing to a juror’s sense of resentment or outrage; and (3) the extent to which the issue upon which it is offered is established by other evidence, stipulation or inference. Id.

[¶15] Even if the evidence was relevant for non-propensity purposes, its probative value was low. The fact that Massachusetts does not require in-person voters to present photo identification when voting diminishes the probative value of this evidence regarding the defendant’s identity. See State v. Smith, 125 N.H. 522, 525 (1984) (“Evidence of prior acts offered to show that no mistake has been made regarding the identity of the defendant as the perpetrator of the charged crime is only relevant if the prior acts were acts of the defendant.”). In addition, the evidence carried little incremental probative value in light of other direct evidence that the defendant was registered to vote in both Massachusetts and New Hampshire, filled out an absentee ballot in Holderness on November 3, 2016, and was checked off on the voter checklist in Belmont on November 8, 2016. We thus agree with the defendant that evidence pertaining to prior elections “was cumulative and added little probative value.”

[¶16] The danger of unfair prejudice was significant. As the defendant observes, because “the issue of alleged voter fraud has become a controversial and hot-button topic across the country,” evidence of numerous uncharged instances of double voting created a substantial risk of unfair prejudice. Moreover, evidence of other similar crimes or acts carries an inherent risk of

unfair prejudice “because, notwithstanding the permissible reasons for which such evidence might be admitted, there is a risk that the jury will find the defendant had a propensity to commit the charged crime merely because the defendant committed a similar crime or wrong in the past.” State v. Belonga, 163 N.H. 343, 360 (2012). “Such a risk runs counter to the principle that a defendant may only be convicted if the jury finds that the accused committed the specific act that is the subject of the trial, and not some similar act at some other time.” Id. (quotation omitted). “The risk of unfair prejudice . . . increases as the degree of similarity between the prior act and the charged crime increases.” Id. Here, the prior bad acts — multiple uncharged instances of alleged double voting in New Hampshire and Massachusetts — are nearly identical to the charged crime. The danger of unfair prejudice, therefore, was significant.

[¶17] Based upon the similarity between the prior bad acts and the charged crime, we conclude that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See N.H. R. Ev. 404(b)(2)(C). The risk that the jury would view the evidence as demonstrating the defendant’s propensity for voting in New Hampshire and Massachusetts during the same elections was substantial. Accordingly, we conclude that the trial court erred by admitting evidence of the defendant’s voting history under Rule 404(b).

#### B. Botelho Evidence

[¶18] The defendant next argues that the trial court erred by precluding the admission of Botelho’s testimony and prior statements. He contends that Botelho’s confession to voting in the defendant’s name does not constitute evidence of “other crimes, wrongs, or acts” because it is evidence of the charged crime. The State, on the other hand, maintains that “there was nothing credible before the trial court” to suggest that Botelho would testify that he voted in the defendant’s name in the 2016 election, and that Botelho’s prior statements constitute Rule 404(b) propensity evidence.

[¶19] Prior to trial, the State moved to preclude Botelho’s interview statements and the “testimony of, or testimony about, Billy Botelho.” During a July 2020 interview, after being informed that the defendant was “being investigated for voter fraud for having voted in New Hampshire and Massachusetts in the 2016 presidential election,” Botelho responded that he “thought [the defendant] was in NH, so [Botelho] went and voted in place of” the defendant. Botelho told the defendant’s investigator that he voted in the defendant’s name in Belmont “three or four times” over the course of “a few years, including 2016.” In addition, during a December 2020 interview with the State’s investigator, Botelho again admitted to voting in the defendant’s name “three, maybe four times.” He stated that he first voted in the defendant’s name in the 1970s and had most recently done so in the 2020

election. He also stated, however, that he “didn’t even vote in this year,” that he last voted in the defendant’s name “a few years back,” and that he “voted last term, when . . . Trump was running against Biden . . . a couple of years back.”

[¶20] The State argued that Botelho’s statements and testimony should be excluded because the defendant had failed to provide notice of his intent to either assert an alibi defense or, alternatively, introduce Botelho’s statements as Rule 404(b) evidence. The defendant responded that Botelho’s statements constituted neither alibi evidence nor Rule 404(b) evidence and that they were admissible under the statements against interest exception to the hearsay rule because Botelho would likely be unavailable to testify at trial.

[¶21] The trial court ruled that Botelho’s statements were alternative perpetrator evidence subject to Rule 404(b). The court further concluded that, although the evidence “does have probative value,” Botelho’s statements were vague and contained “inconsistencies regarding when . . . Botelho allegedly voted in the defendant’s name.” In addition, the court concluded that the defendant had failed to provide notice or file a motion to admit Rule 404(b) evidence and, therefore, “the defendant cannot raise constitutional challenges in an objection for the first time on the eve of trial when he failed to follow the rules of criminal procedure despite having ample time with the evidence to so comply.” Accordingly, the court granted the State’s motion to preclude Botelho’s prior statements and testimony.

[¶22] The trial court’s ruling, however, failed to distinguish evidence that Botelho voted in the defendant’s name during the 2016 election from evidence of similar conduct during prior elections. The court’s ruling, therefore, was overly broad. Botelho’s statements either impliedly or expressly constitute confessions to voting in the defendant’s name during the November 2016 election — the same election for which the defendant was charged with double voting. We agree with the defendant that Botelho’s “confession concerning the charged crime” cannot constitute Rule 404(b) evidence of “other crimes, wrongs, or acts.” Evidence that Botelho voted in the defendant’s name in Belmont during the November 2016 election is not evidence “that the person acted in conformity with” prior bad acts. N.H. R. Ev. 404(b)(1). Rather, it is evidence that someone other than the defendant voted in the defendant’s name in Belmont in the 2016 election, which is the conduct at issue in this case. We therefore conclude that the trial court erred in its ruling that all prior statements and testimony pertaining to Botelho — specifically, evidence that Botelho voted in the defendant’s name during the November 2016 election — constituted Rule 404(b) evidence.

[¶23] Botelho’s statements in which he admitted to voting in the defendant’s name in multiple other elections, however, fall into a different category. Although “Rule 404(b) typically applies when the State seeks to

introduce evidence of other bad acts of a defendant,” State v. Durgin, 165 N.H. 725, 730 (2013), we have previously applied Rule 404(b) to determine the admissibility of evidence of another person’s other “bad acts” offered by the defendant to show that the person was an alternative perpetrator of the crimes. State v. Gay, 169 N.H. 232, 246 (2016); see State v. Roy, 167 N.H. 276, 290 (2015) (agreeing with trial court that Rule 404(b) applied to alternative perpetrator evidence at issue in that case). “[T]he defendant must show a clear connection between the purposes for which he sought to introduce the evidence . . . and the [alternative perpetrator’s] other bad acts.” Durgin, 165 N.H. at 730 (quotation omitted). Thus, the trial court properly ruled that evidence regarding Botelho’s prior conduct constitutes Rule 404(b) evidence.

[¶24] The trial court ruled that Botelho’s prior statements and testimony were inadmissible as Rule 404(b) evidence because “the timing of these alleged acts is unclear” and based upon the defendant’s failure to comply “with the rules of criminal procedure for what he claims is key evidence to his case.” Because the trial court’s ruling was based, at least in part, upon the court’s conclusion that the defendant had failed to comply with the Rules of Criminal Procedure, it is unclear whether the evidence would be admissible under Rule 404(b) in the event of a retrial. Should the State seek to retry the defendant, the parties will have the opportunity to address whether this evidence is admissible under Rule 404(b). Given our conclusion that Botelho’s statements and potential testimony regarding the 2016 election are not inadmissible propensity evidence under Rule 404(b), we need not address whether the trial court’s ruling to exclude evidence of Botelho’s statements violated the defendant’s right to produce all favorable proofs under the State Constitution and his rights to compulsory and due process under the Federal Constitution. Similarly, having concluded that evidence of the defendant’s voting history was inadmissible under Rule 404(b), we need not address the defendant’s argument that such evidence opened the door to Botelho’s prior statements and testimony.

### C. Richards Hearing

[¶25] The defendant next argues that the trial court erred by denying his request for a Richards hearing to address Botelho’s potential testimony. Based upon its conclusion that Botelho’s testimony and any evidence relating to Botelho were inadmissible under Rule 404(b), the trial court declined to conduct a Richards hearing.

[¶26] “[W]hen a witness asserts his or her Fifth Amendment rights, the trial court must determine ‘whether a truthful and complete response might be incriminating.’” State v. King, 146 N.H. 717, 721 (2001) (quoting Richards, 129 N.H. at 673). “[I]n order to legitimately exclude testimony based upon the witness’s Fifth Amendment right, the trial court must conduct a so-called Richards hearing to determine if the privilege is being properly invoked.” Id.

[¶27] Given our conclusion that evidence that Botelho voted in the defendant's name in the November 2016 general election is not Rule 404(b) evidence, we also conclude that if, on remand, Botelho asserts his Fifth Amendment rights, the trial court will be required to "conduct a . . . Richards hearing to determine if the privilege is being properly invoked." Id.

#### D. Territorial Jurisdiction

[¶28] We next consider whether the trial court erred by denying the defendant's motion to dismiss on the ground that New Hampshire lacks territorial jurisdiction. The defendant maintains that he "cast his first, and therefore legal, vote in New Hampshire" by absentee ballot on November 3, five days prior to allegedly voting in person in Massachusetts on November 8. Therefore, he reasons, the prohibited conduct — the second vote — occurred in Massachusetts, and he "committed no criminal act in New Hampshire." We are not persuaded.

[¶29] "[T]erritorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory may the case be tried in that state." Hemenway v. Hemenway, 159 N.H. 680, 683 (2010) (ellipses omitted). "[A] person may be convicted under the laws of this state for any offense committed by his own conduct or by the conduct of another for which he is legally accountable" if "[e]ither conduct which is an element of the offense or the result which is such an element occurs within this state." RSA 625:4, I(a) (2016). "Our statute . . . brings within its ambit any crime which is committed wholly or partly within this State." State v. Breed, 159 N.H. 61, 67-68 (2009).

[¶30] A person is guilty of violating RSA 659:34-a, I, if:

[A]t any election, such person knowingly checks in at the checklist and casts a New Hampshire ballot on which one or more federal or statewide offices or statewide questions are listed if the person also casts a ballot in the same election year in any election held in any other state or territory of the United States . . . .

The premise of the defendant's argument is that his New Hampshire vote preceded his alleged Massachusetts vote because he filled out his absentee ballot in New Hampshire prior to election day.<sup>1</sup> Even if the defendant were correct, his argument misconstrues RSA 659:34-a, I. RSA 659:34-a, I,

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<sup>1</sup> The testimony at trial casts doubt upon the accuracy of the defendant's assertion that his Holderness vote preceded the Belmont vote for purposes of this case. At trial, King testified that in Holderness, absentee ballots filled out prior to an election are kept in a safe until being counted together with in-person ballots on election day. Thus, although the defendant's absentee ballot was completed on November 3, both the New Hampshire and Massachusetts votes were arguably cast for purposes of RSA 659:34-a, I, on November 8, 2016.

prohibits any person from casting a vote in New Hampshire “if the person also casts a ballot in the same election year in any election held in any other state.” RSA 659:34-a, I (emphasis added). Thus, so long as both votes were cast “in the same election year,” when they were cast in relation to each other is immaterial. See id. We therefore reject the defendant’s argument that his New Hampshire vote was legal and “it was the alleged second, Massachusetts vote that was criminal.”

[¶31] Moreover, “knowingly check[ing] in at the checklist and cast[ing] a New Hampshire ballot” constitutes an element of the offense. Id.; see RSA 625:4, I. The defendant does not dispute that he filled out a New Hampshire absentee ballot with King’s assistance at Holderness town hall on November 3, 2016. Therefore, “conduct which is an element of the offense” occurred in New Hampshire, and the trial court properly denied the defendant’s motion to dismiss. RSA 625:4, I(a).

[¶32] The defendant’s analogy to bigamy cases is not persuasive. Rather, we agree with the State that, unlike bigamy cases in which a first legal marriage constitutes “a condition precedent legal status” rather than an element of the crime, “RSA 659:34-a, I, includes no condition precedent legal status” and makes both votes elements of the offense. See RSA 659:34-a, I. We conclude that New Hampshire has territorial jurisdiction in this matter and that the trial court did not err by denying the defendant’s motion to dismiss.

#### E. Motion for Judgment Notwithstanding Verdict or to Set Aside Verdict

[¶33] Finally, the defendant argues that the trial court erred by denying his motion for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict. Motions for judgment notwithstanding the verdict and to set aside the verdict pertain to two distinct concepts: the sufficiency of the evidence and the weight of the evidence, respectively. See State v. Spinale, 156 N.H. 456, 462-63 (2007). On a motion for judgment notwithstanding the verdict, when applying the sufficiency standard, the trial court “upholds the jury’s verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State.” Id. at 463 (brackets omitted). “In considering a motion for [judgment notwithstanding the verdict], the trial court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied.” Id. (quotation and brackets omitted). On appeal, we objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 464.

[¶34] The defendant asserts that the State did not introduce sufficient evidence to establish beyond a reasonable doubt that he voted in

Massachusetts in the 2016 election. He argues that there was a “lack of any direct evidence placing [him] either in Massachusetts or at the polling location.” In the defendant’s view, the evidence did not establish that he, rather than someone else, voted in his name. He avers that “the possibility that [his] alleged vote was a result of fraud was by no means excluded.” (Quotation omitted.)

[¶35] Regarding the out-of-state vote, the State was required to prove in this case that the defendant cast a ballot “in the same election year in any election held in any other state.” RSA 659:34-a, I. Paragraph III of RSA 659:34-a further provides:

The state shall not be required to prove that the person actually marked the ballot for a candidate for any specific office; it shall be sufficient to prove that the person cast a ballot. Evidence that a person was checked off on the checklist, or the equivalent record in another state or territory, as having voted is prima facie evidence that the person cast a ballot in that election.

RSA 659:34-a, III. Thus, evidence that the defendant “was checked off on the checklist” in Massachusetts constituted prima facie evidence that he cast a ballot in Massachusetts. Id.

[¶36] In this case, the State introduced voter checklists from Belmont for the November 2016 election. Cushman also testified that the defendant’s name was checked off on the November 8, 2016 voter check-in list. She testified that the box next to the defendant’s name was “marked in red,” which “indicates that the person showed up in person to vote on election day at the precinct.” In addition, Cushman testified that the defendant’s name was checked off on the check-out list, marked with a “Blue X to indicate that they were checking out and they have actually voted and they’re about to put their ballot into the . . . voting box.” Cushman agreed that the checklist indicated that the defendant “cast a ballot at the precinct . . . polling place on November 8th, 2016.”

[¶37] The defendant argues that there was no direct evidence that he voted in Belmont and that we therefore should apply the standard for purely circumstantial evidence. Under RSA 659:34-a, III, however, evidence that the defendant was “checked off . . . as having voted” in Belmont on November 8, 2016 constitutes “prima facie evidence that [he] cast a ballot in that election” in Massachusetts. The defendant acknowledges that these checklists were admitted into evidence at trial. This evidence, together with additional evidence that the defendant maintained a residence in Belmont, had run for local office in Belmont, and recalled possibly accompanying his wife to the polls in Belmont on election day in 2016, was sufficient to establish that the

defendant voted in person in Massachusetts during the November 2016 general election. See id.

[¶38] Having determined sufficiency, we next turn to the weight of the evidence. “Although a verdict may be supported by sufficient evidence, a trial court may nevertheless conclude that the judgment is against the weight of the evidence.” Spinale, 156 N.H. at 465 (quotation omitted). The weight of the evidence “is a somewhat more subjective concept than that of sufficiency.” Id. It “depends upon the particular circumstances” and is measured by the weight of the evidence “in probative value, not the quantity or amount.” Id. In contrast to a sufficiency claim, when we determine whether a rational juror could have found guilt, a verdict conclusively against the weight of the evidence is one no reasonable jury could return. Id. A “motion addressed to the weight of the evidence primarily presents a question of fact for the trial court, and the trial court has much more discretion when considering such a motion.” Id. Therefore, we will uphold the trial court’s decision unless it was made without evidence or constituted an unsustainable exercise of discretion. Id. at 466. The jury’s verdict must be an unreasonable one before the trial court may set it aside. Id.

[¶39] The defendant asserts that “there is more credible evidence supporting the fact that [he] did not vote in the Massachusetts 2016 election, than vice versa.” He contends that there was evidence “demonstrating the possibility of human error in marking the checklist, as well as transferring the data from the checklist to the online state database,” and that because there was no “eyewitness or other direct evidence linking [him] to Massachusetts during the relevant time period, the weight of the evidence favored innocence over guilt.”

[¶40] We conclude that the record establishes an objective basis to support the trial court’s decision declining to set aside the jury’s verdict as against the weight of the evidence. Accordingly, we will not disturb that decision. Based upon our review of the evidence in the record, this is not an “exceptional case[] in which the evidence preponderates heavily against the verdict.” Id. Rather, while there was no evidence corroborating the defendant’s location on November 8, 2016, the Belmont town clerk testified as to the town’s voting procedures, authenticated the voter checklists, and testified that the records indicate that the defendant cast a ballot in Belmont on November 8, 2016.

### III. Conclusion

[¶41] In summary, we conclude that the trial court erred by admitting evidence of the defendant’s voting history and precluding Botelho’s statements relating to the 2016 election under Rule 404(b). We also conclude that, should Botelho on remand assert his Fifth Amendment rights, the trial court shall

conduct a Richards hearing. Accordingly, we reverse the defendant's conviction and remand for further proceedings consistent with this opinion.

Reversed and remanded.

COUNTWAY and GOULD, JJ., concurred.