THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2016-0006

State of New Hampshire

v.

Ernesto Rivera

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT (SOUTHERN DISTRICT)

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA ATTORNEY GENERAL	and	ANTHONY J. GALDIERI SOLICITOR GENERAL

Elizabeth C. Woodcock, Bar No. 18837
Senior Assistant Attorney General
New Hampshire Department of Justice
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397
Elizabeth.C.Woodcock@doj.nh.gov

(10-minute 3JX oral argument)

TABLE OF CONTENTS

TABLE OF CONTENTS ... 2
ISSUE PRESENTED ... 4
STATEMENT OF THE CASE ... 5
STATEMENT OF FACTS ... 6

A. The State's Case ... 6
B. The Motion to Sever, the Hearing, and the Court's Ruling ... 10

ARGUMENT ... 14

THE TRIAL COURT PROPERLY JOINED THE CHARGES ASSOCIATED WITH THE JULY 21, 2013 ARREST. ... 14

CONCLUSION ... 21
THE STATE OF NEW HAMPSHIRE ... 21
CERTIFICATE OF COMPLIANCE ... 22
CERTIFICATE OF SERVICE ... 23

TABLE OF AUTHORITIES

Cases

State v. Brown, 159 N.H. 544 (2009) 15, 16, 19
State v. Cobb, 143 N.H. 638 (1999) 21
State v. Girard, 173 N.H. 619 (2020) 18
State v. Hayward, 166 N.H. 575 (2014) 18
State v. Locke, 166 N.H. 344 (2014) 16, 17
State v. Papillon, 173 N.H. 13 (2020) 20
State v. Pelkey, 145 N.H. 133 (2000) 20
State v. Ramos, 149 N.H. 118 (2003) 21
State v. Smith, 149 N.H. 693 (2003) 21
State v. Wells, 166 N.H. 73 (2014) 17
United States v. Boulanger, 444 F.3d 76 (1st Cir. 2006) 18
United States v. Stackpole, 811 F.2d 689 (1st Cir. 1987) 19, 21

Rules

N.H. R. Crim. P. 20(a)(1) 16
N.H. R. Crim. P. 20(a)(2) 16
Rule 404(b) 20

ISSUE PRESENTED

Whether the trial court erred in declining to sever for trial the drug charge from the assault and criminal threatening charges where the evidence supporting the drug charge was found as the result of the arrest for the other charges.

.

STATEMENT OF THE CASE

After a July 21, 2013, incident, the defendant was charged with criminal threatening, RSA 631:4, five counts of domestic violence simple assault, RSA 631:2-b, and possession of cocaine with intent to distribute, RSA 318-B:2, I. T 70-73.[1] After a jury trial, the jury acquitted the defendant of possession with intent to distribute, but found him guilty of the lesser-included offense of possession of cocaine. T 199-200. The jury returned verdicts of guilty on all other charges. T 200-02.

After a post-conviction court reversed some of the defendant's other charges, not tried with the ones at issue here, the court (*Templ*e, J.) held a consolidated re-sentencing hearing. The court resentenced the defendant to a stand-committed term of three-and-a-half to seven years in prison for the drug possession conviction, a concurrent twelve-month term for criminal threatening, and a suspended twelve-month term for the five simple-assault convictions. S 71-74.

This appeal followed.

---

[1] References to the record are as follows:
"AD" refers to the addendum to the defendant's brief and page number.
"DBA" refers to the appendix to the defendant's brief and page number.
"DB" refers to the defendant's brief and page number.
"T" refers to the trial transcript and page number. Other transcripts are indentified by the date, followed by "T", and the page number.

STATEMENT OF FACTS

A. The State's Case

On July 21, 2013, at about 9:30 p.m., Leah Heuston had dinner with friends at the San Francisco Kitchen, a Nashua restaurant. T 83-84. They sat at one of the outside tables on the sidewalk. T 84. The defendant and the victim were seated nearby. T 85. At some point that evening, Heuston noticed that the couple was arguing and that the argument "started escalating and getting louder and louder." T 86.

Heuston could hear the defendant's voice, but the victim was not talking. T 86. Instead, the victim "looked very timid, nervous, she just sat there in silence." T 86. The defendant was "[v]ery, very, angry and scary." T 97. At one point, Heuston saw the defendant strike the victim's face more than once. T 87. Heuston was frightened, but her "instinct" told her that she should tell someone. T 87. She waved to a police officer who was driving by and he stopped and told him. T 88.

The victim testified that she began dating the defendant in 2011, when she was 21 years old. T 96. The defendant was about 44 years old. T 97. Although she was working when they met, she stopped working because she "didn't think he wanted [her] to work. [She thought] he'd rather that [she] just stayed home." T 98. She eventually moved into an apartment in Nashua that the defendant found for her. T 98. The defendant even purchased a new cell phone for her, under his name. T 101.

On July 20, 2013, the defendant and the victim went to the San Francisco Kitchen for dinner. T 101. They arrived around dinnertime

and stayed until after midnight. T 102, 104. The victim drank white wine and the defendant drank either wine or beer. T 103. The defendant was "a little intoxicated," but not drunk. T 103. They sat outside. T 104.

The defendant was upset with the victim because the victim had talked to the hostess at the restaurant. T 104. The defendant was "threatening [her]. He was saying that [she] shouldn't have been talking to her and saying he was going to push [the victim's] face into the window and smash it." T 104. The victim apologized, but did not argue. T 105. The argument escalated and, at one point, the defendant "grabbed the back of [her] neck, and he pushed [her] face up against the glass window of the restaurant. And he slapped [her] [face] a few times." T 105-06.

A few minutes later, the police arrived. T 108. An officer came to their table and asked if he could speak with the victim and the defendant separately. T 109-10. The defendant was "kind of tense" and "aggravated." T 110. Another officer arrived. T 110. When the officers asked the victim what had happened, she was "upset… [and] trying to not be too emotional," but she was "nervous" and "a little anxious." T 111. She told the officer at first that she was "fine," because she "didn't want to get in trouble with" the defendant. T 111. It took a while before she told the officer what had actually happened. T 11-12. The victim told the officers that she did not want to "press charges" because she did not want "any trouble." T 112.

On July 21, 2013, at approximately 12:14 a.m., Nashua Police Officer Richard Sprankle, Jr. was in his cruiser, stopped at a traffic light, when a woman, and then a man, waved him down to tell him about the fight at the San Francisco Kitchen. T 131-32. The officer activated his

blue lights, drove through the intersection, and went to the restaurant. T 133.

When Officer Sprankle arrived, he could see a man:

> leaning forward significantly into what seemed to be the female's face. His arms, I remember, were cocked back pushing off of the table as if he was in the female's face. And what made me think that this was the altercation was the female was so far back in his [sic] chair and her face really appeared distraught.

T 133-34. Officer Sprankle identified the defendant as the man he saw that evening. T 134. He also saw Leah Heuston and Steven McNamara, who stopped him as he walked toward the restaurant, and wrote down their contact information. T 135. He was then stopped by a third man, Brennan Ryan, who described the same altercation. T 135-36 (THE OFFICER: "All the subjects that I located in front of San Francisco Kitchen advised that it was an open hand slap, and it was several times with his right hand.").

Officer Sprankle approached the defendant and the victim and asked the defendant if he would agree to speak with him separately. T 136-37. The defendant agreed and the officer and the defendant walked about 10 to 15 yards away from the table before they began to talk. T 137. The defendant told the officer that noting had happened, that it was "just a verbal argument." T 137. The officer described the defendant as "very agitated," noting that the defendant repeatedly put his hands into his pockets. T 137. The defendant was "a muscular individual," and because Officer Sprankle was alone, he asked the defendant if he could perform a

"pat search" of the defendant. T 137. Having performed a pat search, the officer found no weapons on the defendant. T 138.

The defendant continued to tell the officer that "nothing happened" that it was "just a verbal argument." T 139.

When Officer Sprankle spoke with the victim, she was "very timid and nervous." T 139. She denied that anything had happened. T 140. When the officer told her what the other witnesses had told him, the victim was "quiet. She didn't really respond." T 141. She eventually acknowledged that the defendant had grabbed the back of her neck and had slapped her. T 142.

Officer Sprankle placed the defendant under arrest, put him in handcuffs, and placed him in the police cruiser. T 143. By this point, Officer Ryan McDermott had arrived and talked to the victim to go over some domestic violence paperwork. T 142-43. Officer Sprankle transported the defendant to the Nashua Police Department in the cruiser. T 143.

As he drove the defendant to the department, Officer Sprankle looked into the rear view mirror and could see the defendant "constantly sit up in his seat, lift himself up as if -- it appeared to me as if he was reaching for something." T 143. When the defendant was booked, Officer Sprankle "went through [the defendant's] pockets" and found "14 small glassine baggies containing a white powdery substance" in the defendant's right front pocket. T 145. The officer also found $743 in cash. T 144-45. The officer testified that the packets appeared to contain cocaine, and that the quantity and packaging were consistent with drug

trafficking. T 146-47. The packets were sent to the State laboratory and proved to contain 10.83 grams of cocaine. T 147.

Nashua Police Officer Ryan McDermott also testified. He arrived at the San Francisco Kitchen and spoke with the defendant as Officer Sprankle spoke with the victim. T 158-59. The defendant was "was very argumentative, kind of defensive." T 158. Officer McDermott recalled that the defendant was "kind of bothered by me being there and asking him questions. And he seemed much more interested in what [the victim] was saying." T 158-59. Since the defendant kept trying to make eye contact with the victim, Officer McDermott told him "to stop and just talk to [the officer], and let her -- let her talk to Officer Sprankle and try to distract or anything." T 159. As the victim talked to Officer Sprankle, the defendant became "increasingly" "hostile and aggravated by [the police] being there." T 159-60.

After Officer Sprankle placed the defendant under arrest, Officer McDermott went over some paperwork with the victim. T 160. The victim was "petrified, very scared. She was fighting back tears." T 160. The victim did not want to press charges, but Officer McDermott explained that the State would press charges. T 160.

B. The Motion to Sever, the Hearing, and the Court's Ruling

On April 4, 2014, the defendant filed a motion to sever the charges in seven different cases. The cases included: (1) the criminal threatening and five simple assaults stemming from the July 21, 2013 incidents; (2) two counts of possession with intent to distribute stemming from the search at the police station after the July 21 arrest, as well as August 20,

2013; (3) six simple assault charges that had occurred on August 30, 2013; (4) a felon in possession charge and armed career criminal charge from May 5, 2013; (5) a second felon in possession charge and armed career criminal charge from August 23, 2013; (6) a third charge of felon in possession and an armed career criminal charge arising from events on May 13, 2013; and (7) seven counts of witness tampering occurring between November 27, 2013 through February 19, 2014. DBA A3-A4. With respect to the charges before this Court, the defendant wrote that the July 21 charges constituted one "distinct set[ ] of charges." DBA A7.

The State objected. DBA A12. The State contended that all of the charges in all of the cases were related, arguing that the charges were either related as a single criminal episode or as part of a common plan or scheme. DBA A18. Specifically, the State contended that the drug possession charge was part of the same criminal episode as the assaults and criminal threatening. DBA A20.

On May 14, 2014, the trial court held a hearing on the motion to sever. 5/14/14 T 1. At that hearing, the defense argued that the possession with intent to distribute charge should be severed from the other July 21 charges. 5/14/14 T 42-43. The defense contended that joining the drug charge with the other charges could lead the jury to conclude that the defendant was "a bad man who was dealing drugs and abused those women." 5/14/14 T 43.

On June 7, 2014, the trial court concluded that the charges that prompted the July 21, 2013 arrest, and the possession with intent to distribute charge which stemmed from that arrest, were properly joined. AD 39. The court concluded that these charges "represent[ed] another

single criminal episode," AD 27, and that the drug charge arose from evidence recovered as a result of the defendant's arrest, AD 28. However, the court also found that the July 21 charges were "not logically and factually connected to the facts in the other sets of charges." AD 28.

SUMMARY OF THE ARGUMENT

The trial court did not err in declining to sever the drug charge from the assault (domestic violence) and criminal threatening charges. The police found the drugs which led to the possession with intent to distribute charge after the police had arrested the defendant for the assaults. Therefore, the court correctly concluded that the charges were sufficiently linked to warrant trying them together. Moreover, the trial court instructed the jury to consider the charges separately. Since the jury returned a verdict of the lesser-included offense of possession, it appears that the jury followed the instructions and did not convict the defendant of the charge simply by treating the charge as propensity evidence.

ARGUMENT

THE TRIAL COURT PROPERLY JOINED THE CHARGES ASSOCIATED WITH THE JULY 21, 2013 ARREST.

The defendant contends that the trial court erred in joining the drug charge with the assaults and criminal threatening charges because the drug charge and the other charges did not constitute a "single criminal episode." DB: 18-19.

"[T]he decision to join multiple charges [is] a discretionary matter left to the trial court." *State v. Brown*, 159 N.H. 544, 550 (2009) (citation omitted). This Court "will uphold the trial court's ruling unless the decision constitutes an unsustainable exercise of discretion." *Id.* "To show the trial court's decision is unsustainable, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of [the defendant's] case." *Id.* (internal quotation marks omitted). The purpose of joinder is "to achieve efficiency and economy for both the government and the defendant." *Id.* at 554.

New Hampshire Rule of Criminal Procedure 20 governs the joinder of criminal offenses and distinguishes between charges that are related and unrelated. The rule defines three categories of related offenses:

Two or more offenses are related if they:

> (A) Are alleged to have occurred during a single criminal episode; or
>
> (B) Constitute parts of a common scheme or plan; or

> (C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

N.H. R. Crim. P. 20(a)(1). When a party moves to join related charges, the trial court must join them unless it determines that "joinder is not in the best interests of justice." *N.H. R. Crim. P.* 20(a)(2).

In deciding to join cases, a trial court must consider: "(1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant's mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony and other evidence related to the offenses." *Brown*, 159 N.H. at 551-52 (citation omitted). "No single factor is dispositive on the question of relatedness." *Id.* at 554. The five factors "are intended to serve as guidelines that must be sensibly applied in accord with the purposes of joinder." *Id.*

At the outset, the defendant asks this Court to consider the issue raised here as a "single criminal episode" issue, suggesting that the domestic violence assaults and criminal threatening were not part of the same "episode" during which the defendant put drugs into his pocket at some point before leaving for dinner. DB 15-18. Although the trial court referred to the charges as a single criminal episode, and the court concluded that they should be subject to compulsory joinder under *State v. Locke*, the court also appears to have concluded that the charges were actually intrinsic to each other. *See* AD 28 ("Additionally the drugs arose

directly out of this episode [involving the assault and criminal threatening charges]. The drugs were allegedly discovered on the defendant as part of an inventory search immediately following his arrest.").

Generally, as the trial court noted, the single criminal episode test is used to prevent the prosecution from bringing multiple charges when the crime actually constituted a single criminal act. *See State v. Locke*, 166 N.H. 344, 346 (2014) (discussing compulsory joinder as it relates to a "single criminal episode" for purposes of double jeopardy). The "single criminal episode" analysis, therefore, is related to compulsory joinder, not to whether charges should be tried separately. *Id*. at 348.

Rather than analyzing the issue under the "single criminal episode" analysis, this Court should consider the issue raised here as involving intrinsic evidence. *See State v. Wells*, 166 N.H. 73, 77-78 (2014). In explaining intrinsic evidence, the *Wells* court wrote:

> Typically, [intrinsic] evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense. This type of evidence is admissible under the rationale that "events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of [the charged] act so that it may realistically evaluate the evidence."

Id. (citations and internal quotation marks omitted).

In this case, the discovery of the drugs was the direct result of the assaults. *Wells*, 166 N.H. at 77-78. If the drug charge were tried separately, it would have been hard to explain why the officer arrested the defendant without some testimony on the assaults and threat. If the

assault and threat charges were not before the jury, the court would then have to give the jurors some cautionary instruction. Since the discovery of the drugs did not happen "in a vacuum," the charges were properly joined and considered in a single trial. *Id*.

Although the trial court did not explicitly find that the charges were integral to each other, it correctly reached the conclusion that the cases should be joined and this Court should affirm on that basis. *See State v. Hayward*, 166 N.H. 575, 583 (2014).

The *Brown* factors also demonstrate that the cases were properly joined. The drug charge was temporally and spatially related to the criminal threatening and assault charges. As the trial court noted, the defendant was arrested the evening of the assaults and criminal threatening. He did not leave the area and engage in other conduct that might have broken the connection that his arrest had with the drug charge. The participants, notably Officer Sprankle and the victim, were the same witnesses. Although the drug charge was not "similar" to the assault and criminal threatening charges, this factor alone is not dispositive. With respect to the fourth, the charges were certainly different, but the testimony from witnesses would have been duplicated in a second trial.

Two separate trials would have required the victim and the officer to testify to the same events twice. *Cf. State v. Girard*, 173 N.H. 619, 624 (2020) ("Joint trials avoid the duplication of evidence and may reduce inconvenience to victims and witnesses."); *see also United States v. Boulanger*, 444 F.3d 76, 88 (1st Cir. 2006) ("[E]ven if the counts had been severed and tried separately, similar evidence would have been used [at both trials].") (citing *United States v. Stackpole*, 811 F.2d 689, 694

(1st Cir. 1987)). Although the trial court did not consider the impact on the speed of prosecution, clearly, where a defendant is facing so many potential trials, there is a potential benefit to the defendant. *Id.* at 624-25 ("The potential benefits to the defendant may include the faster disposition of pending charges, the possibility of concurrent sentences in the event of conviction, and protection against enhanced sentencing that might occur from separate trials.").

The defendant contends that the State could "gain an unfair advantage if a weak case is joined with a strong case." DB 20 (quoting *Brown*, 159 N.H. at 555) (internal quotation marks omitted). But the State's case with respect to the assaults was hardly weak. The officer testified that five different people, not including the victim, told the officer that the defendant had assaulted her. T 136. Although the victim testified that the defendant threatened her, the officers and Heuston, who witnessed the assaults, testified to her demeanor, which was consistent with being threatened. The drug case was similarly strong, as the drugs and cash were found on the defendant's person after his arrest.

The defendant also asserts that "a further concern arises if the defendant wants to testify as to one offense but not to the others." DB 20 (citing *Brown*, 159 N.H. at 555) (internal quotation marks omitted). If this had been the case, the defense could have raised this concern with the court with respect to these charges. It did not. The defense raised the concern that the felon in possession charge might limit the defendant's ability to testify with respect to the witness tampering charge in two other cases, 5/14/14 T 39, but did not raise that claim with respect to the July 21

charges, 5/14/14 T 42-43. Therefore, while this may be a legitimate concern in another case, it is not a concern here.

Nor is the defendant's reliance on *State v. Papillon*, 173 N.H. 13 (2020) persuasive. In *Papillon*, this Court considered an unrelated threat under Rule 404(b), concluding that the threat was not "intrinsic" and that, therefore, the threat must be subject to Rule 404(b) analysis. *Id.* at 27 (rejecting the State's argument that Rule 404(b) did not apply).

Further, the defendant contends that the drug related evidence could have persuaded the jury that the defendant was a "bad person," and to that end, he directs this Court to *State v. Pelkey*, 145 N.H. 133, 135 (2000). DB 20. But *Pelkey* is distinguishable. In *Pelkey*, the defendant was arrested for driving while intoxicated. *Id.* at 135. As he was leaving the police station after being charged, the defendant stated that "he had $500 that was in his wallet, that the $500 was proceeds from his drug sales and that it better be in the truck when he picked up his truck the next day." *Id*.

The defendant in *Pelkey* was not charged with drug possession or sales. As a result, this Court reversed, concluding that "a danger of unfair prejudice arose from the possibility that the jurors may have concluded that the defendant's statement was true and treated him unfairly because they believed he was a drug dealer." *Id*. at 136.

In contrast, in this case, there was no danger of the jury speculating on criminal activity with which the defendant had not been charged. Significantly, the trial court instructed the jury to consider the charges separately. *See* T 184 (THE COURT: "Now, each of the charges against this Defendant constitutes a separate offense. You must consider each

charge separately and determine whether the State has proved the Defendant's guilt beyond a reasonable doubt."). The court outlined the elements of each of the offenses, as well, making it clear to the jury that the proof for each offense was different. *See State v. Cobb*, 143 N.H. 638, 655 (1999) ("The court explained the elements of each of the three sets of charged crimes and instructed the jurors that they had to determine whether the State had proved each element beyond a reasonable doubt."). Since jurors are presumed to follow instructions, this Court should presume that the jury in this case did. *State v. Smith*, 149 N.H. 693, 696 (2003).

Indeed, the fact that the jury found the defendant not guilty of the possession with the intent to distribute charge, convicting him instead of the lesser offense of possession, supports an inference that the jury did weigh the evidence as to each charge separately. *See State v. Ramos*, 149 N.H. 118, 121 (2003) ("[T]he jury demonstrated that it considered each charge separately by acquitting the defendant on two of the charges."); *see also Stackpole*, 811 F.2d at 694 (assertion that the jury was confused by joinder was "contradicted by the verdict," which included acquittals on two counts).

In sum, the trial court correctly joined the charges arising from the events of July 21, 2013. This Court should affirm the trial court.

CONCLUSION

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

The State requests a 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

/s/ Elizabeth C. Woodcock
Elizabeth C. Woodcock
N.H. Bar ID No. 18837
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,003 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 20, 2021 /s/*Elizabeth C. Woodcock*

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Chief Appellate Defender Christopher M. Johnson, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

December 20, 2021 *s/Elizabeth C. Woodcock*