THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0632

State of New Hampshire

v.

Tommy Page

Appeal Pursuant to Rule 7 from Judgment
of the Grafton County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred by denying Page's motion to suppress.

Issue preserved by Page's motion to suppress, A9*, the State's objection, A24, the State's memorandum in support of its objection, A28, Page's memorandum in support of his motion, A104, and the court's order, Supp. 1.

2. Whether the court erred by denying Page's request to admit, substantively, evidence that the victim's mother said that she did not want to be left alone with the victim because she was having "bad thoughts."

Issue preserved by the State's motion in limine, A112, Page's objection, A120, the State's reply to Page's objection, A126, the parties' arguments, MH 29–35, the court's order, Supp. 21, Page's renewal of his request to admit the statement substantively, T 822–24, the State's objection, T 822–24, and the court's ruling, T 824.

3. Whether the court erred by failing to instruct the jury that, to find Page guilty of first-degree murder, it had to find that Page was aware that his conduct was "practically certain" to cause the victim's death.

Issue raised as plain error.

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* Citations to the record are as follows:
"A" refers to the separately-bound appendix to this brief;
"JS" refers to jury selection on August 22, 2017;
"MH" refers to the hearing on motions in limine on August 3, 2017;
"SH" refers to the hearing on Page's motion to suppress on April 18, 2017;
"Supp." refers to the supplement attached to this brief;
"T" refers the transcript of trial on September 11–19, 2017.

STATEMENT OF THE CASE

In April 2016, the State obtained from a Grafton County grand jury indictments charging Tommy Page with first-degree murder, falsifying physical evidence and administering a controlled drug. A1, A5, A7. The State also obtained an indictment charging him with second-degree murder as an alternative to first-degree murder. A3. At the conclusion of a six-day trial from September 11 to 19, 2017, the jury found Page guilty of first-degree murder and falsifying physical evidence, and not guilty of administering a controlled drug. A1, A5, A7; T 943–44. On October 4, 2017, the court (MacLeod, J.) sentenced Page to life without parole on the first-degree murder charge and to three to seven years, concurrent, on the falsifying physical evidence charge. A177, A179.

STATEMENT OF THE FACTS

A. Suppression Hearing

On November 14, 2015, Sergeant John Sonia of the New Hampshire State Police applied for a warrant to search cell phones belonging to Tommy Page and Danielle Sylvester. A18, A23; SH 118. In his affidavit, Sonia asserted the following facts.

On November 13, 2015, at about 3:03 p.m., Sylvester called 911 and reported that the victim, her eleven-month-old son, was in distress and needed immediate medical assistance. A18. When paramedics arrived at her home in Alexandria, the victim was unconscious with bruising to his head and face. A18. He was transported by helicopter to Dartmouth-Hitchcock Hospital in Lebanon. A18. When he arrived, the bruising covered his head, face and ears. A20. He was in a coma and had multiple skull fractures, severe swelling to his brain, and a leg fracture. A20. A toxicology screen revealed the presence of buprenorphine in the victim's urine. A20. A doctor concluded that the injuries were inflicted within hours of the 911 call. A20. The victim's prognosis was "dire." A20.

In addition to these severe, life-threatening injuries, doctors also observed irritation to the victim's penis, an abrasion under his scrotum, and lacerations and ulcerations to his rectum, which were "consistent with possible sexual abuse." A20.

In speaking to Sylvester and her boyfriend, Page, police learned that the couple lived at the Alexandria home with Page's mother. A19. Page had a

prescription for buprenorphine that was kept in the house. A20. Sylvester shared custody of the victim with his biological father. A19.

Sylvester and Page told the police that, at about 8:00 that morning, while Page was trying to dress the victim, Page dropped him, causing the victim's head to strike a headboard, but this did not leave any visible injuries. A19–20. At about the same time, Page's mother left for work. A19.

In the early afternoon, Sylvester drove to a 1:00 p.m. doctor's appointment while Page stayed home with the victim. A19. Page told the police that he gave the victim a bath, during which the victim struck his head on the bathtub spout. A20. Page later "passed out" from alcohol, buprenorphine and Prozac, and awoke to find the victim crying at the bottom of the stairs. A20. Page assumed that the victim fell down the stairs and returned him to his crib. A20.

Sylvester told the police that she returned home at about 2:30 p.m. A19. Shortly thereafter, she said that she found the victim lying face down in his bed in a pool of vomit. A19. Sylvester and Page carried the victim to their car and then decided to call 911. A19, A21.

Sylvester told the police that, after the victim was flown to the hospital, Page apologized, said that he felt bad that this happened while he was watching the victim, and expressed concern that he would get in trouble. A19–A20. At the hospital, Page questioned the necessity of intensive treatment. A20.

Sylvester and Page told the police that they had exchanged text messages about what happened to the victim. SH 143. The police had no reason to believe that Sylvester and Page communicated through any means other than text messages. SH 144. In his affidavit, however, Sonia wrote that Sylvester and Page told the police that "they ha[d] been in communication with each other through their cellular telephones regarding [the victim's] condition and what may have happened to him." A21.

Page gave the police his cell phone and initially consented to a search of it. A20. Page later requested that the phone be returned to him. A20.

Justice Thomas Rappa issued a search warrant to search Page's phone. A17. The warrant described the place to be searched as Page's phone. A17. It described the items to be searched for as:

> subscriber information, text messaging, including text message routing (from/to), text message content whether saved or deleted, for as far back as possible; photographs and/or video images whether saved or deleted, for as far back as possible; contact information; call history and detail; and voice mail messages, whether saved or deleted.

A17. The warrant did not incorporate Sonia's affidavit. A17.

Matthew Pickering, a criminalist with the digital evidence unit of the state forensic laboratory, executed the search warrant. SH 42, 47. Pickering testified that, when he performed the search, he had the search warrant. SH 63, 90–91. There was no evidence, however, that he had Sonia's affidavit.

Pickering processed Page's phone and a micro-SD card that it contained. SH 47, 83. He noted that the warrant commanded him to search for all

photographs and videos without restriction. SH 91. Consistent with this command, Pickering conducted a "full search of the entire phone," and "looked at all the picture[s] on the phone." SH 95–96, 101–02. Among those photographs were twenty-three images of the victim being sexually abused. SH 78, 126. The images had been deleted but not overwritten and had date and time information that did not appear to have been altered. SH 78–81. That information indicated that the photographs were taken on November 12 and 13, 2015. SH 126–27. They appeared to have been taken on Page's phone and were not transmitted over the internet or via text message. SH 79, 95.

B. Trial

Danielle Sylvester gave birth to the victim on November 23, 2014. T 717–18. She was married to the victim's father and hoped to raise the victim with him. T 715, 717. Their marriage fell apart after the victim's birth, however, and they separated in March of 2015. T 715. Following the separation, they informally agreed to share custody. T 583.

Shortly after the separation, Sylvester moved in with her father and stepmother. T 718, 816–17. Sylvester did not spend much time at their home, however, and her stepmother described her as "out running the roads." T 818, 821. Sylvester came home to take showers and do laundry, but when her stepmother asked if she wanted to bathe or feed the victim, Sylvester declined. T 818. Sylvester's father and stepmother hired a babysitter while they were at work. T 818, 821.

In the fall of 2015, Sylvester met Tommy Page. T 583. Sylvester and Page began a romantic relationship, and, following disputes with her father and stepmother about her parenting skills, Sylvester moved in with Page and his mother at his house in Alexandria. T 583–84, 819, 826. The victim regularly stayed at Page's house. T 586.

Page suffered from back pain and had a prescription for buprenorphine. T 205–06, 210–11, 418–49, 610, 617, 655–57. Because Sylvester was addicted to heroin the prior year, experienced "stroke-like symptoms" and was going through a divorce, she also used Page's buprenorphine and was actively seeking a prescription of her own. T 617–18, 671, 674, 710.

The victim was generally healthy and uninjured in the days leading up to November 13, 2015. T 448–52, 456–63, 587–616. On Thursday, November 12, Sylvester took taxis to and from a doctor's appointment in an attempt to get a buprenorphine prescription, and she took the victim with her. T 468–69, 471–73, 564–65, 568, 571, 593–94, 618. Health-care providers described the victim as "happy," "healthy" and "energetic." T 565, 568–70, 573–74, 577–78.

On the morning of Friday, November 13, Page reached down to pick up a pair of the victim's socks while holding the victim. T 487, 622. As Page bent down, the victim suddenly flailed, pulled away and smacked his head on a bedpost. T 486–88, 518–19, 621–22. Page later told the police that the incident left a "pretty bad bruise" on the side of the victim's face, but that the victim was otherwise fine. T 488, 500. Sylvester testified that the incident did not leave any bruises or marks. T 623–24, 633.

Sylvester had another doctor's appointment scheduled for Friday afternoon. T 598–99. She planned to take the victim with her again, but Page called in sick to work and offered to look after the victim while Sylvester drove his car to the appointment. T 599, 628–32.

Sylvester left for the doctor's appointment at about 12:30 p.m. T 475–79, 486, 489, 634. While Sylvester was gone, Page sexually assaulted the victim by manipulating the victim's penis and inserting his finger into the victim's anus. T 137–38, 185–189, 241–44, 305–07, 314–15, 317–18, 756. Health-care providers later noticed redness to the victim's penis, abrasions around his anus and a cut on his anus. T 137–38, 185–86, 305–06, 314–15, 756, 797–98. Page photographed the sexual assault with his cell phone. T 241–44. The victim is asleep or unconscious in the photographs and has bruising or redness on his head. T 63, 77–78, 912, 924. Page later attempted to delete the photographs and, when questioned about what happened to the victim, did not tell police about the sexual assault. T 244, 483–516.

The State's theory was that Page fed the victim buprenorphine and that, while alone with the victim, Page inflicted the injuries that ultimately caused the victim's death. T 63–64, 76–80, 902, 905, 909, 925, 930–32, 935–37. Page, however, denied inflicting the fatal injuries. T 483–91, 499–515.

When Sylvester went to her doctor's appointment, she obtained a prescription for buprenorphine. T 578, 636. She drove directly to a pharmacy to fill the prescription, but there was a problem with her insurance and Sylvester could not get it filled. T 202–04, 579, 637–39, 704. Sylvester then

returned to the doctor's office and spoke to a receptionist, but was unable to resolve the problem. T 579, 638, 704. A health-care provider described Sylvester as "frustrated" and "upset." T 579–81. Sylvester then drove home. T 638–39, 704–05.

At trial, Sylvester testified that, after returning home, she eventually checked on the victim and found him non-responsive, lying in vomit. T 641. She denied injuring on him. T 597, 644, 646. If Sylvester's version were true, one of the State's experts noted, then Page must have caused the fatal injuries. T 327–28, 340. The defense theory, however, was that Sylvester's version was false and that Sylvester, frustrated by her inability to obtain buprenorphine and believing that the victim urinated on her bed, "lost control" and inflicted the fatal injuries. T 81–82, 99–100, 117, 877, 887, 890.

While Sylvester and Page prepared to bring the victim to the hospital, the victim stopped breathing and Sylvester called 911. T 642. The left side of the victim's face was bruised. T 642. Sylvester testified that she asked Page where the bruise came from, and Page said that it must have happened when the victim's head struck the bedpost that morning. T 642.

When the paramedics arrived, the victim was conscious and responsive, but was breathing abnormally and showed signs of brain injury. T 126, 129–30, 140. He lost consciousness shortly thereafter and was airlifted to the Dartmouth-Hitchcock Medical Center in Lebanon. T 121, 136–38, 266.

Sylvester testified that, at the hospital, Page said that what happened to victim was his fault because he was supposed to be watching the victim.

T 647. Sylvester also testified that Page expressed concern about going to prison. T 648.

Doctors found that the victim suffered extensive fractures to both sides of his skull and bleeding in his brain. T 191, 304–05, 753–54, 804. The victim also suffered from bleeding to his optic nerve, a spiral fracture to his leg and a fracture to his arm. T 192, 305, 755, 792. His urine tested positive for buprenorphine. T 410–12, 428, 442. He died two days later from the head injuries. T 307, 807. The State's experts concluded that the fatal injuries were caused by "multiple blows," inflicted intentionally, "shortly before paramedics were called." T 189, 191, 194, 307, 311–13, 317–19, 328, 331–32, 756–60, 763–64, 796–97, 803, 807–09, 811–12.

Sylvester did not dispute that, even after the victim's hospitalization, she continued to try to resolve the insurance problem with her buprenorphine prescription. T 714–15. On Monday, November 15, the day after the victim died, Sylvester paid for the drug out-of-pocket. T 715.

SUMMARY OF THE ARGUMENT

1. When issuing a search warrant, the magistrate determines the premises to be searched and the items to be searched for, subject to strict requirements of probable cause and particularity. When executing the warrant, the police determine which containers to open, subject only to the more relaxed requirement of reasonableness. Here, the warrant commanded the police to look "for . . . photographs." The court, however, mistakenly interpreted "photographs" as containers to be opened, thus artificially relaxing the applicable standard. Under the correct standards, there was no probable to search for photographs, and even if there was, the warrant's description of photographs and other items was insufficiently particular.

2. The court erred by excluding, substantively, the victim's mother's statement that she did not want to be left alone with the victim because she was having "bad thoughts." Her statement about "bad thoughts" satisfied both the "present sense impression" and "state of mind" exceptions to the hearsay rule. Any risk of unfair prejudice from her aversion to being left alone with the victim did not substantially outweigh the statement's probative value.

3. To establish first-degree murder, the State had to prove that Page was aware that his conduct was "practically certain" to cause the victim's death. The court, however, told the jury that the State merely had to prove that Page was "aware of the nature of his conduct or the circumstances under which he acted." Because the jury never truly found that Page knowingly caused the victim's death, this constitutes plain error.

I. THE COURT ERRED BY DENYING PAGE'S MOTION TO SUPPRESS.

Page moved to suppress the photographs found on his phone, citing Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. A9. Page did not dispute that the affidavit established probable cause to search his phone for text messages that he and Sylvester exchanged after the victim's hospitalization. A15. Page argued, however, that the search warrant was unconstitutional in two respects. First, it commanded the police to search for photographs, even though there was no probable cause that any photographs were evidence of any crime. A14. Second, it commanded the police to search for text messages and photographs "for as far back as possible," even though the affidavit only referred to communication following the victim's hospitalization. A13. Thus, Page argued, the search warrant was "broader than the probable cause on which it [wa]s based" and failed to "describe . . . the objects to be seized with sufficient particularity." A12, A14.

The State objected. A24. It asserted that the warrant "was sufficiently particular and not overly broad." A25. It also asserted that, even if the warrant "lacked sufficient particularity or was overbroad," the photographs at issue "inevitably would have been recovered as a result of the ongoing and independent investigation into the victim's homicide." A25–A26. The State indicated that it would file a memorandum "elaborat[ing] o[n] the legal grounds" of its objection after an evidentiary hearing. A26.

At the hearing, the State called Pickering, the criminalist who searched Page's phone, as well as other witnesses whose testimony was relevant to the State's inevitable discovery argument, which it again indicated that it would explain in a subsequent memorandum. SH 8–145, 153. The State did not call Sonia, the officer who applied for the search warrant.

Three days later, the State submitted a 71-page memorandum. A28. In it, the State argued, first, that the warrant was constitutional, and second, that even it was not, inevitable discovery applied. A29. Three days later, Page filed an eight-page memorandum reiterating his arguments. A104.

The court denied Page's motion to suppress. Supp. 20. The court did not, however, acknowledge that the warrant commanded the police to search for photographs. Instead, the court treated the warrant as if it commanded the police to search within photographs, for something else. Supp. 11 (issue is "whether the affidavit actually provided grounds for searching the cell phone's photographs"), Supp. 11 (issue is whether "there was a fair probability that the evidence the police justifiably sought could be found within the photographs"); Supp. 12 (issue is whether there was "probable cause to search the cell phone's photographs"). In other words, the court treated "photographs" as containers to be opened and looked into, rather than as the objects sought. Thus, the court addressed only whether there was probable cause to believe that photographic files contained evidence of a crime; it did not address whether there was probable cause to believe that photographs themselves were evidence of a crime.

The court found that there was probable cause to believe that photographic files contained evidence of a crime for two reasons. First, it found that Page and Sylvester "could have" sent photographs attached to text messages. Supp. 11. Second, it found that Page "could have" taken "screen captures" of written communications and then "stored these screen captures among other photographs." Supp. 12.

The court acknowledged that "the affidavit did not discuss these possibilities." Supp. 12. It nevertheless found that "these smartphone capabilities are well known" and that the magistrate "could have relied on his common sense and knowledge when making his probable cause determination." Supp. 12.

The court then ruled that, "even assuming that [the magistrate] lacked a sufficient basis to find probable cause to search the cell phone's photographs, such a finding would not necessarily have been required." Supp. 13. The court reasoned that it was "undisputed" that the affidavit established probable cause to search for text messages and that police executing a search warrant may look inside any container in which "the object of the search may be found." Supp. 13. The court noted that some jurisdictions apply a higher standard to searches for digital evidence, holding that the police may open any electronic files in which the evidence sought "might reasonably be found." Supp. 14. In light of the two possibilities it articulated, the court found that evidence of text messages might reasonably be found within photographic files. Supp. 14. Thus, the court ruled that even if the affidavit failed to establish probable

cause that any photographic files contained evidence of a crime, the magistrate could still command the police to open every photographic file on Page's phone. Supp. 14.

The court also rejected Page's argument that the warrant was not sufficiently particular. Supp. 18. It cited two possibilities. First, it found, a cell phone user "could employ various applications or methods to manipulate a file's extension or its date and time signifiers." Supp. 17. Second, it found, a user who attaches a photograph to a text message "could" delete the text message, leaving only the photograph. Supp. 17–18.

In rejecting Page's particularity challenge, the court noted that many "variables . . . inform[]" computer "search parameters" and indicated that it would be inappropriate for a magistrate, when authorizing a search of a computer or other electronic device, to enact a "search protocol" dictating which categories of files the police open when executing the warrant. Supp. 19–20. The court did not attempt to reconcile this view with its earlier finding that this warrant properly commanded the police to open all the photographic files on Page's phone.

Having found the warrant constitutional, the court declined to address the State's inevitable discovery argument. Supp. 20. By finding the warrant constitutional, the court erred.

Part I, Article 19 of the New Hampshire Constitution guarantees every subject the "right to be secure from all unreasonable searches . . . of . . . all his possessions." It provides, "[A]ll warrants to search suspected places . . . are

contrary to this right, if the cause or foundation of them be not previously supported . . . and if the order . . . to make search in suspected places . . . be not accompanied with a special designation of the . . . objects of search." RSA 595-A:2 reiterates the particularity requirement: "Search warrants . . . shall particularly describe the property or articles to be searched for."

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their . . . effects . . . against unreasonable searches." It provides, "[N]o Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the . . . things to be seized." The Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

The magistrate issuing a search warrant must examine the totality of the circumstances and make a "practical, common-sense" determination of whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Letoile, 166 N.H. 269, 273 (2014). In resolving challenges to the issuance of a search warrant, trial courts "afford much deference" to the magistrate's probable cause determination and will not read the supporting affidavit in a "hypertechnical sense." Id. In light of the preference accorded to warrants, the question is whether the magistrate had a substantial basis to conclude that probable cause existed. Id. This standard, however, does not prevent a trial court from "conclud[ing] that a warrant was invalid because the [magistrate's] probable-cause determination reflected an

improper analysis of the totality of the circumstances." State v. Ball, 164 N.H. 204, 207 (2012). This Court reviews a trial court's ruling on a motion to suppress de novo, except with respect to any controlling factual findings. Letoile, 166 N.H. at 273.

The warrant here commanded the police to search "for . . . photographs." A17. In Part A, below, Page argues that the court mistakenly interpreted "photographs" as containers to be opened, rather than as items sought. As a result, the court failed to apply the probable cause and particularity standards that apply to a magistrate's designation of items sought. Instead, it applied the more relaxed reasonableness standard that applies to the police's decision to open containers. To the extent that the court's interpretation of the warrant was correct, the warrant was unconstitutional because the magistrate usurped the police's role and failed to fulfill his own. The premise of Parts B and C is that the warrant meant what it said — it commanded the police to search "for . . . photographs," among other things. In Part B, Page argues that there was no probable cause to search for any photographs. In Part C, Page argues that, even if there was, the warrant was insufficiently particular, because it commanded the police to search for photographs and other items, without limitation, "for as far back as possible." A17.

A. "Photographs" were items sought, not containers to be opened.

A magistrate issuing a search warrant has two obligations. Both involve determinations of probable cause, not mere possibility. The first is to specify, with particularity, the place in which there is probable cause to believe that

evidence of a crime exists. See generally, 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.5, at 709 (5th ed. 2012) ("Particular description of place to be searched"). The second is to specify, with particularity, the items which there is probable cause to believe constitute evidence of a crime. See generally, id. § 4.6, at 763 ("Particular description of things to be seized"). Thus, a search warrant commands the police to search within a particular place, for particular items.

While it is the magistrate's role to define the place to be searched and the items sought, the police determine how to search within the designated place, see generally, id. § 4.10, at 931 ("Scope and intensity of the search"), including which compartments to open and look inside, id. § 4.10(b), at 946 ("It is not necessary . . . that the warrant also describe . . . receptacles" within the designated place). "[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant — subject of course to the general Fourth Amendment protection against unreasonable searches and seizures." Dalia v. United States, 441 U.S. 238, 256 (1979); see also United States v. Upham, 168 F.3d 532 (1st Cir. 1999) ("The warrant process is primarily concerned with identifying what may be searched or seized — not how"); LaFave, supra, § 4.10(d), at 972 ("The warrant . . . does not list any order of priority or sequence as to the areas to be searched within the described premises"). "The permissible intensity of the search within the described premises is determined by the description of the things to be seized . . . [a]nd

ordinarily will not otherwise be addressed in the search warrant itself." LaFave, supra, § 4.10(d), at 958 & n.110.50 (& Supp. 2017). "[T]he police are not completely free to pursue the search in any manner they choose." Id. at 973; State v. Schulz, 164 N.H. 217, 221 (2012) ("[I]f the warrant satisfies the particularity and probable cause requirements, the manner of its execution must in other respects be reasonable").

Whether the police may open a particular container depends on all the circumstances, including many that are unknown to the magistrate who issues the warrant. One such circumstance is the apparent likelihood that the container has been mislabeled. In United States v. Slocum, 708 F.2d 587 (11th Cir. 1983), for instance, the court held that it was reasonable for the police to open a folder, even though the label on the folder did not suggest it contained the documents sought, because of "the disheveled state of the offices and the apparent absence of any filing system." Id. at 604. "In an office with an orderly filing system," the court added, "the label on certain files might exempt them from any intrusion by searching agents." Id. at 604, n.24.

Courts have applied this principle to search warrants for electronic devices. In People v. Herrera, 357 P.3d 1227 (Colo. 2015), the search warrant authorized the police to search the defendant's cell phone for text messages between the defendant and named person. Id. at 1229. The police, however, opened a text message folder with someone else's name. Id. The court held this unconstitutional "because there was no evidence that [the defendant] might have mislabeled the folders." Id. at 1233. "The mere, abstract possibility that

he might have done so" was not enough. Id. "If we were to hold that any text message folder could be searched because of the abstract possibility that it might have been deceptively labeled," the court noted, "we would . . . be faced with a limitless search." Id.

In United States v. Carey, 172 F.3d 1268 (10th Cir. 1999), the search warrant authorized the police to search the defendant's computer for documents related to drug dealing. Id. at 1270. The police, however, opened files labelled with the "JPG" file extension, denoting a photographic file, and discovered child pornography. Id. at 1271. The court rejected the government's argument that doing so was permissible because "any file," including those that "appeared to [be] graphics files," "might well have contained information relating to drug crimes." Id. at 1272. Because the photographic files appeared to be "properly labeled," the court held, it was unconstitutional for the police to open them. Id. at 1275.

Another circumstance relevant to the reasonableness of opening a particular container is whether other, yet-unsearched areas or containers are more likely to contain the items sought. "[T]here is authority that the police cannot begin their search by looking in places which common sense would suggest are the least likely locations of the items specified in the search warrant." LaFave, supra, § 4.10(d), at 974. In Purcell v. State, 325 So. 2d 83 (Fla. Dist. Ct. App. 1976), the warrant authorized the police to search a two-story storage facility for stolen photographic equipment believed to be in a black cardboard carrying case. Id. at 85. When the police entered the attic,

they saw a black cardboard carrying case on the far side of the room. Id. Instead of proceeding directly to it, however, they "launched a thorough search of the entire upstairs, working systematically, as they described it, from the point of entrance to the rear of the room where the black bag sat." Id. This "systematic search of the attic," the court held, was unconstitutional. Id. at 86; see also State v. Mollberg, 246 N.W.2d 463, 468 (Minn. 1976) (where search warrant authorized the police to search a residence for fresh deerskin, unreasonable for police to believe deerskin was in a bedroom closet, when they had yet to open a barrel outside, in which they later found deerskin); State v. Kelsey, 592 S.W.2d 509, 512–14 (Mo. Ct. App. 1979) (where search warrant authorized the police to search for drugs and marked money, and where police knew that narcotics were kept in a particular cabinet downstairs, unconstitutional to search nightstand in bedroom upstairs before opening cabinet).

The final circumstance is relatively straightforward. "When the purposes of the warrant have been carried out, the authority to search is at an end." LaFave, supra, § 4.10(d), at 982–83. Thus, when the police locate the items sought, they may not continue searching.

The court here denied Page's motion to suppress based in part on its finding that the warrant properly commanded the police to open the photographic files on Page's cell phone. The court was mistaken, for three reasons.

First, the warrant commanded the police, in relevant part, to search Page's phone "for . . . photographs." A17. "Photographs" were the among the objects sought; they were not containers that the magistrate commanded the police to open. A17. The court's finding that the warrant commanded the police to "search the cell phone's photographs," A12, or to search "within the photographs," A11, is squarely contradicted by the plain language of the warrant.

Second, as explained above, it is not the role of the magistrate to dictate to the police which containers, within the place to be searched, the police should open. The police must make that determination, pursuant to standards of reasonableness, depending on various considerations that only become known during the search.

This is especially true in searches of electronic devices. The court cited one commentator, Orin Kerr, for the proposition that it would be inappropriate for a magistrate to dictate a particular search protocol. Supp. 19–20. As Professor Kerr has noted:

> [T]he computer forensics process is contingent, fact-bound, and quite unpredictable. Before an analyst starts searching a storage device, he normally has little idea which operating system the computer is running, what software is on it, how that software was used, what else is on the hard drive, or whether the suspect took steps to hide, misname, or otherwise disguise files. Perhaps the defendant made no effort to hide incriminating files; perhaps he changed file extensions, altered file headers, encrypted files, or took other steps to thwart the forensics process.
>
> . . . In a sense, the forensics process is a bit like surgery: the doctor may not know how best to proceed

> until he opens up the patient and takes a look. The ability to target information described in a warrant is highly contingent on a number of factors that are difficult or even impossible to predict ex ante.

Orin S. Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 575 (2005). For these reasons, Professor Kerr concluded, "The computer forensics process calls for ex post standards, not ex ante rules." Id. at 576.

A warrant that commands the police to open every file of a particular category prevents the police from exercising their obligation to execute the search warrant in a reasonable manner by, for instance, first opening those folders and files most likely to contain the items sought, stopping the search if the items are found there, and, if they are not, considering whether there is any evidence of tampering with file dates, times or extensions. If, as the court here found, the warrant commanded the police to open every photographic file, "for as far back as possible," regardless of the circumstances they encountered during the search, it was for that reason unconstitutional. See Lo-Ji Sales v. New York, 442 U.S. 319, 326–28 (1979) (unconstitutional for magistrate to oversee the execution of his own search warrant).

Third, every search warrant must identify, with particularly, the items sought. If, as the court here found, the items listed in the search warrant within the box following the words "for the following property:" — including "photographs" — were not the items sought, but rather electronic folders and files the police were commanded to open, then the search warrant failed to identify the items sought, and the warrant was for that reason unconstitutional.

Properly understood, the issue here was not whether some unspecified items could have been found within photographic files, whether they reasonably could have been found within photographic files, or even whether there was probable cause that they would be found within photographic files. Rather, the issues were whether the affidavit established probable cause that photographs themselves constituted evidence of a crime, and, if so, whether the warrant described those photographs for which probable cause existed with particularity. See State v. Castagnola, 46 N.E.3d 638, 658 (Ohio 2015) ("the particularity issue we address here does not relate to where the information was stored but rather 'what' evidence the detective had a fair probability of believing existed on [the defendant]'s computers"). Had the court addressed those issues, it's ruling would have been reviewed de novo. Thus, this Court should address them in the first instance.

B. There was no probable cause to search for photographs.

Probable cause means a "fair probability." Letoile, 166 N.H. at 273. Although a "fair probability" means something less than "conclusive proof," id. at 274, it also means something more than mere possibility. "[A] lawful basis for search has not been established unless it is . . . shown to be probable that [the items sought] constitute the fruits, instrumentalities, or evidence of crime." LaFave, supra, § 3.7(d), at 518. Thus, a warrant cannot authorize a search for "photographs" absent a showing that it is "probable" that photographs constitute the fruits, instrumentalities, or evidence of crime.

The supporting affidavit here failed to show that it was "probable" that photographs constituted the fruit, instrumentalities, or evidence of any crime. At no point did the affidavit mention photographs. Although the court conjured hypothetical possibilities of photographs attached to text messages and "screen captures" of photographs, Supp. 11–12, Sonia's affidavit contained no reference to these possibilities. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention." Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964); see also United States v. Ford, 184 F.3d 566, 576 (6th Cir. 1999) (refusing to consider justification for search warrant that was not presented to the magistrate). Even if such hypothetical possibilities are considered, they do not rise to the level of "fair probability." Thus, the warrant, in as much as it "command[ed]" the police to search "for . . . photographs," A17, was unconstitutional.

C. The items sought were insufficiently particular.

Even if the affidavit established probable cause to search for some photographs, the magistrate's description of the items sought, "photographs . . . for as back as possible," A17, failed to satisfy the particularity requirement.

In the eighteenth century, executive officers, not magistrates, had "discretion to determine the scope of the search, and thus to engage in a general, exploratory rummaging in a person's belongings." State v. Tucker, 133 N.H. 204, 206 (1990) (internal quotation and citation omitted). Part I,

Article 19 "was intended to abolish general warrants and writs of assistance which had been used by the British to conduct sweeping searches based upon generalized suspicions and without specifying the places to be searched or things to be seized." State v. Canelo, 139 N.H. 376, 386 (1995). "[I]ts purpose plainly was to prohibit the issuance of warrants that did not satisfy the requirements of probable cause and particularity." Id.

"The manifest purpose of [the Fourth Amendment's] particularity requirement," similarly, "was to prevent general searches," Maryland v. Garrison, 480 U.S. 79, 84 (1987), "a specific evil . . . abhorred by the colonists," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), consisting of "a general, exploratory rummaging in a person's belongings," Andresen v. Maryland, 427 U.S. 463, 480 (1976). Thus, a "distinct objective" of the Fourth Amendment is that "those searches deemed necessary should be as limited as possible." Coolidge, 403 U.S. at 467. The particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another." Andresen, 427 U.S. at 480. It "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Garrison, 480 U.S. at 84.

"The degree of specificity required in a search warrant depends upon the nature of the items to be seized." State v. Kirsch, 139 N.H. 647, 652 (1995). "[A] generic description of goods may pass muster when the seizable nature of all possible examples is apparent, as in the case of contraband, or when

probable cause has been demonstrated for believing that any example of generically described objects is likely to have evidentiary character." Tucker, 133 N.H. at 206 (citation omitted). "But the soundest generalization probably is that generic descriptions are inadequate whenever it is reasonably possible for a warrant's applicant or issuing magistrate to narrow its scope by using descriptive criteria for distinguishing objects with evidentiary significance from similar items having no such value." Id. at 206–07.

"The greatest care in description is required when the consequences of a seizure of innocent articles by mistake is most substantial, as . . . where the place to be searched is a cell phone." LaFave, supra, § 4.6(a), at 774 (& Supp. 2017). Modern cell phones have an "immense storage capacity" and can contain "vast quantities of personal information." Riley v. California, 134 S. Ct. 2473, 2485, 2489 (2014). "[M]any of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate." Id. at 2490. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions." Id. at 2489. "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." Id. at 2495.

In determining whether the warrant's description of items to be seized was as narrow as reasonably possible, reviewing courts are not bound by the facts alleged in the affidavit; they consider all the information known to the

police at the time they applied for the warrant, and the defendant need not establish than any omissions were intentional or reckless. See United States v. Leary, 846 F.2d 592, 604–05 (10th Cir. 1988) (description of items to be seized insufficient "because information was available to the government to make the description of the items to be seized much more particular"); United States v. Fuccillo, 808 F.2d 173, 176–77 (1st Cir. 1987) (search warrants to search wholesale distributor, warehouse and retail clothing store for "cartons of women's clothing" had insufficient description, especially because "the defects could have been cured had the warrant[s] . . . set forth information clearly available to the government" as to nature and brands of clothing); United States v. Cook, 657 F.2d 730, 732–34 (5th Cir. 1981) (where police had a "catalogue of 'pirated motion pictures,'" warrant authorizing seizure of "cassettes on to which . . . copyrighted films . . . have been electronically transferred and recorded" was insufficiently particular, regardless of whether "the magistrate . . . was not given or did not use" the catalogue).

The warrant here commanded the police to search Page's phone "for . . . photographs . . . for as far back as possible." A17. No limitations were placed on this command. A17. It was not limited to photographs related to Sylvester; it was not limited to photographs attached to text messages; it was not limited to screen captures. A17. Although the warrant indicated that the magistrate found probable cause to believe that "evidence that may relate to the crimes of assault, felonious sexual assault, endangering the welfare of a child and/or hindering apprehension or prosecution" would be found on Page's phone, no

such limitation was included in the warrant's command. A17. The warrant did not indicate that probable cause was limited to communication between Page and Sylvester. A17. In fact, it did not even mention Sylvester. A17. The warrant did not incorporate the affidavit, the person who executed the warrant was not the affiant, and there was no evidence that the person who executed the warrant had, or had access to, the affidavit. See Castagnola, 46 N.E.3d at 659 ("Adherence to [the particularity] requirement is especially important when . . . the person conducting the search is not the affiant").

In analogous situations, courts have held that such sweeping descriptions of electronic information are insufficiently particular. In United States v. Otero, 563 F.3d 1127 (10th Cir. 2009), the police had probable cause that a postal carrier was stealing credit-card related mail from residents on her route. Id. at 1129. The magistrate issued a warrant to search her computer for all electronic data. Id. at 1130. The court observed, "The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important." Id. at 1132. Rejecting the government's argument that the scope of the items to be seized was narrower than the warrant's plain language suggested, the court held that the warrant was insufficiently particular. Id. at 1132–33; see also United States v. Riccardi, 405 F.3d 852, 861–63 (10th Cir. 2005) (where police had probable cause to search for child pornography, unconstitutional for warrant to

authorize search for all electronic media); State v. Henderson, 854 N.W.2d 616, 632–34 (Neb. 2014) (where police had probable cause to search cell phone for communication about shooting, unconstitutional for warrant to authorize search for all electronic data); Castagnola, 46 N.E.3d at 657–59 (where police had probable cause to search computers for evidence of defendant's online search history, unconstitutional for warrant to authorize search for "records and documents" without limitation).

The warrant here was insufficiently particular in a second respect. Although probable cause existed only as to text messages between Page and Sylvester sent after the victim's hospitalization, the search warrant contained no temporal limitation. A17. In fact, it affirmatively eschewed any temporal limitation by commanding the police to search for text messages and photographs "for as far back as possible." A17.

"Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." Ford, 184 F.3d at 576. In analogous situations, courts have held that the absence of an available temporal limitation violates the particularity requirement. In Wheeler v. State, 135 A.3d 282 (Del. 2016), the police had probable cause to search the defendant's computer for "evidence of written communication" after a particular date, which constituted evidence of witness tampering concerning child sexual abuse. Id. at 287–89. The magistrate issued a warrant to search the computer for all electronic data, including photograph and video files, with no temporal limitation. Id. at 289–90. During the search, police discovered

child pornography. Id. at 290–91. The court held that the warrant was insufficiently particular because it lacked a temporal limitation, and noted that it was likely also invalid because it authorized a search for videos and pictures. Id. 304–07; see also In re Grand Jury Investigation, 130 F.3d 853, 856 (9th Cir. 1997) (five-year time period insufficiently particular where "the Government nowhere provides a rationale for the dates chosen"); United States v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980) (warrant insufficiently particular because "there is no limitation as to time"); State v. Mansor, 381 P.3d 930, 938–44 (Or. Ct. App. 2016) (in infant homicide, where affidavit established probable cause to search defendant's cell phone for internet searches within a fifteen-minute period, "temporally unlimited" warrant was unconstitutional); State v. Keodara, 364 P.3d 777, 783 (Wash. Ct. App. 2015) (warrant to search cell phone invalid because it did not "limit the search to information generated close in time to incidents for which the police had probable cause").

The affidavit here established probable cause to search for written communication between Page and Sylvester after the victim's hospitalization. By commanding the police to search Page's phone for a broad range of data, including photographs and videos, "for as far back as possible," A17, the warrant commanded precisely the type of general rummaging that Part I, Article 19 and the Fourth Amendment prohibit.

II. THE COURT ERRED BY DENYING PAGE'S REQUEST TO ADMIT, SUBSTANTIVELY, EVIDENCE THAT THE VICTIM'S MOTHER SAID THAT SHE DID NOT WANT TO BE LEFT ALONE WITH THE VICTIM BECAUSE SHE WAS HAVING "BAD THOUGHTS."

The State filed a motion in limine "to exclude prior statements made by [Sylvester] regarding [the victim]," including her statement that "she did not want to be left alone with [the victim]." A112–13. The State argued that the statements were hearsay and should be excluded under New Hampshire Rule of Evidence 403. A113–14.

Page objected, noting that Sylvester was one of "the last two people alone with [the victim] before" his hospitalization and that the statements showed that she "had a motive to . . . harm [the victim]." A120. He proffered that Sylvester "told her stepmother that she was afraid to be alone with [the victim] because she was having 'bad thoughts.'" A121. He argued that the statements were admissible under the "state of mind" exception to the hearsay rule and that any risk of unfair prejudice did not substantially outweigh their probative value. A122–23. At the hearing on the motion, Sylvester's stepmother testified that, in early May, 2015, Sylvester told her that "she could not be left alone with [the victim] because she was having bad thoughts." MH 23.

The court, in a written order, referred to Sylvester's stepmother's statement to investigators that Sylvester told her that "she didn't want to be left alone with [the victim] because she had been having bad thoughts." Supp. 28–29. The court ruled that the risk of unfair prejudice from the first part of the statement — that Sylvester did not want to be left alone with [the victim] — substantially outweighed its probative value. Supp. 32–33. The court

noted that the statement was made approximately six months prior to the victim's death and that there was a "lack of any evidence that [Sylvester] actually inflicted physical harm to her son" at that time. Supp. 33. Thus, it ruled, "her prior statement is hardly relevant to proving that she had a motive to murder [the victim]." Supp. 33. "Conversely," the court ruled, "the statement would likely have a great emotional impact on the jury because it implies [Sylvester] did not act as a responsible and caring parent." Supp. 33. The court ruled that the second part of the statement it referenced — that Sylvester had been having "bad thoughts" — did not fall within the "state of mind" exception because "it references prior feelings or thoughts offered as justification for her contemporaneous state of mind." Supp. 31. The court ruled that Page could question Sylvester about her feelings toward the victim, but that her prior statements could only be used for impeachment, not substantively. Supp. 32–33.

At trial, the State called Sylvester to testify. On cross-examination, she denied that she ever had not wanted to be alone with the victim and denied that she ever had "bad thoughts." T 726. She also denied that she ever told her stepmother that she did not want to be alone with the victim or that she was having "bad thoughts." T 727. Page later called Sylvester's stepmother, who testified that Sylvester told her, "I don't want to be alone with [the victim]," and, "I am having bad thoughts." T 822. Page then renewed his request to admit the statement substantively, citing both the "present sense impression" and "then existing mental, emotional and physical condition" exceptions to the

hearsay rule, and noting that Sylvester's statement about bad thoughts was not made in the past tense, but in the present tense. T 822–24. The court denied Page's request. T 824.

The court later instructed the jury:

> If [a] witness made an inconsistent statement before trial, you may use that statement in deciding whether to believe that witness. You may not use a statement made before trial as proof that the facts in the statement are true. The statement made before trial is only to be used by you in deciding whether to believe a particular witness.[1]

T 864. By excluding, as substantive evidence, Sylvester's statement that she did not want to be left alone with the victim because she was having "bad thoughts," the court erred.

A court's evidentiary rulings are generally reviewed for an unsustainable exercise of discretion. Under this standard, the question is whether the ruling was clearly untenable or unreasonable to the prejudice of the appellant's case. An error of law, however, is not afforded deference. Koon v. United States, 518 U.S. 81, 100 (1996) (A trial court "by definition abuses its discretion when it makes an error of law"). Thus, "whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review." State v. Saucier, 926 A.2d 633, 641 (Conn. 2007).

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[1] The court excepted from this general rule statements by a party and statements made under oath. Neither exception is applicable here.

A. Sylvester's statement that she was having "bad thoughts" about the victim fell within two hearsay exceptions.

The general hearsay rule does not exclude an out-of-court statement offered for its truth if it falls within an exception to that rule. N.H. Rs. Ev. 801, 802. One exception covers a "present sense impression," "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." N.H. R. Ev. 803(1). Another exception covers a "[t]hen-existing [m]ental, [e]motional, or [p]hysical [c]ondiciton," "[a] statement of the declarant's then-existing state of mind . . ., or emotional, sensory, or physical condition, but not including a statement of memory or belief to prove the fact remembered or believed." N.H. R. Ev. 803(3).

Sylvester's statement here — that she was having "bad thoughts" — fell within both exceptions. It fell within Rule 803(1) because Sylvester's "bad thoughts" were a "condition" and Sylvester made the statement while that condition persisted. It fell within Rule 803(3) because Sylvester's "bad thoughts" were a "state of mind" or "emotional . . . condition," not a "memory" or "belief," and because Sylvester made the statement while that state of mind or emotional condition persisted. Any doubt about the persistence of Sylvester's bad thoughts is resolved by Sylvester's statement that she did not want to be left alone with the victim; had Sylvester's bad thoughts ceased before she made the statement, they would not have been a reason for her to not want to be left alone with the victim.

In its ruling excluding the statement substantively, the court referred only to the transcript of Sylvester's stepmother's interview with the police, in

which she said that Sylvester said that she "had been having bad thoughts." Supp. 28–29 (citing A161). Page, however, did not seek to admit Sylvester's stepmother's statement to the police; he sought to admit her testimony at trial. Sylvester's stepmother's testimony at the hearing on the motion was that Sylvester said that "she was having bad thoughts." MH 23. Her testimony at trial was that Sylvester said, "I am having bad thoughts." T 822. Those statements made clear that the "bad thoughts" persisted at the time she made the statement.

Even if Sylvester's stepmother's testimony had been that Sylvester said that she "had been having bad thoughts," the statement still would have fallen within the hearsay exceptions. The phrase "had been having" still signifies that the bad thoughts persisted. Had Sylvester meant that her "bad thoughts" had ceased, she would have said that she "used to have bad thoughts" or that she "had had bad thoughts." There was no evidence that Sylvester used any such phrasing.

The court relied on Daniels v. Lafler, 192 F. App'x 408 (6th Cir. 2006), an unpublished order, in which the court stated that the state of mind exception "allows the admission of hearsay statements that the declarant was in a certain state of mind," but "does not . . . allow the admission of statements as to why the declarant was in a certain state of mind." Supp. 31 (citing id. at 423). This reliance was misplaced. When the Sixth Circuit referred to "statements as to why the declarant was in a certain state of mind," it meant statements about past events, not statements that are themselves statements about the

declarant's state of mind. Id. at 423–24. In Daniels, for example, the statement at issue was the alleged victim's statement that the defendant raped her, a statement about a past event, not her state of mind. Id. at 422–24.

The court's interpretation of Daniels would produce arbitrary and absurd results. Under that view, if the declared said only, "I'm depressed," the statement would fall within the state-of-mind exception. But if the declarant said, "I'm depressed, so I don't want to go out," then the statement, "I'm depressed," would not fall within the exception, because it would then be a "statement[] as to why the declarant" didn't want to go out. No court has adopted that approach.

B. Any risk of unfair prejudice did not substantially outweigh the probative value of Sylvester's statement that she did not want to be alone with the victim.

The court also erred when it substantively excluded, under Rule 403, Sylvester's statement that she did not want to be alone with the victim. Rule 403 permitted the court to exclude the statement only if the risk of unfair prejudice substantially outweighed its probative value. It did not.

"[E]vidence of motive may be probative of the identity of the criminal," particularly if it shows "a virulent hostility toward a specific individual." 1 G. Dix et al., McCormick on Evidence § 190, at 1040–42 (7th ed. 2013). Here, the probative value was considerable. The evidence at trial showed that someone inflicted the fatal injuries in the hours before the victim's hospitalization. Only two people had access to the victim during that time, and Sylvester was one of them. The fact that Sylvester did not want to be alone

with the victim — her own son — was thus probative of the identity of the perpetrator.

State v. Sawtell, 152 N.H. 177 (2005), is analogous. In Sawtell, the defendant was convicted of first-degree murder for shooting his girlfriend, who had given birth to the defendant's son about two months earlier. Id. at 178. On appeal, this Court held that the trial court properly admitted, over the defendant's Rule 403 objection, evidence that the defendant was unhappy about being a father and attempted to evict the victim and his son from his home, finding the evidence "highly probative of the defendant's motive to commit murder" and not substantially outweighed by any risk of unfair prejudice. Id. at 180–81; see also State v. Fandozzi, 159 N.H. 773, 780–81 (2010) (in prosecution for first-degree assault on child, trial court properly admitted, over defendant's Rule 403 objection, evidence of defendant's favoritism toward victim's sibling as "relevant to explain the defendant's motivation in harming one, but not the other").

In finding that the statement had little probative value due to the "lack of temporal proximity to the events at issue," Supp. 33, the court was mistaken. That Sylvester made the statement approximately six months prior to the victim's death demonstrated that temporal proximity was present, not lacking. See State v. Pepin, 156 N.H. 269, 278–79 (2007) (in attempted murder prosecution, any risk of unfair prejudice did not substantially outweigh probative value of evidence that defendant threatened victim five months earlier); State v. Brewster, 147 N.H. 645, 648–50 (2002) (in harassment

prosecution, any risk of unfair prejudice did not substantially outweigh probative value of evidence that defendant threatened victim two years earlier); State v. Allen, 128 N.H. 390, 397–98 (1986) (in attempted murder prosecution, any risk of unfair prejudice did not substantially outweigh probative value of evidence that defendant entered victim's house with a loaded revolver over three years earlier). Additionally, the court overlooked the fact that, between Sylvester's statement and the victim's death, Sylvester was incarcerated for over three months. A121. Thus, the time in which Sylvester had the opportunity to harm the victim was only about three months.

Any risk of unfair prejudice arising from Sylvester's statement that she did not want to be alone with the victim was minimal, particularly in the context of other evidence the court admitted, often over Page's objections. This case involved the homicide of an eleven-month-old baby. The court overruled Page's Rule 403 objection to color autopsy photographs of the victim's body. A171–72. This case also involved the sexual assault of the baby. The court overruled Page's Rule 403 objection to photographs of the abuse. JS 2–11. In this context, evidence that Sylvester did not want to alone with victim would not have had "a great emotional impact on the jury," supp. 33. See Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 Iowa L. Rev. 413, 444 (1989) (under Rule 403 "the trial court [should] decide its prejudice rulings in light of . . . other[rulings] and . . . apportion fairly the prejudice among the parties," which "may require a trial court to balance the prejudice flowing from a number of significantly different evidence rulings").

The evidence at issue here involved only a statement — not any act. Thus it was not governed by Rule 404(b) and carried less risk of any unfair prejudice. In State v. Fiske, 170 N.H. 279 (2017), this Court held that the trial court properly admitted defendant's statement that he had "perversion addictions" because it made it more likely that he committed the charged sexual assaults. Id. at 286–87. This Court found that "the danger of undue prejudice was minute" because the statement was "relatively tame" compared to other evidence of "acts" that the jury also heard. Id. at 287.

By finding that Sylvester's statement was unfairly prejudicial "because it implie[d that] Sylvester did not act as a responsible and caring parent," the court was mistaken. "[U]nfair prejudice is not mere detriment to a [party] from the tendency of the evidence to prove [the other party's theory], in which sense all evidence . . . is meant to be prejudicial." State v. DePaula, 170 N.H. 139, 150 (2017). The statement's tendency to show that Sylvester was not "a responsible and caring parent" to the victim, and thus, that she could have inflicted the fatal injuries, made the statement probative. Sylvester's statement, if admitted substantively, could have caused the jury to harbor a reasonable doubt that she, not Page, caused the victim's death. That tendency was entirely legitimate; to the extent it could be called "prejudice," it was not "unfair prejudice."

C. The ruling prejudiced Page.

The State had the burden of proving, beyond a reasonable doubt, that Page caused the victim's death. Page's defense was that Sylvester inflicted the

fatal injuries. Although Sylvester's statement was admitted for impeachment, the court instructed the jury that it could not "use a statement made before trial as proof that the facts in the statement are true." T 864. Juries are presumed to follow limiting instructions. DePaula, 170 N.H. at 150. Had the jury been permitted to consider the fact that Sylvester did not want to be alone with the victim because she was having "bad thoughts," it might have concluded that a reasonable doubt existed as whether Page caused the victim's death.

III. THE COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT, TO FIND PAGE GUILTY OF FIRST-DEGREE MURDER, IT HAD TO FIND THAT PAGE WAS AWARE THAT HIS CONDUCT WAS "PRACTICALLY CERTAIN" TO CAUSE THE VICTIM'S DEATH.

The first-degree murder charge required the State to prove, among other things, that Page "knowingly" caused the victim's death. RSA 630:1-a, I(b)(1); A1. The court here instructed the jury that "[a] person acts knowingly when he is aware of the nature of his conduct or the circumstances under which he acted." T 867. The court did not instruct the jury that the State had to prove that Page was aware that his conduct was "practically certain" to cause the victim's death. By failing to do so, the court erred.

This Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. State v. Washburn, ___ N.H. ___ (Apr. 13, 2018); Sup. Ct. R. 16-A. The error here satisfies this standard.

Mental states have no meaning in themselves; they only acquire meaning when applied to a material element, and their meaning depends on the type of element to which they are applied. See generally, RSA 626:2 (discussing mental states "with respect to" and "applied to" material elements). When applied to a conduct element, for instance, the mental state of "knowingly" means that the actor "is aware that his conduct is of such nature." RSA 626:2, II(b). When applied to an attendant-circumstance element, it means that the actor "is aware . . . that such circumstances exist." Id. And when applied to a result element, it means that the actor "is aware that it is practically certain that his conduct will cause [the] prohibited result." State v. Glenn, 160 N.H.

480, 486 (2010); see also Model Penal Code and Commentaries § 2.02(2)(b)(ii), at 226 (1985) (setting forth substantially identical language).

Here, death was a result element. Thus, to prove first-degree murder, the State had to prove that Page "[wa]s aware that it [wa]s practically certain that his conduct w[ould] cause" the victim's death. Glenn, 160 N.H. at 486. The court's failure to so instruct the jury was error and that error was plain.

The error was prejudicial. Even though the jury here concluded that Page inflicted injuries that later proved to be fatal, and that he was "aware of the nature of his conduct or the circumstances under which he acted," a properly instructed jury may not have concluded that Page was aware that death was "practically certain" to occur. Page's conduct supports this conclusion. He took photographs of the sexual assault, but attempted to delete the photographs after the victim's hospitalization. This suggests that Page was surprised by the severity of the victim's injuries.

The error seriously affects the fairness, integrity or public reputation of judicial proceedings. In addition to capital murder, several statutes prohibit homicide. First-degree murder is unique among them, in that it carries a mandatory sentence of life without parole. The defining characteristic of first-degree murder is that the homicide must be committed knowingly or purposely; if it is not, the defendant is innocent of first-degree murder, no matter how egregious the circumstances or how vulnerable the victim. Here, although Page was convicted of first-degree murder and the court imposed the mandatory life-without-parole sentence, the jury never truly found that Page

acted knowingly, because it never found that he was aware that his conduct was practically certain to cause the victim's death.

In State v. Mueller, 166 N.H. 65 (2014), the defendant was convicted of felony wiretapping after the court instructed the jury, without objection, that the applicable mental state was "purposely" rather than "wilfully." Id. at 67–68. On appeal, this Court held that the trial court erred, "[i]n light of the applicable definition of wilfully," because it "did not require the State to prove that the defendant was either aware of or recklessly ignorant of the fact that recording the conversations without consent was against the law." Id. at 69. This Court rejected the State's argument that the plain error standard was not satisfied because the defendant did not present a mental-state defense. Id. at 72. Focusing instead on the evidence, it found that the error was prejudicial because it "[could]not state with confidence that the jury would have found the defendant guilty if it had been properly instructed." Id. Finally, it found that the convictions seriously affected the fairness and integrity of judicial proceedings because "the evidence of the defendant's wilful mental state . . . was far from overwhelming." Id. at 72–73.

Here, as in Mueller, the court's instruction "lessened the State's burden of proof regarding the applicable mental state." Id. at 70. As in Mueller, the error was prejudicial and affected the fairness and integrity of judicial proceedings because the evidence that Page knew that his conduct was practically certain to cause the victim's death was far from overwhelming.

CONCLUSION

WHEREFORE, Tommy Page respectfully request that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

Appealed decisions on the first and second issues and are in writing and are appended to the brief. Appealed decisions on the second and third issues were not in writing and therefore are not appended to this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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_____
Thomas Barnard

DATED: June 5, 2018

SUPPLEMENT

SUPPLEMENT – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 16-CR-137

State of New Hampshire

v.

Tommy Page

ORDER ON THE DEFENDANT'S MOTION TO SUPPRESS

The defendant, Tommy Page, is charged with first and second degree murder, manslaughter, falsification of physical evidence, and administration of a controlled drug in connection with the death of a young child, identified for the purposes of this order as S.S. The defendant now moves to suppress twenty-three photographs seized during a search of his cellular telephone ("cell phone") conducted pursuant to a warrant on November 18, 2015, on the grounds that the warrant lacked sufficient particularity and was not supported by probable cause in violation of both Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment of the United States Constitution. (Index ## 22, 27.) The State objects. (Index ## 23, 28.) The court held a hearing on this matter on April 18, 2017, during which the parties submitted numerous exhibits and the court heard testimony from Senior Assistant Attorney General Jeffery Strelzin, Department of Safety Forensic Criminalist Matthew Pickering, and New Hampshire State Police Sergeant Matthew Koehler. Based on the record, the parties' arguments, and the applicable law, the court finds and rules as follows.

CLERK'S NOTICE DATE
6/26/17
cc: AG's Office, NMPD

I. Background

On November 14, 2015, Sergeant John R. Sonia of the New Hampshire State Police submitted an application for a search warrant to search the defendant's Samsung Galaxy model S4 cell phone. Sergeant Sonia's affidavit attached to his application contained the following assertions:

1. At about 3:03 p.m. on November 13, 2015, a 911 call was placed by [D.S.] reporting in substance that her son, 11-month-old S.S. (birth date 11/23/2014) was in medical distress and that she needed immediate medical assistance.
2. As a result of the 911 call placed by [D.S.], emergency medical personnel responded to 133 Fowler River Road in Alexandria, New Hampshire. Upon arrival at the residence, emergency medical personnel observed that S.S. was nonresponsive, had visible bruising to his head and face, and was in need for immediate medical attention. Because of S.S.'s critical condition, he was transported by medical helicopter to Dartmouth-Hitchcock Hospital in Lebanon, New Hampshire.
3. 133 Fowler River Road is a single family residence. [D.S.] lives in the home with her son, S.S., her boyfriend Tommy Page, and Tommy Page's mother Melissa Page. According to [D.S.], Tommy Page is the owner of the residence at 133 Fowler River Road.
4. According to S.S.'s mother, [D.S.], she has shared custody of S.S. with S.S.'s father [S.S. senior]. At about 7:00 p.m. on Wednesday, November 11, 2015, [S.S. senior] transferred custody of S.S. to [D.S.]. According to [S.S. senior] and S.S.'s paternal step-grandmother [M.D.], who babysat S.S. earlier in the day on Wednesday, S.S. had no injuries to him and was not acting unusual. [D.S.] reported that S.S. was acting lethargic Wednesday night when she saw him, but she reported that she saw no visible injuries to him.
5. On Thursday, November 12, [D.S.] went to a doctor's office for a scheduled appointment, and brought S.S. with her. She spent the day with S.S. Tommy Page worked on Thursday (at a construction site) until 4 p.m. Upon Tommy Page's return home from work, he went to a local hospital to obtain treatment for back pain. [D.S.] reported no unusual activity with or from S.S. during the day on Thursday, other than that he appeared "sluggish" and had been wheezing occasionally. According to S.S.'s paternal grandmother [M.D.], at around October 31, 2015, S.S. had developed croup, for which he had received treatment and by November 11 had mostly passed.
6. On Friday, November 13, [D.S.] woke up at about 8:00 a.m. and heard Tommy Page speaking with someone in another room, about ten feet away. [D.S.] then heard a "thud" sound, followed by S.S. whining.

[D.S.] then proceeded to an adjacent room, where S.S. had been sleeping. Tommy Page was in the room with S.S., and Tommy Page reported in substance that S.S. had bumped his head on the bedpost. Tommy Page then handed S.S. to [D.S.], who returned to bed and laid down with S.S. Before [D.S.] woke up that Friday morning at about 8:00 a.m., Tommy Page's mother left for work.

7. According to [D.S.], early in the afternoon on November 13 she went to attend a scheduled doctor's appointment and asked Tommy Page to drive her. Tommy Page replied in substance that he wanted to stay home, so [D.S.] drove herself to the doctor's while Tommy Page remained at the residence at 133 Fowler River Road alone with S.S. [D.S.] arrived at the doctor's office at about 1:00 p.m., and returned to 133 Fowler River Road at about 2:30 p.m. According to [D.S.], S.S. had no visible injuries to him when she left the residence at 133 Fowler Road to attend her doctor's appointment.
8. When [D.S.] returned to 133 Fowler River Road at about 2:30 p.m., the only two people at the residence were Tommy Page and S.S. Shortly after [D.S.] returned home, she went to S.S.'s bedroom, and observed him lying face-down in his bed, in a pool of apparent vomit. Shortly after discovering S.S. in distress, [D.S.] called 911.
9. According to [D.S.], after S.S. was rushed to the hospital, Tommy Page apologized, said in substance that "I feel bad this happened while I was watching him," and said in substance that he was going to get in trouble for what happened to S.S. At the hospital, when medical personnel asked [D.S.] permission to perform more intensive treatment on S.S., Tommy Page asked in substance if such treatment were necessary and what would happen if consent were not given.
10. According to [D.S.], Tommy Page has had a prescription for Suboxone, a prescription medication used for treatment of opioid dependence, and has had Suboxone at the residence at 133 Fowler River Road.
11. S.S. was taken by helicopter to Dartmouth-Hitchcock Hospital for treatment of his injuries. Medical personnel have documented extensive bruising to S.S.'s head, face, and ears. S.S. also suffered multiple displaced and complex skull fractures, and has severe swelling to his brain. S.S. also has a fractured left tibia. The nature and extent of the constellation of injuries suffered by S.S. is consistent with severe assault and not consistent with a simple fall. S.S. currently is in a coma and his prognosis is dire.[1] One of S.S.'s treating physicians opined that in light of the nature and extent of injuries suffered by S.S., he would have sustained them within hours of the initial response of medical personnel at about 3:00 p.m.
12. Medical personnel also observed several injuries to S.S. consistent with possible sexual abuse. Specifically, personnel observed an irritation to S.S.'s penis, as well as an abrasion under his scrotum and lacerations

[1] On November 15, 2015, the day after Sergeant Sonia submitted the warrant application, S.S. died in the hospital as a result of his injuries.

and ulcerations to his rectum, not consistent with normal bowel function.

13. An initial toxicology screening of S.S. revealed the presence of burprenorphine in his urine. Suboxone contains burprenorphine.
14. Tommy Page has been interviewed by investigators. Tommy Page claimed that nobody visited the residence at 133 Fowler River Road while he was with S.S. on November 13 while [D.S.] was absent. Tommy Page also acknowledged that as late as Thursday, November 12, S.S. was active and acting normally. Tommy Page initially claimed in substance that while S.S. was with him at 133 Fowler River Road on November 13, he (Tommy Page) dropped S.S. while trying to clothe him, as a result of which Tommy Page claimed that S.S. hit his head on a headboard. Later in the interview, Tommy Page claimed in substance that S.S. also hit his head on a bathtub spout while bathing. Tommy Page further claimed that while he was "passed out" from drinking alcohol and taking Suboxone and Prozac, he awoke to find S.S. at the bottom of stairs and crying; Tommy Page assumed that S.S. had fallen down the stairs and returned him to his crib.
15. As part of the interview of Tommy Page conducted by investigators. [sic] Tommy Page initially consented to a search of his cellular telephone, to wit, a Samsung Galaxy model S4, white in color with a Boston Bruins hockey logo on the back, with corresponding cellular telephone number 603-630-8372. Tommy Page has since requested that his cellular telephone be returned to him. [D.S.] also has a cellular telephone, to wit, a black-colored LG brand smartphone with corresponding number [xxx-xxx-xxxx]. Both cellular telephone numbers 603-630-8372 and [xxx-xxx-xxxx] are serviced by Cellco Partnership, d/b/a Verizon Wireless.
16. According to [D.S.] and Tommy Page, they have been in communication with each other through their cellular telephones regarding S.S.'s condition and what may have happened to him.
17. During the execution of a judge reviewed and approved warrant seeking the search of the premises at 133 Fowler River Road in Alexandria, New Hampshire, investigators observed a surveillance video camera mounted externally, pointing in the direction of the residence's driveway. Tommy Page informed investigators that there were three additional functional surveillance video cameras that covered the exterior area of the residence, and that all of the surveillance cameras record and send recorded content to a hard drive within the home.
18. According to what [D.S.] informed investigators, she and Tommy Page carried S.S. from the house when she discovered S.S. in acute medical distress and called 911 for assistance, and that they placed S.S. on the trunk of Tommy Page's car, parked in the residence's driveway, in an effort to render aid to S.S.
19. Based upon the foregoing information, there is probable cause to believe evidence that relates to the crimes of assault, felonious sexual

assault, endangering the welfare of a child, and/or hindering apprehension of prosecution may be found within the data on cellular telephones belonging to Tommy Page (to wit, a Samsung Galaxy model S4, white in color with a Boston Bruins hockey logo on the back, with corresponding cellular telephone number 603-630-8372 serviced by Cellco Partnership, d/b/a Verizon Wireless) and [D.S.] (to wit, a black-colored LG brand smartphone with corresponding number [xxx-xxx-xxxx]), such evidence to include but not limited to subscriber information; text messaging, including text message routing (from/to), text message content whether saved or deleted, for as far back as possible; photographs and/or video images whether saved or deleted, for as far back as possible; contact information; call history and detail; and voice mail messages, whether saved or deleted.

20. With respect to voicemail messages in connection with paragraph #19, the Affiant requests court authorization for Cellco Partnership, d/b/a Verizon Wireless, to provide investigators of the New Hampshire State Police with a temporary voicemail password in order to access the voicemail messages associated with the above-described cellular telephone, or to otherwise allow access.
21. Based upon the foregoing information, there is probable cause to believe evidence that relates to the crimes of assault, felonious sexual assault, endangering the welfare of a child, and/or hindering apprehension or prosecution may be found within surveillance tapes, photos, digital records, or similar media that would retain images captured on surveillance cameras found at the residence at 133 Fowler River Road in Alexandria, New Hampshire, including accessing any computers, hard drives, portable storage devices, or similar devices that can secure and/or store such images.

(Def.'s Ex 1 filed with Mot. Suppress, Index # 22.)

On November 14, 2015, the same day Sergeant Sonia submitted the warrant application, Judge Rappa of the Grafton County (2nd) Circuit Court signed a warrant to search the defendant's cell phone. Specifically, the warrant stated that Sergeant Sonia's affidavit provided the following probable cause:

> evidence that may relate to the crimes of assault, felonious sexual assault, endangering the welfare of a child, and/or hindering apprehension or prosecution, to wit, subscriber information; text messaging, including text message routing (from/to), text message content whether saved or deleted, for as far back as possible; photographs and/or video images whether saved or deleted, for as far back as possible; contact information; call history and detail; and voice mail messages, whether saved or deleted.

(*Id.*) The warrant further authorized officers "to make an immediate search" of

> [a] cellular telephone belonging to Tommy Page (to wit, a Samsung Galaxy model S4, white in color with a Boston Bruins hockey logo on the back, with corresponding cellular telephone number 603-630-8372 serviced by Cellco Partnership, d/b/a Verizon Wireless) . . . for the following property: subscriber information; text messaging, including text message routing (from/to), text message content whether saved or deleted, for as far back as possible; photographs and/or video images whether saved or deleted, for as far back as possible; contact information; call history and detail; and voice mail messages, whether saved or deleted.

(*Id.*)

While in possession of the warrant, Criminalist Pickering examined the defendant's cell phone on November 18, 2015. Criminalist Pickering described the defendant's cell phone as a "smartphone" and explained that it had capabilities commonly associated with smartphones, such as the ability to send and receive emails, text messages, and calls, view webpages, take and store photographs and videos, record the user's geolocation, and run a multitude of applications or "apps." The defendant's cell phone was also equipped with a secured digital card ("SD card"), which is a storage device that can be inserted into and later removed from the cell phone by its user and is designed to increase the cell phone's data storage capacity. Criminalist Pickering analogized an SD card to external storage devices, such as hard drives and thumb drives, that are commonly used in combination with personal computers. He also explained that cell phones are usually programmed to automatically organize and save data to an SD card without direction from a user, however, this would not preclude a user from employing certain applications to reorganize such data in any number of ways.

Criminalist Pickering removed the SD card from the defendant's cell phone and processed it separately by first duplicating and saving its contents to a local server. From there, Criminalist Pickering employed a software program called Forensic Toolkit

("FTK") to inspect this duplicated version of the data stored on the SD card. Based on Criminalist Pickering's training and experience, FTK is regularly used by local, state, and federal agencies for forensic data extraction purposes. It is the court's understanding that FTK's interface has two primary displays. On the left the program displays a "tree-view," which enables the user to explore the various folders, sub-folders, and files on the device, and on the right the program displays a "details-view" of folders, sub-folders, or files that are specifically selected by the user. FTK allows a user to filter files by, among other things, file type and date and time. Further, FTK has built-in "global filters" or "tabs" that automatically locate and organize all files of a certain type, such as graphics files, videos files, or internet search history files.

At some point during his examination of the duplicated version of the SD card, Criminalist Pickering selected the graphics tab within the FTK display, enabling him to see thumbnails[2] of all the graphic images, including photographs, stored on the SD card. Consistent with the warrant, Criminalist Pickering then briefly looked through these images for evidence of assault, felonious sexual assault, and endangering the welfare of a child. In doing so, Criminalist Pickering discovered twenty-three photographs captured by the defendant's cell phone on November 12, 2015, and November 13, 2015. The photographs immediately appeared to Criminalist Pickering to represent child pornographic images. The majority of the photographs depict the penis and anus of an infant male and several depict an adult male hand digitally penetrating the infant's anus. Two of the images taken on November 13th depict S.S. lying naked with what appears to be swelling and redness on his face and head.

[2] A "thumbnail" is a smaller representation of a larger image that enables a user to see the contents of the image without having to explicitly open the file. In this case, FTK displayed many thumbnails on the same screen, which allowed Criminalist Pickering to quickly examine numerous images at once.

Each of the twenty-three photographs had been deleted from the defendant's cell phone by a user. Nevertheless, FTK was able to retrieve the deleted photographs and restore them to their original location. Criminalist Pickering explained that, generally speaking, when a user deletes a file the user effectively orders the device to no longer display the file and informs the device that the location where the deleted file is stored may be overwritten by new data when necessary. Until the device actually overwrites the deleted file, however, FTK has the ability to retrieve the deleted file and possibly restore the deleted file to its original location, depending on to what extent the file and associated data has been overwritten.

II. Analysis

The defendant now seeks to suppress the discovery of the twenty-three photographs on the grounds that the warrant to search his cell phone was neither sufficiently supported by probable cause or particular in its description of the items within the phone to be searched. The court will address the defendant's arguments in turn.

a. Probable Cause

As the State Constitution provides the defendant with at least as much protection as the Federal Constitution with regards to the requirement that a search warrant be based on a determination of probable cause, the court will analyze the defendant's arguments relating to this issue under the State Constitution and cite to federal opinions only for guidance. *See State v. Daniel*, 142 N.H. 54, 57 (1997).

"Part I, Article 19 of the New Hampshire Constitution requires that search warrants be issued only upon a finding of probable cause." *State v. Ward*, 163 N.H. 156, 159 (2012). The New Hampshire Supreme Court has interpreted Part I, Article 19 as also

"requiring an objective determination of probable cause by a neutral and detached magistrate." *State v. Canelo*, 139 N.H. 376, 380 (1995) (quotation omitted). "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *State v. Orde*, 161 N.H. 260, 269 (2010). "[N]either certainty, nor proof beyond a reasonable doubt, nor even proof by a preponderance of the evidence, is required for a magistrate to find probable cause." *State v. Letoile*, 166 N.H. 269, 274 (2014). Instead, the task of a magistrate reviewing a warrant application is merely to "make a practical, common-sense decision whether given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Ball*, 164 N.H. 204, 207 (2012) (quotation omitted).

"[G]reat deference" is to be afforded to a magistrate's determination of probable cause, and the court will "not invalidate a warrant by interpreting the evidence submitted in a hypertechnical sense." *State v. Zwicker*, 151 N.H. 179, 185 (2004). The court rather reviews "the affidavit in a common-sense manner, and determine[s] close cases by the preference to be accorded to warrants." *Letoile*, 166 N.H. at 273. Ultimately, it is the court's duty to simply "ensure that the issuing magistrate had a substantial basis for concluding that probable cause existed," *id.*, and in doing so, the court "may consider *only* the information that the police brought to the issuing court's attention." *Ball*, 164 N.H. at 207 (emphasis in original).

The defendant contends that "the warrant's inclusion of all text messages, voice mails, and call history, and even photographs and video images, was broader than the probable cause upon which it was based," (Mot. Suppress ¶ 16), because the warrant

"affidavit failed to provide probable cause to believe that any data other than recent text messages between [the defendant and D.S.] contained evidentiary value [and] offered no basis to believe that photographs or video images were connected with the concerns at-hand." (*Id.* ¶ 17.)

Paragraph sixteen of the warrant affidavit, which states that "[a]ccording to [D.S.] and Tommy Page, they have been *in communication* with each other through their cellular telephones regarding S.S.'s condition and what may have happened to him," (emphasis added), belies the defendant's argument that the affidavit failed to provide a basis to search data on the defendant's cell phone beyond certain recent text messages because the phrase "in communication" with regards to modern cell phones could easily encompass both text messages as well as more traditional forms of telephonic communication such as call histories and voicemails.

The defendant argues, however, that "at the time the State submitted its affidavit, it knew that the communication between [the defendant and D.S.] was relegated to text messages" and that "[t]he State should not benefit from an ambiguity it created by using a generic term in lieu of the more specific information it possessed." (Mem. of Law in Supp. of Mot. Suppress ¶ 3 [hereinafter "Def.'s Mem."].) The defendant further maintains that "the State's failure to specify within the affidavit that the communications consisted specifically of text messages constituted a reckless and material misrepresentation." (*Id.*)

"[A] defendant is entitled to be heard in attacking a facially valid warrant only after a preliminary showing that in demonstrating probable cause for issuing the warrant, the police made knowing or reckless misstatements *that were material in the sense of being necessary for the finding of probable cause.*" *State v. Valenzuela*, 130

N.H. 175, 191 (1987) (emphasis added) (stating further that, with regard to this issue, "the New Hampshire rule . . . is identical to the . . . federal rule"). To the extent that paragraph sixteen's use of the phrase "in communication," as opposed to "texting," constituted a misrepresentation, it did not constitute a material one, at least with regards to the discovery of the photographic evidence that the defendant seeks to suppress. As the court will discuss in greater detail below, the basis for searching the photographs on the defendant's cell phone was based largely on the fact that the defendant and D.S. could have sent photographs using their cell phone's text messaging capabilities. Therefore, had the affidavit more accurately described the form of communications that the defendant and D.S. admitted to exchanging, the affidavit still would have supported a finding of probable cause.[3]

Regarding whether the affidavit actually provided grounds for searching the cell phone's photographs, the defendant is correct that the affidavit did not explicitly indicate that the defendant and D.S. had communicated using photographs. This does not mean, however, that Judge Rappa did not have a substantial basis to believe that there was a fair probability that the evidence the police justifiably sought could be found within the photographs on the defendant's cell phone. It is well known that modern smartphones have the capability to send and receive photographs attached to text

[3] Furthermore, notwithstanding Sergeant Koehler's testimony at the suppression hearing that, "[w]ith regard to paragraph sixteen [of the warrant affidavit], . . . [he] had received or learned of no information that there was communication between [D.S. and the defendant] beyond text messages," the defendant failed to sustain his burden of demonstrating that the supposed misrepresentation was knowingly or recklessly made. While Sergeant Koehler was intimately involved with the investigation from its inception, another officer, Sergeant Sonia, completed the warrant affidavit itself. "The appropriate focus in attacking a facially valid warrant on the ground that it contains misrepresentations is whether it contains misrepresentations made by the *affiant*." *State v. Carroll*, 131 N.H. 179, 191 (1988) (emphasis in original). Therefore, as Sergeant Sonia did not testify at the hearing, nor was testimony elicited regarding his basis of knowledge relative to paragraph sixteen's assertions, the defendant did not present sufficient evidence for the court to make a finding.

messages and that users do in fact commonly communicate in this manner.[4] Additionally, many smartphones have the capability to take "screen captures," allowing the user to capture in photographic form whatever is presently displayed on the cell phone's screen. Using such a tool, the defendant could have "screen captured" communications sent to and from D.S. and stored these screen captures among other photographs on his cell phone.

While the affidavit did not discuss these possibilities, because these smartphone capabilities are well known Judge Rappa could have relied on his common sense and knowledge when making his probable cause determination. *See, e.g., Letoile*, 166 N.H. at 275 (upholding a finding of probable cause to search the defendant's computer for child pornography where, although the warrant affidavit did not specifically state that the defendant had actually downloaded child pornography, the warrant described evidence observed within the computer's browsing history tending to show that the defendant had visited suspicious websites, allowing the magistrate to infer, based on common knowledge, "that a computer's browsing history would leave behind images in a temporary file on the computer's hard drive that could be accessed at a later date or time"). Accordingly, the defendant's argument is ultimately unavailing because Judge Rappa had a substantial basis to find probable cause to search the cell phone's photographs despite the fact that the affidavit did not explicitly indicate that the defendant and D.S. had communicated using photographs. *See Com. v. Dorelas*, 43 N.E. 3d 306, 313 (Mass. 2016) (affirming finding of probable cause to search the photographs on the defendant's cell phone merely because "[c]ommunications can come in many

[4] The defendant in fact concedes that "it is theoretically possible that [the defendant and D.S.] could have communicated about S.S.'s condition and what may have happened to him through photographs and video images." (Def.'s Mem. ¶ 2.)

forms including photographic" and the warrant affidavit established "probable cause to believe that the defendant's iPhone likely contained evidence of multiple contentious communications between himself and other persons in the days leading up to the shooting").

Moreover, even assuming that Judge Rappa lacked a sufficient basis to find probable cause to search the cell phone's photographs, such a finding would not necessarily have been required. It is undisputed that the warrant affidavit sufficiently established probable cause to believe that on or around November 13, 2015, the defendant used his cell phone to send and receive data relevant to the investigation in the form of text messages. Yet, the defendant essentially argues that this did not entitle investigators to search any file on the defendant's cell phone where this data may be found, but rather only specific files that there was probable cause to believe actually contained the data. This is not, however, a fair characterization of the law.

In the physical world "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search *may be found*." *United States v. Ross*, 456 U.S. 798, 820 (1982) (emphasis added) (explaining further that "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found"); *see also State v. Decoteau*, 137 N.H. 106, 112 (1993) (holding, where reasonable interpretation of the warrant affidavit was "that the defendant manipulated the propane tank and hot water heater to cause the explosion and fire, and then used accelerants to ensure the rapid and complete destruction of the entire residence," that a "search to prove or disprove this theory would necessarily encompass not only the section of the

defendant's home where the propane tank and water heater were located, but also the surrounding structure where accelerants *might have been used*" (emphasis added)).

While the New Hampshire Supreme Court has not explicitly addressed whether a similar standard applies to searches for digital evidence, numerous other jurisdictions have grappled with this issue. For example, when considering analogous facts to those in this case, the Supreme Judicial Court of Massachusetts recently held that "[g]iven the differences between searches of physical and virtual places, at a minimum, the standard that governs the proper scope of a search of an electronic device, such as the iPhone here, for evidence for which probable cause has been found is whether that evidence *might reasonably be found* in the electronic files searched; 'capable of containing' is far too broad." *Dorelas*, 43 N.E.3d at 313 n. 13 (emphasis added). Indeed, the United States Supreme Court noted that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (emphasis in original) (referencing personal information unique to smartphones such as "apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life").

Even if the court were to apply a more exacting standard requiring that the scope of a search of an electronic device be limited to only those files that might reasonably, as opposed to possibly, contain the data that is sought, that standard is met here.

Photograph files are in fact a relatively narrow slice of all the possible categories of files that may be stored on a smartphone and that could also be capable of containing text message data.[5] Furthermore, of these myriad file categories, photograph files are certainly among the more commonly associated with text messages. To that point, at least some, if not most, smartphones have functions built into their text messaging applications designed to transmit, or even to take, photographs. As well, photographs are not among "the broad array of private information never found in a home in any form." *Id.* The court, therefore, is not convinced that the photographs searched in this case should be afforded significantly greater protection than photographs stored in the physical world. *See Com. v. Wills*, 500 N.E.2d 1341, 1344 (Mass. 1986) (upholding discovery of relevant photographic evidence made during a search of "photo albums stacked in open view on a bookcase" and that were "closed tight," where warrant authorized search of a premise for knives, sheaths, and materials used to treat knife wounds despite the fact that the investigator admitted that "nothing about the outward appearance of [the photo albums] led him to believe that a bulky object such as a knife would be found therein" (quotations omitted)).

b. Particularity

As with the probable cause requirement, the State Constitution provides the defendant with at least as much protection as the Federal Constitution with regards to the requirement that a search warrant be sufficiently particular, therefore, the court will analyze the defendant's arguments relating to this issue under the State Constitution

[5] Document files, files associated with social media applications, and email files immediately come to mind.

and cite to federal opinions only for guidance. *State v. Fitanides*, 131 N.H. 298, 303 (1988).

Part I, Article 19 of the State Constitution requires search warrants to "describe with particularity the area to be searched and the things to be seized." *State v. Moreau*, 113 N.H. 303, 308 (1973). These requirements are a safeguard against impermissible general exploratory searches. *State v. Tucker*, 133 N.H. 204, 206 (1990) ("[T]he constitutional standards demanding the special designation or particular description of the objects of a search, . . . address[es] that feature of the objectionable eighteenth century practice that invested the executive officer, not a magistrate, with discretion to determine the scope of the search, and thus to engage in a general, exploratory rummaging in a person's belongings." (citation and quotation omitted)).

Although "[t]he law is well established . . . that the specificity required in a search warrant depends upon the nature of the items to be seized," *Fitanides*, 131 N.H. at 300, "[t]he degree of required exactitude is not readily described in the abstract." *Tucker*, 133 N.H. at 206. Thus, "the soundest generalization probably is that generic descriptions are inadequate whenever it is reasonably possible for a warrant's applicant or issuing magistrate to narrow its scope by using descriptive criteria for distinguishing objects with evidentiary significance from similar items having no such value." *Id.* at 207.

Essentially the defendant argues that, even if the affidavit provided probable cause to search those photographs pertaining to text messages the defendant sent to or received from D.S. on or around November 13, 2015, the warrant failed to satisfy the particularity requirement because it enabled investigators to examine *any* photograph on the cell phone. (*See* Mot. Suppress ¶¶ 14–15 ("[B]ecause the warrant's expansive language extended far beyond the objects of evidentiary concern described in [Sergeant]

Sonia's affidavit" it allowed "the police to engage in a general rummaging through [the defendant's] phone, a search far more invasive than justified by the facts").)

At first glance, the defendant's argument appears persuasive. The defendant's counsel elicited testimony from Criminalist Pickering to the effect that it would have been possible for him to narrow his search to only those photographs bearing indications that they may pertain to the evidence that the investigators justifiably sought. For example, Criminalist Pickering explained that smartphones generally retain records of text messages, that these records often contain thumbnail versions of any photographs attached to the text messages, and that FTK allows users to navigate to those sub-folders housing these records without extensively examining other areas of the phone. He also testified that photographs taken with a smartphone usually have date and time information both embedded within the files themselves and stored elsewhere on the cell phone that would have enabled him to search only those photographs taken on or around November 13, 2015. Additionally, Criminalist Pickering explained that when a smartphone takes a screen capture it saves the resulting file using an extension[6] that is most likely different from the extensions used to save photographs taken using the phone's camera.

Criminalist Pickering's testimony also revealed, however, that using such targeted search procedures could ultimately be ineffective because they could allow evidence subject to seizure under the warrant to go undiscovered. For example, a user could employ various applications or methods to manipulate a file's extension or its date and time signifiers. More importantly, a user could easily delete a text message used to

[6] A file extension is the three or four letter suffix following the dot at the end of a filename that indicates what type of file the file is. With regards to the defendant's cell phone, Criminalist Pickering believed that the device saved screen captures as .PNG files and normal photographs as .JPG files.

send a photograph, causing any record that the photograph was sent via text message to eventually be overwritten, while the photograph itself could still remain on the phone. *See Dorelas*, 43 N.E.3d at 313–14 ("While it may be possible for a forensic examiner to retrieve some photographic evidence through searches of files other than the photograph file, that does not make such a retrieval method constitutionally required where such photographic evidence would also reasonably be found in the iPhone's photograph file . . . and where texts and their attachments may be overwritten by new data, the saved photographic attachment may only be found in the iPhone's photograph file.").

Indeed, "because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity,[7] a broad, expansive search of the hard drive may be required." *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011). Thus, many "federal courts have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers." *United States v. Richards*, 659 F.3d 527, 539 (6th Cir. 2011); *see also United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) ("A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs.").

Moreover, the court is simply not convinced that it would have been reasonably possible for the search warrant to distinguish which photographs could have evidentiary significance from those with no such value. Admittedly, the warrant could have included

[7] It is important to remember that in this case, the defendant presumably did in fact delete the photographs he now seeks to suppress.

an instruction akin to limiting the search to only photographs "bearing sufficient indicia" that they pertained to the relevant communications. Including such a subjective instruction, however, would impermissibly delegate to the investigator the authority to determine which photographs to search. *See Rivera Rodriguez v. Beninato*, 469 F.3d 1, 4 (1st Cir. 2006) ("In requiring a particular description of articles to be seized, the Fourth Amendment makes general searches impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. Unfettered discretion by the executing officer is one of the principal evils against which the Fourth Amendment provides protection. . . ." (quotations, citations, and ellipses omitted)).

Theoretically Judge Rappa could have determined which categories of photographs he believed would have been sufficiently relevant and then dictated that the investigators follow a strict search protocol designed to search only those photographs. The drafting of such a protocol, however, would require not only an extensive understanding of forensic digital searches in general, but also detailed knowledge of the defendant's actual cell phone that would not have been available prior to searching the phone itself.[8] *See* Kerr, SEARCHES AND SEIZURES IN A DIGITAL WORLD, 119 Harv. L. Rev. 531, 572 (2005) ("The ex ante strategy is deeply flawed, however. It wrongly assumes that prosecutors and magistrate judges have the knowledge needed to articulate search strategies before the search begins. In truth, the forensics process is too contingent and unpredictable for judges to establish effective ex ante rules. Legal regulation of computer searches therefore should be imposed ex post, not ex ante, just

[8] Among the variables that Criminalist Pickering identified at the hearing as informing his search parameters were the phone's make and model, the year of its production, the phone's operating system, the presence of external memory devices, and phone's applications.

like regulation of physical searches."). Thus, "courts appear disinclined to require that computer search warrants contain a search protocol." 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(d), at 969 (5th ed. 2012) (collecting cases).

III. Conclusion

For the foregoing reasons, the court DENIES the defendant's Motion to Suppress.[9]

SO ORDERED, this 28th day of June 2017.

Lawrence A. MacLeod, Jr.
Presiding Justice

[9] In light of the court's conclusions that the warrant satisfied both the probable cause and particularity requirements, the court declines to address whether the evidence obtained during the search would have been inevitably discovered.

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 16-CR-137

State of New Hampshire

v.

Tommy Page

ORDER ON PENDING MOTIONS

The defendant, Tommy Page, is charged with first and second degree murder, falsification of physical evidence, and administration of a controlled drug in connection with the death of a young child, identified for the purposes of this order as S.S. The State has filed nine Motions *In Limine*. (Index ##39–47). The defendant objects, in whole or in part, to each motion. (Index ##48–55). The State has also filed a replication to the defendant's objections. (Index #56). The court held a hearing on August 3, 2017, during which the parties made arguments and Ralph Dudley and Meghan Dudley testified and were cross-examined. Based on the record, the parties' arguments, and the applicable law, the court finds and rules as follows.

Motion In Limine # 1

Pursuant to New Hampshire Rule of Evidence 609, the State seeks a ruling permitting it, should the defendant testify, to introduce evidence of the defendant's 2009 federal felony conviction for possession of a firearm in furtherance of a drug trafficking offense. The defendant does not object, "provided an appropriate limiting instruction is given and the evidence is limited to the fact that [the defendant] was

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cc: Hanaway/Dudley

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convicted in 2009 of a crime punishable by imprisonment in excess of one year." (Obj. to State's Mot. *In Limine* 1 ¶ 2.) It is the court's understanding that the State does not object to the defendant's proposed limitations.

The State also argues that it is entitled to present evidence of the conviction in its case-in-chief to prove an essential element of the charge of administration of a controlled drug unless the defendant stipulates or allocutes to the relevant element of the charge. The defendant contends that his prior conviction is not, however, an essential element of the charge, but rather merely a sentencing factor. The court construes the defendant's argument as a stipulation that the State will not be required to present evidence of the defendant's prior conviction to satisfy its burden regarding the defendant's administration charge. As the parties are in substantial agreement, the State's Motion *In Limine* # 1 is GRANTED in accordance with the foregoing.

Motion In Limine # 2

S.S.'s autopsy revealed injuries to his head and hand, likely sustained some number of days or weeks prior to the injuries that ultimately caused his death. Citing *State v. Guyette*, 139 N.H. 526 (1995), the State seeks a ruling forbidding the introduction of this evidence by either party.

The defendant concedes that, in accordance with *Guyette*, the evidence of S.S.'s prior injuries would be inadmissible to establish that a perpetrator other than the defendant was responsible for the victim's injuries. The defendant argues, however, that the evidence is admissible for three alternative purposes: (1) to suggest that the prior injuries to S.S.'s skull may have contributed to his death; (2) to challenge the competency of a State's witness who initially overlooked or misinterpreted the injuries;

and (3) to suggest that the police did not conduct a thorough and complete investigation because there is no documented investigation into the origins of the prior injuries.

The State concedes that the defendant's first two alternative purposes are proper grounds for admitting evidence of the prior injuries. While the State does not explicitly object to the defendant's third purpose, it argues that, pursuant to the specific contradiction doctrine, it should be permitted to contradict any impression that the police did not investigate the causes of S.S.'s prior injuries by presenting evidence that the police learned of a different infant that the defendant allegedly inflicted similar hand injuries upon.

The "specific contradiction" doctrine is "broadly applied when one party has introduced admissible evidence that creates a misleading advantage" and allows the opposing party to then "introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage." *State v. Wamala*, 158 N.H. 583, 589 (2009). "For the specific contradiction doctrine to apply, a party must introduce evidence that provides a justification, beyond mere relevance, for the opponent's introduction of evidence that may not otherwise be admissible. The initial evidence must, however, have reasonably misled the fact finder in some way." *Id.* at 589–90 (citation omitted).

Based on the parties' representations, there is minimal risk that introducing evidence of S.S.'s prior injuries, and the police's supposed failure to investigate their origins, will unfairly mislead the jury. First, the evidence does not necessarily contradict the State's theory of the case because the prior injuries occurred during a period of time when the defendant supposedly had access to S.S. Second, it is unclear when police

investigators learned of the allegations that the defendant harmed another infant and to what degree, if any, the allegations influenced their investigation.

However, even assuming that evidence of the prior injuries and a lack of investigation by the police would mislead the jury, and that the police's discovery of the defendant's alleged abuse of a different infant would actually contradict this misleading impression, the evidence of the defendant's purported prior wrongdoing would nevertheless be inadmissible. Pursuant to New Hampshire Rule of Evidence 404(b) "[a] three-pronged test is utilized to determine the admissibility of evidence of a prior bad act. First, the evidence must be relevant for a purpose other than to prove character or disposition. Second, there must be clear proof that the defendant committed the prior offense. Third, the probative value of the evidence must substantially outweigh the danger of prejudice to the defendant." *State v. Simonds*, 135 N.H. 203, 206 (1991) (citation omitted). The second and third prongs are not satisfied in this case. Specifically, there is not even clear proof that an injury actually occurred to the other infant's hand, let alone that the defendant inflicted the injury, and, given the highly inflammatory nature of the evidence when viewed in the context of the charged acts, there is substantial danger of unfair prejudice to the defendant. *See, e.g., State v. Smalley*, 151 N.H. 193, 200 (2004) ("The degree of prejudice inherent in a reference to another charge may depend upon the similarity of the 'other incident' to that for which the defendant is currently on trial." (Brackets and quotation omitted)).

Finally, both parties agree that the court should issue an appropriate limiting instruction designed to ensure that the evidence of S.S.'s prior injuries is used only for the purposes articulated above. Given the uncertainty of how such evidence will be

introduced, however, it is inappropriate to define the terms of such a limiting instruction at this time.

In accordance with the foregoing, the State's Motion *In Limine* # 2 is GRANTED in part and DENIED in part.

Motion In Limine # 3

The State seeks an order precluding the defendant from introducing the following: (1) Danielle Sylvester's[1] use of heroin and buprenorphine while pregnant with S.S.; (2) Danielle Sylvester's attempts to seek a prescription for buprenorphine or its pharmaceutical equivalent in November 2015; and (3) the purpose of Danielle Sylvester's medical appointments on November 12 and 13, 2015. The State primarily argues that such evidence is of little probative value to any relevant issue and is highly prejudicial. *See* N.H. R. Ev. 403 & 404(b). To the extent such facts would be presented through hearsay, the State argues that such testimony is inadmissible on that basis as well.

The defendant agrees that he will not elicit evidence that Danielle Sylvester used heroin and buprenorphine while pregnant. However, the defendant wishes to introduce evidence that Ms. Sylvester failed to fill a prescription for buprenorphine on November 13, 2015, and became agitated as a result.

The State concedes the relevance of Danielle Sylvester's state of mind on November 13, 2015 and her alleged agitation that day due to failing to fill a prescription. Nevertheless, the State argues that it is irrelevant that the prescription was specifically

[1] Danielle Sylvester was the biological mother of S.S. and the defendant's live-in girlfriend at the time S.S. suffered his fatal injuries.

for buprenorphine. The defendant counters that buprenorphine is a medication designed to curb opioid withdrawal symptoms and, because such symptoms can be quite uncomfortable, it is relevant that Ms. Sylvester failed to fill a prescription specifically for buprenorphine.

"Under [New Hampshire Rule of Evidence] 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *State v. Willis*, 165 N.H. 206, 216 (2013) (quotation omitted). "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." *State v. Nightingale*, 160 N.H. 569, 574 (2010). Thus, "[a]mong the factors [the court] consider[s] 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.* at 574–75.

Prior to considering the prejudicial impact of evidence, however, the court must first evaluate the probative value of the evidence. Here, even assuming that this evidence is relevant to the acts charged, there is little probative value in the fact that Danielle Sylvester failed to fill a prescription specifically for buprenorphine as opposed to any other prescription. While the court acknowledges that it is common knowledge that opioid withdrawal is a serious matter, there is no evidence that Ms. Sylvester either experienced opioid withdrawal or was likely to suffer the symptoms of withdrawal due

to her failure to fill her prescription. To the contrary, the State represented at the August 3rd hearing that the defendant was in possession of a supply of suboxone — itself a medication used to treat opioid withdrawal — and that he had shared his supply with Danielle Sylvester in the past. Given the limited relevance, if any, of this evidence, the court finds that there is a significant risk that the prejudicial impact of the fact that Ms. Sylvester sought a prescription for a medication that demonstrates she was an opioid user will substantially outweigh the evidence's probative value.

The State's Motion *In Limine* # 3 is GRANTED in accordance with the foregoing.

Motion In Limine # 4

While S.S. received treatment for his injuries, the defendant allegedly told Danielle Sylvester that he would rather die than return to prison. Acknowledging that any reference to a previous term of imprisonment may be inadmissible pursuant to New Hampshire Rule of Evidence 404(b), the State seeks a ruling permitting it to elicit evidence that the defendant merely stated that he would rather die than *go to* prison, as opposed to *return to* prison. The State further indicates that it would seek to admit the defendant's reference to returning to prison should the defendant "open the door." As an example, the State argues that "should the defense chose to elicit that the defendant was emotional when he made inculpatory statements to [Danielle Sylvester], thereby suggesting a degree of concern for the victim on his part or emotions consistent with a defense claim of accident, such a tactic would open the door to alternative reasons for the defendant's emotions when making inculpatory remarks to [Ms. Sylvester]. Specifically, selfish concern for his own well-being, and his fear that the consequences of his conduct would result in his return to prison." (State's Mot. *In Limine* # 4 ¶ 5.)

The defendant concedes that the State may offer evidence that the defendant stated that he would rather die than go to prison. However, the defendant argues that the State should not be allowed to elicit the defendant's reference to returning to prison in the scenario described above. The court declines to speculate at this time regarding what circumstances would "open the door" to the introduction of the defendant's full statement. That said, for the reasons the defendant articulates in his Objection, the court is inclined to agree that the scenario outlined in the State's Motion would not open the door to the introduction of the full statement.

In accordance with the foregoing, the State's Motion *In Limine* # 4 is GRANTED.

Motion In Limine # 5

The State seeks a ruling prohibiting the admission of certain statements Danielle Sylvester made to her father and stepmother concerning S.S. The State argues that the statements are inadmissible hearsay and that they have "relevancy that is low at best and [that] is far outweighed by [the statement's] potential for creating unfair prejudice, confusing legitimate trial issues, and misleading the jury." (State's Mot. *In Limine* # 5 at 1.)

During the August 3rd hearing, Ralph and Megan Dudley, Danielle Sylvester's father and stepmother, testified regarding statements they gave to police investigators on November 14, 2015. The transcripts of these interviews were submitted as full exhibits during the hearing. (*See* Def.'s Ex. A & B.) Meghan Dudley testified that she recalled describing to investigators several statements attributed to Danielle Sylvester. First, toward the end of May 2015, Mrs. Dudley claimed that Ms. Sylvester told her that "she didn't want [S.S] and that she didn't want to be left alone with him because she had

been having bad thoughts." (Def.'s Ex. A at 31.) Second, soon after Halloween 2015, Meghan Dudley testified that her husband relayed to her statements Danielle Sylvester had made to him during a recent phone conversation. These statements included assertions to the effect that Mr. Dudley, Mrs. Dudley, and S.S.'s father "would never see S.S. again" and that Ms. Sylvester "didn't want S.S." Finally, Meghan Dudley testified that Danielle Sylvester made statements to her on numerous occasions, beginning immediately after S.S.'s birth and continuing until soon before his death, to the effect that she "didn't want to have S.S., had wanted to have him adopted, never wanted a baby, and had wanted an abortion."

At the August 3rd hearing, Ralph Dudley struggled to remember his conversation with investigators on November 14, 2015, or the details of the phone conversation he had with his daughter around Halloween 2015. The State conceded during the hearing that the defendant elicited sufficient testimony from Mr. Dudley to establish that his statements to the police on November 14th regarding his conversation with Danielle Sylvester would be admissible as a past recollection recorded provided the statements are otherwise admissible. Based on the transcript, Mr. Dudley told investigators that during the conversation with his daughter she "started throwing her little temper tantrum" and said "I didn't want to go through this I didn't . . . sign up for all this I didn't even want the baby." (Def.'s Ex. B at 13–14.)

The defendant claims that Danielle Sylvester "is a crucial figure in this case, as she and [the defendant] were the last two people alone with [S.S.] before his presentation to medical personnel." (Obj. to State's Mot. *In Limine* # 5 ¶ 2.) The defendant further asserts that Danielle Sylvester "had motive to sedate and otherwise harm her son" because she resented him "for the general burden and lifestyle

impediment she felt he posed, and she expressed this resentment through both her words and conduct." (*Id.* ¶ 3.) The defendant, therefore, maintains that he "is entitled to cross-examine [Danielle Sylvester] regarding potential animus towards [S.S.]" and that, "[s]hould [Ms. Sylvester] deny harboring the sentiments she conveyed to others, [the defendant] is entitled to impeach her by prior inconsistent statement." (*Id.* ¶ 9.) The defendant also contends that Danielle Sylvester's "prior statements are also independently and substantively admissible under the 'then existing state of mind' exception to the hearsay rule.[2]" (*Id.*)

Pursuant to New Hampshire Rule of Evidence 803(3), an out-of-court statement offered in evidence for the truth of the matter asserted is not excluded by the hearsay rule should it be "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." "The perceived guarantee of trustworthiness underlying this exception is the declarant's lack of time for fabrication or deliberate or conscious misrepresentation due to the spontaneous nature of the statement," thus, "to be admissible under Rule 803(3), the statement must be contemporaneous with the declarant's state of mind or physical condition, and must relate to then-present feelings, pain, or state of mind." *N.H. Ev. Man.* at VIII-50.

[2] The defendant's argument suggests that he concedes that Danielle Sylvester's statements to Ralph and Meghan Dudley constitute hearsay as defined in New Hampshire Rule of Evidence 801. Accordingly, the court assumes that the defendant wishes to admit Ms. Sylvester's out of court statements for the purpose of proving the factual assertions contained therein.

A portion of Danielle Sylvester's May 2015 statement, where she allegedly said that "she didn't want [S.S.] and that she didn't want to be left alone with him," satisfies the Rule 803(3) exception because it reflects Ms. Sylvester's contemporaneous desire not to be left alone with S.S. The second half of her statement, however, where Ms. Sylvester stated that "she had been having bad thoughts" about S.S., does not satisfy the rule because it references prior feelings or thoughts offered as justification for her contemporaneous state of mind. *See Daniels v. Lafler*, 192 F. App'x 408, 423–24 (6th Cir. 2006) (applying an identical Michigan Rule of Evidence 803(3) and concluding that the rule "allows the admission of hearsay statements that the declarant was in a certain state of mind," but "does not, however, allow the admission of statements as to *why* the declarant was in a certain state of mind" (emphasis in original)).

Likewise, Danielle Sylvester's recurring statements to the effect that she "didn't want to have S.S., had wanted to have him adopted, never wanted a baby, and had wanted an abortion," and her statements to her father around Halloween 2015 that she "didn't want to go through this" and "didn't . . . sign up for all this [and] didn't even want the baby," are themselves references to prior thoughts and feelings. Rule 803(3) excludes such references because, unlike spontaneous reflections of a then-present state of mind, there is sufficient time for the declarant to consciously fabricate or misrepresent a prior thought or feeling to comport or justify the declarant's then-existing state of mind.

There is also a hearsay within hearsay issue regarding Meghan Dudley's testimony about her recollection of Danielle Sylvester's statements to Ralph Dudley over the telephone. *See N.H. R. Ev.* 805. Mrs. Dudley only learned of these statements via Mr. Dudley's own out of court description of his conversation with his daughter, and the

court is not persuaded that a hearsay exception applies to Mr. Dudley's statements in this circumstance. *See, e.g., Simpkins v. Snow*, 139 N.H. 735, 738 (1995) ("Narratives of past facts or expressions of one's understanding of what has happened . . . are incompetent hearsay." (Quotation and brackets omitted)).

That said, the defendant is entitled to question Danielle Sylvester regarding her feelings toward S.S. during his lifetime because her possible animus towards her son is relevant. *See State v. Sawtell*, 152 N.H. 177, 181 (2005) (finding trial court properly exercised its discretion in admitting evidence that the defendant — who was charged with murdering the mother of his infant son — had expressed a "dislike of being a parent" and had threatened the victim during her pregnancy because the evidence was "relevant and highly probative of the defendant's motive to commit murder" and did not lack temporal proximity to the crime although some of the defendant's statements occurred ten month before the murder).

Furthermore, should Danielle Sylvester's responses sufficiently contradict her prior statements to Ralph and Meghan Dudley, these statements may be used to impeach her testimony provided that the defendant complies with the requirements of New Hampshire Rule of Evidence 613. *See State v. Martin*, 138 N.H. 508, 514 (1994) (reasoning that statements offered not for their truth, but only to evaluate the credibility of a witness, are not hearsay).

The court must next address New Hampshire Rule of Evidence 403's impact on the admissibility of Danielle Sylvester's prior statements. With regards to Ms. Sylvester's May 2015 statement, that "she didn't want [S.S.] and that she didn't want to be left alone with him," although this statement satisfies Rule 803(3), it does not satisfy Rule 403 should the statement be offered in the first instance to show that Ms. Sylvester harbored

ill will toward her son. Danielle Sylvester made this statement approximately six months prior to S.S.'s death. This lack of temporal proximity to the events at issue, coupled with the lack of any evidence that Ms. Sylvester actually inflicted physical harm to her son, means that her prior statement is hardly relevant to proving that she had a motive to murder S.S. Conversely, the statement would likely have a great emotional impact on the jury because it implies Ms. Sylvester did not act as a responsible and caring parent.

Nonetheless, should Danielle Sylvester's prior statements, including her May 2015 statement, be used solely for impeachment purposes, Rule 403 will be satisfied. For Ms. Sylvester's statements to be admissible for impeachment purposes, evidence must first be presented that tends to contradict the sentiments embodied in these statements. Under such circumstances, the probative value of Danielle Sylvester's statements would be significantly higher than if the statements were offered only to establish a possible motive on her part to kill S.S. Therefore, while the statements would still have a similar emotional impact on the jury, this impact is unlikely to substantially outweigh the probative value of the evidence.

In accordance with the foregoing, the State's Motion *In Limine* # 5 is GRANTED in part and DENIED in part.

Motions In Limine # 6 thru # 8

Based on the parties' representations at the August 3rd hearing, as well as a review of the parties' relevant filings, the court understands that the parties are in agreement concerning the issues raised in the State's Motion *In Limine* # 6, Motion *In Limine* # 7, and Motion *In Limine* # 8. Accordingly, these motions are GRANTED.

Motion In Limine # 9

The State seeks to prevent any cross-examination of its witnesses regarding explanations for S.S.'s injuries that the defendant described to investigators during an interview on November 14, 2015. The State argues that the defendant's statements constitute inadmissible hearsay should they be offered for their substantive value. The State concedes, however, that the statements may be admissible for non-substantive purposes, such as to assist jurors in evaluating the opinions of the State's expert witnesses.

Both parties agree that the court should instruct the jurors regarding the permissible use of the defendant's statements. The defendant objects, however, to the specific limiting instruction the State proposed in its motion. Given the uncertainty of precisely how and when the defendant's statements may be elicited during cross-examination, the court declines to draft an instruction at this time and instead invites the parties to submit their own instructions. The parties also dispute the frequency with which the court should so instruct the jury. Again, given the uncertainty on this issue, it is inappropriate to rule at this time regarding when and under what circumstances the court will instruct the jury.

Finally, the State argues that "it is incumbent upon defense counsel, should they seek to inquire on cross-examination into the substance of the defendant's statements, in the first instance to identify for the Court outside the presence of the jury what specific statements they seek to cross-examine the State's experts on, and to provide the relevance thereof." (State's Mot. *In Limine* # 9 ¶ 15.) The court understands that the defendant concedes at this time that the defendant's statements to investigators constitute inadmissible hearsay if offered for their "substance," *i.e.* to prove the truth of

the facts asserted therein. Therefore, the court agrees with the State that should the defendant come to believe, due to events at trial, that the substance of these statements are somehow admissible, that the defense counsel should first inform the court, outside the presence of the jury, of their intention to elicit such evidence.

In accordance with the foregoing, the State's Motion *In Limine* # 9 is GRANTED in part and DENIED in part.

SO ORDERED, this 17th day of August 2017.

Lawrence A. MacLeod, Jr.
Presiding Justice