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

REPLY BRIEF FOR THE DEFENDANT

Thomas Barnard
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 16414
603-224-1236
(15 minutes oral argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Court Rules

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

The court made factual findings regarding the general, hypothetical capabilities of smartphones. At least a dozen times, the State refers to the deferential standard of review for factual findings. SB* 16–34. Here, however, Page does not challenge the court's factual findings; he challenges its legal conclusions regarding probable cause and particularity. Those legal conclusions are reviewed de novo. See State v. Norman, ___ N.H. ___ (July 6, 2018) (reversing trial court's ruling on probable cause, even though no one disputed that the affidavit established a possibility that the defendant possessed child pornography).

The State claims that Page "suggest[s] that a search protocol was necessary to limit the discretion of those performing the search." SB 15. It similarly claims that Page argues that the warrant should have "limit[ed] the . . . search to a particular date range." SB 30 (quoting United States v. Loera, 59 F. Supp. 3d 1089, 1153 (D.N.M. 2014)). The State claims that its position, in contrast, recognizes "the need for flexibility" in executing search warrants for digital data. SB 23.

The State has it backwards. Page's argument is that the warrant was unconstitutional, not because it gave the analyst discretion to decide where to search, but because it took that discretion away. The State fails to

---

* Citations to the record are as follows:
"DB A" refers to the separately-bound appendix to Page's opening brief;
"SH" refers to the hearing on Page's motion to suppress on April 18, 2017;
"SB" refers to the State's brief
"DB Supp." refers to the supplement attached to Page's opening brief;
"T" refers the transcript of trial on September 11–19, 2017.

acknowledge a key fact about the warrant: it did not merely "authorize[] investigators to search the cellphone for photographs," SB 6, it "command[ed]" them to search for and seize each and every photograph on Page's phone. DB A17. A constitutional warrant would have accurately described the particular items for which probable cause existed — text messages between Page and Sylvester after the victim's hospitalization — commanded the police to search for and seize that particular evidence, and left it to the expert analyst to exercise his reasonable discretion in deciding which electronic files to open and examine — and which not. But because the warrant here commanded the police to open, view and seize every photograph on Page's phone, it wholly deprived the expert analyst of that "need[ed] flexibility," SB 23.

The State characterizes the analyst's search of Page's phone as "limited." SB 9, 11. His testimony, however, was that, as commanded by the warrant, SH 91, he "looked at all the picture[s] on the phone." SH 95–96. According to the analyst, "[t]here w[ere] a lot of images . . . on the phone." SH 96. This cannot plausibly be characterized as a "limited" search. See Riley v. California, 134 S. Ct. 2473, 2489 (2014) ("The sum of an individual's private life can be reconstructed through" all the photographs on his phone).

The State's argument is essentially that the warrant could have been worse. See SB 26 ("The warrant did not permit blanket access to a host of other media and electronic devices"); SB 26 ("The warrant . . . did not grant authority to search any and all data found on the cellphone. . ."); SB 27 ("[T]he warrant allowed access to only some of th[e] wealth of information" stored on

Page's phone); SB 28 ("The warrant did not permit a search of all possible communications that [Page's] cellphone could send, receive, or store."); SB 28 ("[T]he warrant did not allow for a perusal of 'any and all' available digital data that could be located on [Page's] cellphone. . ."). "It could have been worse" is no defense to any complaint of illegality, and it is not the standard by which the constitutionality of a search warrant is determined.

The State relies heavily on Commonwealth v. Dorelas, 43 N.E.3d 306 (Mass. 2016), a four-to-three decision from the Supreme Judicial Court of Massachusetts. SB 19–22, 33, 35. The State makes two claims about Dorelas. Both are mistaken.

First, the State claims that, in Dorelas, the defendant "argu[ed] that the warrant impermissibly allowed for a search for photos," that his claim was "substantively identical to that voiced by [Page] here," and that "[t]he issue squarely before the Supreme Judicial Court in Dorelas was the validity of a warrant. . ." SB 19–20. But unlike Page, the defendant in Dorelas challenged only the search, not the warrant, in the trial court. See id. at 310–11 ("In his arguments to the motion judge, the defendant conceded that the search warrant affidavit provided probable cause to search the iPhone for text messages relevant to the shooting under investigation, but that it was unreasonable to search the photographs files on his iPhone for such evidence. The motion judge held that it was appropriate for the police to search the files on the defendant's iPhone that contained his photographs. . ."). Although the defendant also argued on appeal that the warrant lacked particularity, "these

arguments were not made in the trial court," so the Supreme Judicial Court "d[id] not consider them." Id. at 311, n. 8.[1] Thus, "[t]he issue squarely before the Supreme Judicial Court in Dorelas" was the reasonableness of the search, not, as the State claims, "the validity of [the] warrant," SB 19. See also SB 15 (criticizing Page for citing "cases [that] address the execution of a particular search warrant, rather than the validity of the warrant itself.")[2].

Second, the State claims that "the warrant at issue in Dorelas authorized a search [of] the defendant's cellphone for, among other . . . information, saved and deleted photographs with no corresponding date restrictions." SB 20 (internal quotation and brackets omitted). Although this description reflects the warrant in Dorelas on its face, it does not reflect how the trial court and the Supreme Judicial Court interpreted the warrant. Id. at 310, n.3. Those courts noted that the warrant incorporated the supporting affidavit. Id. Thus, they "considered [the warrant] in conjunction with [that] affidavit." Id. Considered in conjunction with the affidavit, they concluded, the warrant did not broadly authorize a search for all photographs, but instead authorized a much narrower search "for evidence of communication that would link the defendant and another person to the shooting." Id.

The Supreme Judicial Court did not stop there, however. The majority noted that, considered on its own, the warrant "conflat[ed] at least in part the items to be searched for and the places to be searched." Id. Thus, the majority

---

[1] The dissent addressed the particularity challenge and found that the warrant was insufficiently particular. Id. at 314 (Lenk, J., dissenting).
[2] Unlike the State, Page cited such cases precisely to illustrate this distinction. DB 19–21.

stated, "We agree with the dissent that as written the warrant and the warrant application are overly broad." Id.

Unlike the warrant at issue in Dorelas, the warrant here did not incorporate the affidavit. DB A17. In fact, there is no evidence that the analyst who searched Page's smartphone was even aware that Sylvester told the police that she and Page "had been in communication with each other through their cellular telephones regarding [the victim's] condition and what may have happened to him," DB A21, the sole basis for searching Page's smartphone in the first place. Thus, unlike in Dorelas, the trial court here did not rule, and the State does not argue, that the warrant should be read more narrowly than "as written," id. As the above-quoted agreement from Dorelas makes clear, had the Supreme Judicial Court considered the warrant here, all seven members of that court would have held it "overly broad" and unconstitutional. Thus, Dorelas supports Page's position.

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 claims that the trial court "precluded . . . [the] entirety [of Sylvester's statement] after conducting a Rule 403 balancing test." SB 37. The State is mistaken. The court's Rule 403 ruling only applied to Sylvester's statement that she did not want to be alone with the victim. DB Supp. 32–33. The court excluded Sylvester's statement that she was having "bad thoughts" only under the hearsay rule[3], not under Rule 403. DB Supp. 31; T 824.

The State repeatedly claims that there was no evidence that Sylvester ever acted on her bad thoughts. SB 37 ("absence of any evidence that [Sylvester] had ever actually harmed [the victim]"); SB 38 ("that single remark was not acted upon . . . in the . . . months that followed"); SB 38 ("absence of any evidence that Sylvester ever acted on the remark"); SB 39 ("it was a[n] . . . unacted-upon remark"); SB 40 ("there is no evidence whatsoever that Sylvester ever acted on the statement").

The State confuses its theory of the case with the evidence. The evidence was that, about six months after Sylvester told her step-mother that she did not want to be left alone with the victim because she was having "bad thoughts," Sylvester returned home "frustrated" and "upset" that she couldn't get a buprenorphine prescription. T 579–81, 638–39, 704–05. Shortly thereafter, the victim suffered "multiple blows," inflicted intentionally. T 189,

[3] The State does not dispute that the court's hearsay ruling at trial was erroneous. SB 37, n.15.

191, 194, 307, 311–13, 317–19, 328, 331–32, 756–60, 763–64, 796–97, 803, 807–09, 811–12. The victim was then airlifted to the hospital with extensive fractures to both sides of his skull, bleeding in his brain and optic nerve, and fractures to his arm and leg, injuries that proved fatal. T 191–92, 304–05, 307, 807, 753–55, 792, 804. This constituted evidence, albeit circumstantial, that Sylvester harmed the victim. The mere fact that the State's theory of the case was that someone else caused the injuries does not change the evidence.

The State argues that, to infer a motive to harm from Sylvester's statement, the jurors would have to "draw an improper propensity-based inference" and "rel[y] on an improper attack on [Sylvester's] character." SB 39–40. The "improper propensity-based inference" the State references is addressed in Rule 404(b). But the trial court here did not exclude the statement under Rule 404(b), nor could it. "[F]or Rule 404(b) to apply, there must be evidence of a crime, wrong, or act at issue." State v. Giddens, 155 N.H. 175, 179 (2007). If the party objecting to the evidence "does not allege a crime, wrong, or act — [but] only an inference," then "Rule 404(b) does not apply." Id. Sylvester's desire not to be alone with the victim was not a "crime, wrong or act." And even if Rule 404(b) applied, the rule allows for the introduction of evidence for purposes other than propensity, such as "motive," which directly refutes the State's argument that, to infer a motive to harm the victim, the jury would have had to rely on inferences of propensity or character.

The State suggests that this issue is about trial court discretion. SB 41. "At best," the State argues, "[State v. Sawtell, 152 N.H. 177 (2005)], as well as

the other cases that [Page] cites, may support an argument that another judge reviewing the same evidence might have exercised his or her discretion differently." SB 41. But Sawtell, State v. Fandozzi, 159 N.H. 773 (2010), and other cases cited in Page's brief indicate that, when the State charges an individual with murder or assault, trial courts are virtually certain to admit, to show motive, evidence of the individual's prior expressions of animus toward the victim. The only difference here was that a defendant, rather than the State, sought to introduce the evidence. Nothing in Rule 403 suggests that it should operate differently depending on whether the proponent of the evidence is the State or the defendant. But see State v. Maggi, No. 2015-0029 (N.H. May 20, 2016) (3JX, non-precedential order) (same trial judge who granted State's motion to exclude evidence here denied defendant's motion to exclude "disturbing" sexual Facebook conversations he had with alleged victims' thirteen-year-old friend, offered to show the defendant's "sexual intent," concluding that "the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice."). Because Rule 403 requires evenhanded discretion, not a double standard, this Court should find error.

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.

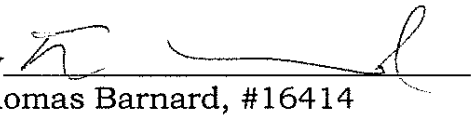
The State claims that the trial court's instruction here "state[d] nearly verbatim the applicable model instruction." SB 43–44. It did not. The court here instructed the jury that "a person acts knowingly when he is aware of the nature of his conduct or the circumstances under which he acted." T 867. The model instruction provides that "'knowingly' means that the State must prove that the defendant was aware that his acts would cause the prohibited result." N.H. Criminal Jury Instructions 2.04 (1985)). There is a world of difference between the two. In a typical DWI, firearm-cleaning or single-punch homicide, for instance, the defendant may very well have been "aware of the nature of his conduct or the circumstances under which he acted," in the sense that he knew that he was driving drunk, cleaning a firearm in an improper manner or punching the victim. But that is much different than saying that such a defendant was "aware that his acts would cause" someone else's death. Thus, the trial court's instruction here fell far short of "adequately inform[ing] the jury on the applicable law," SB 43, of knowing first-degree murder.

CONCLUSION

WHEREFORE, Tommy Page respectfully request that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

Respectfully submitted,

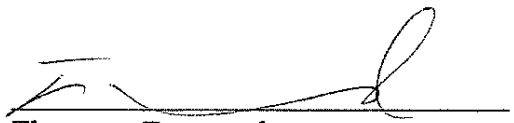
By 

Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

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

Peter Hinckley
Senior Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301



Thomas Barnard

DATED: September 10, 2018