2013 WL 10938860 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

STALE OF NEW HAMPSHIRE,

v.

Kevin RAWNSLEY.

No. 2013-0512.
December 17, 2013.

Appeal Pursuant to Rule 7 from Judgment of the Merrimack County Superior Court
(15 Minutes)

Brief for the Defendant

Christopher M. Johnson, NH Bar # 15149, Chief Appellate Defender, Appellate Defender Program, 10 Ferry Street, Suite 202, Concord, NH 03301, 603-224-1236.

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Cases

*1 *QUESTION PRESENTED*

Whether the trial court erroneously failed to strike Stacey Rawnsley's testimony conveying information covered by the marital evidentiary privilege of Rule 504.

Issue raised as plain error. See Supreme Court Rule 16-A. [a1]

*2 *STATEMENT OF THE CASE*

In July 2012, a Merrimack County grand jury indicted Kevin Rawnsley with one count of robbery, alleging that on February 16, 2008, in Pittsfield, he struck Mohammed Ahmed on the head with a baseball bat while committing a theft. T 3-4. At the close of trial, a jury convicted Rawnsley as charged. T 275-77. The trial court (McNamara, J.) sentenced Rawnsley to a stand-committed term of seven and a half to fifteen years. A1-A2.

*3 *STATEMENT OF FACTS*

As Mohammed Shaneem Ahmed prepared to close the K2 market in Pittsfield at 10 p.m. on February 16, 2008, a man entered the store wearing a mask. T 24-25. When Ahmed asked the man his name, the man replied "Jon Benedict," and in response to Ahmed's question about the mask, answered that he wore it because of the cold weather. T 25. The man then approached Ahmed, who was closing down some refrigerated display cases, and struck him in the head with a baseball bat. T 26. While Ahmed lay on the floor, the man went to the cash register, which he also struck with the bat until it opened, whereupon the man stuffed cash from the register into his sweatshirt. T 157, 258. The man then fled the store. T 202. A store surveillance video depicted all of these events. T 51, 170.

A passer-by, William Morel, saw the perpetrator run out of the store. T 201-02. Upon hearing Ahmed's cries for help, Morel went into the store and called 911. T 201-02. He remained on the scene awaiting the police, and described to them the perpetrator's clothing. Morel could not identify the perpetrator. T 203. However, Morel is related by marriage to Jonathan Benedict and testified that the perpetrator's eye color was not consistent with Benedict's. T 204-05. Benedict, who at the time of trial was incarcerated on other charges, also testified and denied having anything to do with the robbery of the K2 market. T 233-34.

In response to Morel's 911 call, police responded to the scene. T 202. One officer brought a tracking dog who followed a scent from the store through ***4** parts of downtown Pittsfield. T 177-87, 190. The track failed, though, to lead the police to any suspect, and the investigation stalled. T 158, 161-62, 187.

In 2012, while involved in a contentious custody battle with her ex-husband Kevin Rawnsley, and while incarcerated pending criminal charges that carried a possible sentence of twenty to forty years and for which she expected to receive a plea offer requiring her to serve five to ten years in prison, Stacey Rawnsley ("Stacey") contacted the police with an offer to provide information about crimes in exchange for consideration in regards to her pending criminal charges. T 54-55, 59-60, 77-78, 212-13, 225. Stacey reported to the police, and testified at trial, that she believed that Rawnsley had robbed the K2 market. Ultimately, Stacey received a one and a half to four year sentence, and was transferred to home confinement before reaching her minimum. T 80-81.

Stacey testified that, on the evening of February 16, 2008, she and Rawnsley used cocaine and then argued. T 62. She saw him leave their downtown Pittsfield apartment wearing black clothes, including a hooded sweatshirt, a cold-weather face mask, and black gloves with the word "mechanical" on them. T 62-64. On his way out the door, he took a wooden baseball bat and, when asked what he was doing, responded, "don't worry about it." T 63, 65. She testified that he left the apartment at about 9:45 p.m., and returned about 10:10 or 10:15 p.m. T 65-66. When he returned, she saw him pull money in small bills out of his sweatshirt, and shortly afterwards heard police cars drive by. T 66-67. When she asked where he had gone, ***5** Rawnsley again told her not to worry about it. T 67. Stacey testified that she then saw, on the eleven o'clock news, a story about the robbery of the K2 market. T 67. She claimed that she then confronted Rawnsley with her suspicion that he had robbed the store, and that eventually he admitted the crime to her, describing some details of it and of the route of his flight from the scene. T 67-69, 144.

The defense denied that Rawnsley had committed the crime. T 244. It argued that Stacey's desire to minimize her future incarceration, in conjunction with the ulterior motives implicated in the custody proceedings, had led her falsely to accuse Rawnsley. T 245-48. Rawnsley did not testify.

The nature of the dispute led the parties to focus on matters bearing on Stacey's credibility. The prosecution noted the extent to which Stacey's testimony about what Rawnsley told her and did in her presence in their home matched details of the crime as shown on the surveillance video and through other testimony. For example, the State noted that the surveillance video's depiction of the robber stuffing money in his sweatshirt corroborated Stacey's claim to have seen Rawnsley dump money out of his sweatshirt onto the floor of their apartment. T 258. Also, Stacey's testimony about what Rawnsley told her about the crime matched the video's depiction of the robber striking Ahmed near the refrigerated display cases, and the police officer's testimony about the route followed by the tracking dog. T 254-55, 261. The State also argued that the perpetrator's clothes, as depicted on the surveillance video, generally matched Stacey's testimony about Rawnsley's clothes. T 251-53.

***6** The defense emphasized Stacey's self-interested motives. Stacey acknowledged, for example, saying to a friend during a phone call from the jail that giving information about the robbery was "probably the only thing that is going to get [her] to walk, walk, walk." T 78-79. Stacey also acknowledged asking a friend to research the K2 market robbery on the internet. T 58-59.

With regard to other evidence, the defense noted that the tracking dog passed the entrance to Rawnsley's apartment without tracking the scent to his door. T 191-94, 246. Also, Ahmed testified that he could see a tattoo on the man's wrist between his glove and his sleeve, T 25, 29-30, but Rawnsley does not have a tattoo on the wrist which the perpetrator revealed, as shown on the surveillance video, when he reached to touch some products on shelves. T 44, 170-71.

7** ***SUMMARY OF THE ARGUMENT

The trial court committed plain error in failing to strike Stacey Rawnsley's testimony conveying information covered by the marital evidentiary privilege embodied in Evidence Rule 504. The privilege covers Stacey's testimony both about Rawnsley's

statements to her admitting the crime, and about private acts done by him in her presence. Rawnsley never waived the privilege, and considerations of public policy do not justify overriding the privilege in the circumstances presented here. The law governing the application of the privilege to the facts here is well-established, and thus Rawnsley can show the court's error to be "plain." The error affected substantial rights, in the sense that the evidence improperly presented to the jury mattered greatly to the State's case. Finally, the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

***8 I. THE TRIAL COURT ERRED IN FAILING TO STRIKE STACEY RAWNSLEY'S TESTIMONY CONVEYING INFORMATION COVERED BY THE MARITAL EVIDENTIARY PRIVILEGE.**

Evidence Rule 504 establishes a "husband and wife privilege." The rule provides that

> [h]usband and wife are competent witnesses for or against each other in all cases, civil and criminal, except that unless otherwise specifically provided, neither shall be allowed to testify against the other as to any statement, conversation, letter or other communication made to the other or to another person, nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence.

The terms of the rule would appear to set forth two distinct privileges: a privilege covering any communications between married people, and a privilege covering "any matter" which a court finds would lead to a violation of marital confidence. However, this Court has "folded both prongs into one" so that exclusion of evidence is required only where there is a "violation of a marital confidence." *State v. Wilkinson*, 136 N.H. 170, 177-78 (1992); *Clements v. Marston*. 52 N.H. 31, 38 (1872); *see also Noves v. Marston*, 70 N.H. 7, 15-20 (1899) (describing in detail legislative and judicial history of the privilege that led the *Clements* Court to "fold[] both prongs into one").

To constitute a marital confidence, "the communication at issue must be something confided by one to the other, simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances." *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 672 (1993) (quoting *Clements)*. This Court has thus held that a communication ***9** between spouses that is not confidential, such as may occur when a wife is acting as a business agent for her husband, does not become confidential simply because the two people happen to be married to each other. *Clements*, 52 N.H. at 38; *see also Key Bank of Maine*, 137 N.H. at 672-73 (no marital confidence where testimony at issue would relate to "purely business matters"). The privilege does, though, apply in a circumstance that involves a

> conversation or act performed by [a spouse] which is attributable to the husband-wife relation, i.e., that which might not be spoken or done openly in public as tending to expose personal feelings and relationships or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation ....

State v. Pelletier, 149 N.H. 243, 247 (2003) (quoting *White v. State*, 440 S.E.2d 68, 70 (Ga. App. 1994)). It is a "near universal" rule that marital communications are presumed to be confidential. *State v. Smith*, 384 A.2d 687, 691 (Me. 1978); *see also State v. Christian*. 841 A.2d 1158, 1170-79 (Conn. 2004) (summarizing law of marital confidences privilege).

In some situations, testimony otherwise covered by the marital privilege may nevertheless be admitted. For example, the marital privilege can be waived if the person claiming the privilege "knowingly and voluntarily discloses any significant part of the privileged matter." *Wilkinson*, 136 N.H. at 178 (citing N.H. R. Evid. 510). Also, the privilege can be overridden by considerations of public policy, as when application of the privilege would prevent one spouse from providing relevant testimony concerning the alleged sexual abuse of a child. *Pelletier*, 149 N.H. at 249; *see also* RSA 161-F:48 ***10** (exception to marital privilege in proceedings involving abuse and **neglect** of **elderly**); RSA 546-A:9 (exeption to marital privilege in support proceedings).

It is important to bear in mind the distinction between two types of marital evidentiary privileges. *See, e.g.*, *Christian*, 841 A.2d at 1171 (differentiating the two types); *State v. Carpenter*, 615 N.E.2d 1103 (Ohio App. 1992) (applying both types in same case). One depends on the continued existence of the marriage at the time of the the spouse's testimony, and can prevent one spouse from giving any testimony against the other. *Christian*, 841 A.2d at 1171. Because Rawnsley and Stacey were not still married at the time of her testimony, this case does not implicate that form of the privilege. The second form does not depend on the continued existence of the marriage at the time of the testimony, but rather requires only that the spouses were married at the time of the confidential communication. *Id.* When applicable, that privilege does not exclude all testimony from a spouse; it only prevents testimony about confidential communications made during the marriage. This Court has previously applied that form of marital privilege in cases in which the spouses were no longer married at the time of the testimony. *Pelletier*, 149 N.H. at 245-49. Because Rawnsley and Stacey were married at the time of the relevant confidences, T 55, the privilege embodied in Rule 504 and described above governs the admissibility of the evidence at issue in this case.

The trial court erred in failing to strike Stacey's testimony that Rawnsley confessed to her his role in the robbery, and described to her details about the crime and his route to and from the store. T 67-69. Moreover, the court erred ***11** in failing to strike Stacey's testimony about Rawnsley's actions in their home around the time of his alleged commission of the robbery. Because the defense made no objection to this testimony, Rawnsley raises the issue as plain error,

Supreme Court Rule 16-A allows the Court to consider, as plain error, claims not raised at trial. This Court has identified four essential elements of a successful claim of plain error: "(1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Maclnnes*, 151 N.H. 732, 737 (2005). The Court explained that the plain error rule "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 736-37. In the context of a claim of plain error relating to the introduction of inadmissible evidence, this Court has characterized the "pertinent question [as] whether the trial court erred in failing *sua sponte* to strike or issue a curative instruction" with respect to the testimony. *State v. Noucas*, 165 N.H. 146, 161 (2013).

The first prong considers whether there was error. Under the principles described above, Rawnsley's private statements to his wife admitting to a crime and describing details of it constitute marital confidences. The matters under discussion could certainly tend to bring "embarrassment or discomfiture" if ***12** disclosed publicly. *Pelletier*, 149 N.H. at 247. Other courts have found that a defendant's confession to a spouse of a crime falls within the marital privilege. [1]

The same conclusion holds true for Rawnsley's actions, done in only Stacey's presence in the privacy of their home on the night of the robbery. As New York's highest court has held:

> The applicable general rule which we have applied in this State, and which has the support of the weight of authority throughout the United States, is that the term communication means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing. An act may communicate knowledge to the known observer and repose a confidence in him as clearly and unmistakably as if accompanying descriptive words were uttered.

People v. Daghita, 86 N.E.2d 172, 174 (N.Y. 1949). A number of other courts similarly include within the privilege a spouse's knowledge obtained through the observation of private acts done by the other spouse while aware of the observing spouse's presence and attention. [2]

***13** With regard to the marital privilege, *Daghita* involved facts similar to those presented here. In *Daghita*, the court found to be covered by the marital privilege "the wife's knowledge gained by observance of defendant's conduct in bringing home stolen property in the early morning and storing it in different parts of the house and more particularly under his bed, ..." *Id.* In support of that conclusion, the court reasoned that

> [i]t cannot be supposed that the defendant would have so conducted himself except in reliance upon the free and unrestrained privacy of the marital relation and the socially desirable confidence which exists, and should exist, between husband and wife. The record makes plain that defendant made no effort to conceal or disguise his conduct at his home from his wife. He was, in a word, confiding in her the information disclosed by his conduct. Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact. Clearly, if defendant had told his wife that he was bringing home goods from Montgomery under the circumstances disclosed here, she could not have been compelled to testify as to such statement over his objection. That being so, she may not be compelled to testify to conduct transpiring in her presence in the home which clearly, though not orally, communicated the same fact to her.

Id. The same logic and conclusion applies equally here. Courts have, on a number of occasions, found a violation of the marital privilege in the admission ***14** of testimony describing a spouse's privately observed conduct. [3] *See also* Annotation, *''"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse*, 23 A.L.R.6th 1 (2007). Therefore, Rawnsley's acts of removing the money and counting it aloud in her presence amounted to a communication, or at least to a disclosive act, done in her presence only because of the confidence associated with the marital relationship. T 66-67.

Some courts take a narrower view of the extent to which conduct can fall within the scope of the marital privilege. In *Curran v. Pasek*, 886 P.2d 272, 275-76 (Wyo. 1994), the Wyoming Supreme Court surveyed the caselaw and identified two prevalent tests for determining whether a spouse's conduct, done in private and observed only by the other spouse, falls within the marital privilege. The first, which the court called the "expectation test," focuses on "whether the conduct was undertaken in reliance on the confidences of the marital relationship, i.e., whether there was an expectation of confidentiality." *Id.* The second, which the court called the "intentions test," focuses on "whether the conduct was intended to communicate a confidential message to ***15** the other spouse," and finds a marital privilege only where such an intention exists. *Id.* at 276; *see also Kindred*, 524 N.E.2d at 296 (defining an intermediate position whereby "there must be some indication the communicating spouse invites the other's presence or attention, and that any disclosure was an express manifestation of the intent to communicate the knowledge imparted by the act").

For two reasons, that variation among jurisdictions regarding the application of the marital privilege to conduct cannot defeat Rawnsley's claim of plain error. First, the language of New Hampshire's rule expressly contemplates inclusion within the privilege of "any matter which in the opinion of the Court would lead to a violation of marital confidence." *See Robinson*, 376 S.E.2d at 609, n.4 (listing New Hampshire among states with a statute that "either expressly includes acts or conduct of a spouse or is broad enough to include anything that occurs in the course of the marital relation"). Moreover, this Court has at least implicitly already resolved the debate between the two tests in favor of the "expectation of confidentiality" test.

In *Pelletier*, the Court described the privilege as encompassing any "conversation or act" that is "attributable to the husband-wife relation, i.e., that which might not be spoken or done openly in public as tending to expose personal feelings and relationships or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital Relation ...." *Pelletier*, 149 N.H. at 247 (quoting *White*, 440 S.E.2d at 70). That description adopts the expectations test insofar as it contemplates ***16** applying the privilege, independent of any specific communicative intention, to acts "which might not be ... done openly in public as ... tending to bring embarrassment or discomfiture to the participants." Moreover, in declaring sexual conduct to be covered, the *Pelletier* Court applied the privilege in a context that does not necessarily involve an intention to communicate a particular confidential message.

Second, even if this Court were to adopt the "intentions test," Rawnsley's acts of pouring money out of his sweatshirt and audibly counting it in Stacey's presence manifests an intention to communicate a message. T 66. In particular, it communicates the message that Rawnsley had just obtained money in the amount counted. For all these reasons, this Court must conclude that the marital privilege covered both Rawnsley's statements and his actions done in the privacy of the marital home.

Finally, there is no evidence that Rawnsley waived the privilege with respect to any of that evidence. The State introduced no evidence that he confessed to anybody else that he committed the K2 robbery. Also, no other public policy ground applies to render the confession admissible notwithstanding the applicability of the marital privilege. For all these reasons, the court's failure to strike Stacey's testimony about Rawnsley's words and private conduct constituted error.

The second prong of the plain error test involves an inquiry into whether the error was "plain." This Court has described the second prong as follows:

> Plain is synonymous with clear or, equivalently, obvious. At a minimum, a court of appeals cannot correct an error ***17** ... unless the error is clear under current law. Thus, an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary .... Generally, when the law is not clear at the time of trial, and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error.

Noucas, 165 N.H. at 161 (citation omitted). The principles described above state the law governing the marital privilege. Under that law, Stacey's testimony about Rawnsley's statements, as well as her testimony about his private conduct, was plainly inadmissible.

In *Noucas*, in finding an alleged evidentiary error not plain, this Court noted that it had "never held that a trial court must *sua sponte* strike or issue a curative instruction with respect to witness testimony." *Noucas*, 165 N.H. at 161. In that case, though, as this Court noted, the prosecutor did not deliberately elicit the allegedly improper testimony. *Id.* Here, by contrast, the prosecutor did deliberately elicit Stacey's testimony about Rawnsley's statements and conduct. Moreover, in *Noucas*, this Court noted that "defense counsel may have had strategic reasons for not objecting" to the allegedly improper testimony because a part of the witness's answer conveyed exculpatory information. *Noucas*, 165 N.H. at 161-62. By contrast, here, no such strategic reason was plausible, insofar as Stacey's testimony about Rawnsley's words and conduct was unequivocally incriminating.

The third plain error prong addresses whether the error affects substantial rights. "Generally, to satisfy the burden of demonstrating that an error affected substantial rights, the defendant must demonstrate that the error was prejudicial, i.e., that it affected the outcome of the proceeding." ***18** *State v. Moussa*, 164 N.H. 108, 118 (2012) (quotation and citation omitted). Here, the error was prejudicial because much of the most incriminating aspects of Stacey's testimony were covered by the privilege. Stacey testified that Rawnsley confessed his commission of the crime to her, and described to her details of the crime that matched the surveillance video's depiction of it and the tracking dog's route from the K2 Market. Stacey also described incriminating conduct - such as Rawnsley's production of money from his sweatshirt - done in the privacy of their home in only her presence. The prosecution emphasized those aspects of Stacey's testimony in its closing argument. T 254-58, 261. Further confirmation of the significance of Stacey's testimony appears in the fact that, until she came forward with her accusation, the crime had remained unsolved.

The fourth plain error prong evaluates whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings. Even if the fourth prong mandates an inquiry into questions other than case-specific prejudice associated with the jury's consideration of the inadmissible evidence, there is reason to find the prong satisfied here. This Court has said that there "are few, if any, relationships more respected and important than marriage." *Pelletier*, 149 N.H. at 248. The importance of that relationship lends substance to the marital evidentiary privilege. As the Indiana Supreme Court has held,

> where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation, and will not permit her to make known what he communicated, even as it will not ask him to disclose it himself. Strong public policy grounds favor promotion and preservation of marital
> ***19** confidences even if truthful and invaluable testimony in certain cases is excluded.

Russell v. State, 743 N.E.2d 269, 271-72 (Ind. 2001) (citations and quotation marks omitted). The significance of the marital relationship, and the role the marital confidences privilege plays in supporting that relationship, means that the integrity and public reputation of the judicial system is implicated in the erroneous admission of testimony protected by the privilege.

For the reasons stated above, Rawnsley's claim meets all four prongs of the plain error analysis. This Court must accordingly vacate his conviction. *Cf. State v. Adamson*, 650 N.E.2d 875, 878 (Ohio 1995) (reversing murder conviction on plain error where trial court failed to inform witness-spouse of her right not to testify against defendant-spouse).

20** ***CONCLUSION

WHEREFORE, Mr. Rawnsley respectfully request that this Court vacate his conviction.

Undersigned counsel requests fifteen minutes of oral argument.

Because the claim is raised as plain error, there was no decision by the trial court, and thus no decision in writing can be appended to this brief.
Respectfully submitted,

By <<signature>>

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Appendix not available.

Footnotes

a1 Citations to the record are as follows:
"A" refers to the Appendix to this brief;
"T" refers to the consecutively-paginated transcript of three-day trial held on May 14-16, 2013.

1 *See, e.g. Christian*, 841 A.2d at 1169 85 1174 (Conn. 2004); *Bolin v. State*, 650 So. 2d 21, (Fla. 1995); *Smith v. State*, 344 So. 2d 915, 918-20 (Fla. App. 1977), *disapproved on other grounds by Ruffin v. State*, 397 So. 2d 277, 279 (Fla. 1981); *Brown v. State*, 753 A.2d 84 (Md. 2000); *Smith*, 384 A.2d at 693 (Me. 1978)(citing cases); *Fisher v. State*, 690 So. 2d 268, 272 (Miss. 1996).

2 *See, e.g, Arnold v. State*, 353 So. 2d 524, 526 (Ala. 1977) (privilege belongs to communicating spouse, who "may prevent the other spouse from testifying to any conversation or action performed in the privacy of the marriage;" 8s "privilege includes only those statements or acts made or performed by one party to the marriage in communicating with the other"); *Hall v. State*, 720 So. 2d 1043, 1047 (Ala. Crim. App. 1998) (citing authority for proposition that "privilege applies to exclude all knowledge coming to the witness spouse by reason of the relationship and which, but for the confidence growing out of it, would not have been known"); *Kindred v. State*, 524 N.E.2d 279, 295-96 (Ind. 1988) (privileged communication includes "knowledge communicated by an act, which would not have been done by one in the presence, or within the sight of the other, but for the confidence between them by reason of the marital relationship," at least where acting spouse's conduct manifests "intent to communicate the knowledge imparted by the act"); *State v. Benner*, 284 A.2d 91, 109 (Me. 1971) (recognizing that conduct may fall within privilege "if confidentiality between husband and wife is an actual inducing factor of the conduct"); *Menefee v. Commonwealth*, 55 S.E.2d 9, 15 (Va. 1949) (same as *Daghita); State v. Robinson*, 376 S.E.2d 606, 609-11 (W.Va. 1988) (adopting Daghita, and citing other cases to same effect).

3 *See. e.g., Smith*, 384 A.2d at 690 (finding confidential marital communication in defendant's display to his wife of stolen property, on the theory that where "conduct by a spouse can be reasonably interpreted as intending to convey a message to the other spouse, a marital communication has occurred"); *Shepherd v. State*, 277 N.E.2d 165, 166-68 (Ind. 1971) (reversing conviction on marital privilege grounds where spouse testified to conduct defendant spouse committed in witness spouse's presence); *State v. Holmes*, 412 S.E.2d 660, 665 (N.C. 1992) (same); *Carpenter*, 615 N.E.2d at 1104-05 (Ohio App. 1992) (same); *Menefee*, 55 S.E.2d at 15 (same); *State v. Robbins*, 213 P.2d 310, 313-14 (Wash. App. 1950) (same); *Robinson*, 376 S.E.2d at 611 (same); *State v. Sabin*, 255 N.W.2d 320, 322 (Wis. 1977) (finding marital privilege applies to testimony of wife to seeing husband taking father-in-law's car keys off table in house).

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