THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0632

The State of New Hampshire

v.

Tommy Page

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE GRAFTON COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUES PRESENTED

1. Whether the court below correctly determined, based on pertinent facts found after a full evidentiary hearing, that a judicially authorized warrant authorizing a search of the defendant's cellphone for specified and limited digital information was supported by probable cause and was sufficiently particular.

2. Whether the trial court unsustainably exercised its discretion when it excluded, as substantive evidence, an ambiguous statement attributed to the victim's mother made about six months before the victim's murder.

3. Whether the trial court committed plain error in instructing the jurors on the "knowingly" element of first-degree murder consistently with the statutory definition and model instruction.

STATEMENT OF THE CASE

A Grafton County grand jury indicted the defendant, Tommy Page, on one count each of first-degree murder, second-degree murder, falsification of physical evidence, and administration of a controlled drug. DA 1–8.[1] *See* RSA 630:1-a, I(b)(1) (2016); RSA630:1-b, I(b) (2016); RSA 641:6, I (2016); RSA 318-B:2 (2017). Those charges arose out of the defendant's sexual abuse and murder of an eleven-month-old infant in Alexandria, New Hampshire, on November 13, 2015.

The defendant subsequently moved to suppress photographs of him sexually abusing the unconscious victim that were found on his cellphone during a search conducted under the authority of a judge-issued search warrant. The superior court (*MacLeod, J.*), held an evidentiary hearing on the matter on April 18, 2017, and in a written ruling issued on June 28, 2017, made relevant factual findings, set forth legal conclusions, and denied the defendant's motion.

After a six-day trial, on September 19, 2017, the jury convicted the defendant of first-degree murder and falsification of physical evidence, and acquitted him of administration of a controlled substance. The superior court (*MacLeod, J.*) sentenced the defendant to a stand-committed term of life without the possibility of parole on the first-degree murder conviction and a concurrent stand-committed term of 3½ to 7 years on the falsification conviction. DA 177–80. This appeal followed.

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[1]DA refers to the appendix of the defendant's brief.
DB refers to the defendant's brief.
DS refers to the supplement at the end of the defendant's brief.
T refers to the trial transcript.
SH refers to the transcript of the hearing on the defendant's motion to suppress.
MH refers to the transcript of the hearing on motions *in limine* conducted on August 13, 2017.

STATEMENT OF FACTS

In November 2014, Danielle Sylvester gave birth to the victim. T 582. Over the course of the first year of the victim's life, Sylvester shared custody of him with his biological father, from whom she had separated. T 583–84. In the fall of 2015, Sylvester and the defendant began a romantic relationship. T 583. Soon thereafter, Sylvester moved in with the defendant in a house in Alexandria, New Hampshire. T 584–85.

On November 11, 2015, the defendant and Danielle Sylvester picked up the victim from his biological father. T 484, 589–90. The following morning, Sylvester took the victim with her to a doctor's appointment. T 564–65, 568, 573, 577, 593. At that visit, several people saw and played with the victim, who was alert and playful and had no visible injuries to him. T 565–66, 569–70, 573–74, 578.

On the morning of November 13, the defendant, Danielle Sylvester, and the victim were alone in the house. T 259–60, 619–20.[2] While Sylvester was in bed, she heard the defendant with the victim in a nearby room, and then heard a loud noise. T 621–22. When Sylvester went to investigate the sound, the defendant claimed that the victim had fallen and hit his head on a bedpost. Tr. 486, 622. Sylvester took the victim and returned to bed with him, and was with him until she left for a doctor's appointment at about 12:30 p.m. T 624, 634. Sylvester had planned to take the victim with her, but the defendant unexpectedly told her to borrow his car and said that he would watch the victim at the house. T 629–31. The defendant instructed Sylvester to call him before she returned home. T 633. The defendant had never been in the home alone with the

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[2] The house was equipped with exterior security cameras, including one that captured the house's driveway and front entrance. T 211–12, 249–50, 584–85. From the evening of November 12 to the victim's transportation to the hospital the following day, all of the arrivals and departures at the house were captured on security videotape. T 251–66, 371–72.

victim before. T 632. When Sylvester left, she noticed that the victim appeared sleepy, but did not observe any injuries to him. T 623–24, 634.

Danielle Sylvester was gone from the home for about two hours, during which time the defendant was alone with the victim in the house. T 260–61, 489, 578, 634–39. Before Sylvester returned home, she called the defendant, as he had instructed, and he informed her that he had given the victim a bath, something that he had never done before. T 635–36. While the defendant was alone with the victim, he took photographs of him sexually abusing the victim. T 241–46; St. Exh. 28. Those photos included two that clearly showed the victim's entire face and body, and depicted him unconscious with head and face injuries. T 345–46; St. Exh. 28.

Soon after Danielle Sylvester returned home at about 2:30 p.m., she checked on the victim and saw that he was having difficulty breathing. T 640–42. Sylvester called 911, emergency personnel responded within minutes, and the victim was taken to Dartmouth Hospital. T 120–21, 136–37, 642–44. When medical personnel first saw the victim, he had visible bruising to his head and face, quickly lost consciousness, and needed assistance to breath. T 126–27, 129–30, 181.

Investigators interviewed the defendant the day after the victim's hospitalization. T 481–82. The defendant initially claimed that the victim "bumped" his head while with him the previous morning but insisted that nothing else untoward happened, although he suggested on multiple occasions that the victim's father was an unfit and neglectful parent. T 486–88, 494–95, 500–02. Later in the same interview, and after the defendant repeatedly and adamantly denied that anything happened to the victim while in his care, the defendant changed his account and claimed that while he was passed out after drinking a beer and taking medication, the victim fell down a staircase. T 512–16.

The victim remained hospitalized until he died on November 15. T 174, 181. The victim had suffered multiple skull fractures to both sides of his head, along with corresponding catastrophic brain damage. T 191, 804–06, 810–11. He also had extensive and separate bruising to both sides of his head and face. T 182–85, 798–803. The victim's right arm and left leg were broken. T 192, 792. The victim also had traumatic injuries to his penis and anus consistent with sexual abuse. T 185–89, 307, 314–15, 756, 797.[3]

According to three separate child abuse experts, as well as the medical examiner who conducted the victim's autopsy, given the constellation of the victim's injuries, as well as other factors such as his limited mobility given his early level of development, those injuries were caused by physical abuse. T 194–96, 307–12, 746, 756–57, 787, 806–08. The victim's many injuries were acute, that is, they occurred at around the same time, and were inflicted within hours of when medical personnel began treating him. T 304–05, 328–30, 752–53, 763–65, 810–11. The catastrophic injuries to the victim's head resulted from crushing-type forces, such as repeated stomping, and were caused by multiple blows. Tr. 192–93, 317–20, 753–55, 759, 808. The injuries suffered by the victim could not have occurred from the staircase fall claimed by the defendant. T 322–26, 757–59, 809.

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[3] The victim had in his system buprenorphine, a medication used to treat opioid addiction. T 410–12, 426, 429, 436. The defendant had a prescription for the medication, and Sylvester attended her medical appointments in order to get her own prescription. T 617–18.

SUMMARY OF THE ARGUMENT

1. After the court below held an evidentiary hearing and made pertinent factual findings, the court properly denied the defendant's motion to suppress evidence recovered from a search of some of the data contained on his cellphone pursuant to a warrant. The court was correct that the warrant properly authorized investigators to search the cellphone for photographs. The defendant concedes that the affidavit in support of the warrant established probable cause to search his cellphone for text messages. The court properly found, based on uncontradicted facts, that a search for such messages reasonably entailed a search of photographs, either as part of the messages themselves or as documentation thereof. Moreover, the warrant's authorization for investigators to search for photographs "as far back as possible" did not render the warrant insufficiently particular, because, as the court reasonably found based on facts educed at the hearing, the sought-after data delineated in the warrant was limited and date restrictions were not practical given the nature of the digital information at issue.

2. The trial court properly excluded, as substantive evidence, a statement attributed to the victim's mother. The statement at issue, voiced on a single occasion about six months before the victim's murder, constituted inadmissible hearsay and was not relevant to the defendant's claimed motive by the mother to harm the victim, and its potential for prejudice outweighed any relevance it may have had.

3. The trial court did not commit plain error in instructing the jury on the "knowingly" element of first-degree murder in accordance with the statutory definition and the applicable model instruction.

ARGUMENT

I. THE COURT BELOW, BASED ON FACTUAL FINDINGS MADE AFTER A FULL EVIDENTIARY HEARING, CORRECTLY REJECTED THE DEFENDANT'S CHALLENGES TO THE WARRANT ALLOWING A LIMITED SEARCH OF HIS CELLPHONE FOR SPECIFICALLY-DELINEATED DATA.

Below, the defendant unsuccessfully challenged the judge-signed warrant through which a search of his cellphone revealed photos that he had taken of him sexually abusing the unconscious murder victim. The defendant now attacks the hearing court's decision in three respects. Initially, the defendant contends for the first time that the court applied an incorrect legal standard. The defendant also argues, as he did below, that the warrant lacked probable cause to search for photographs, and that it was insufficiently particular. The defendant's first argument is unpreserved, and all three arguments are meritless.

A. Factual Background.

Prior to trial, the defendant moved to suppress photos found on his cellphone. In support of the defendant's motion, he challenged the search warrant in two regards: (1) that the warrant "was broader than the probable cause upon which it was based," and (2) that it "lacked sufficient particularity." DA 12. The defendant did not dispute that the affidavit submitted in support of the warrant established probable cause to search his phone for text messages. DA 15.[4]

1. Evidence At The Hearing On The Defendant's Suppression Motion.

A full evidentiary hearing held on the defendant's motion to suppress established the following uncontradicted and controlling facts. A criminal investigation began on November 13,

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[4] Although the defendant on appeal concedes that probable cause existed to search his cellphone for text messages between him and Danielle Sylvester "sent after the victim's hospitalization," DB 30, below the defendant never identified post-hospitalization as the permissible time period. Rather, the defendant conceded that the affidavit accompanying the warrant provided probable cause to search for "recent" text messages. DA 15. Notably, that affidavit set forth information that the victim had been acting "lethargic" and "sluggish" and "had been wheezing occasionally" beginning days before his hospitalization, and also days before the defendant took the photographs at issue, just hours before the victim's hospitalization. DS 2.

2015, after the victim's hospitalization with injuries indicating that he had been physically and sexually abused. DS 3–4. Based on information gathered from that investigation, the State applied for warrants to search cellphones belonging to the defendant and Danielle Sylvester for possible evidence of the crimes of assault, felonious sexual assault, endangering the welfare of a child, and hindering apprehension. DS 5; SH 112, 119. The affidavit submitted in support of the requested warrants set forth background information into the investigation, as well as the grounds for which judicial permission was sought to search the cellphones at issue for certain data. DS 2–5.

Particularly relevant to the claims raised by the defendant on appeal, the affidavit submitted in support of the warrant informed the reviewing judge that the victim had been with the defendant and Sylvester since November 11—two days before his hospitalization—and that they were the only ones with him on the day he was hospitalized, before medical personnel responded. DS 2–4. The affidavit further averred that the defendant and Sylvester each had claimed that no injuries were seen on the victim, although at various times beginning on November 11 he was acting lethargic and was having difficulty breathing. *Id.* According to other information set forth in the affidavit, the defendant gave investigators various claims as to how the victim may have been injured. DS 4. The affidavit also stated that after the victim was hospitalized, the defendant told Sylvester in substance that he was going to get in trouble for what happened to the victim, and, "I feel bad this happened while I was watching him." DS 3.

Additionally, the affidavit informed the reviewing judge that the defendant had a cellphone and initially allowed investigators to search it, but later withdrew his consent. DS 4. The affidavit also set forth that "[a]ccording to [Sylvester] and [the defendant], they have been in

communication with each other through their cellular telephones regarding [the victim's] condition and what may have happened to him." DS 4.

From this and other information set forth in the affidavit, a warrant submitted by the State set forth that the following probable cause was established for a search of the defendant's specifically-identified cellphone:

> 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.

DS 5.

Judge Thomas Rappa reviewed the affidavit and accompanying warrant, and authorized the limited search sought of the defendant's cellphone. SH 120. That search was conducted by Matthew Pickering, who testified at the suppression hearing. SH 63–64. Pickering was a criminalist at the New Hampshire State Police laboratory, and an expert in the forensic investigation of electronic devices such as cellphones. SH 46. With respect to the search of the defendant's cellphone, Picking utilized specialized forensic software that extracted all of the data from the defendant's cellphone pursuant to standard procedure, and then reviewed *only* certain portions of that recovered data, pursuant to the warrant. SH 47–50, 55–57, 75–76.

When Pickering looked through data extracted from the defendant's cellphone for potential evidence, he had a copy of the warrant signed by Judge Rappa, was aware of its contents, and was looking only for evidence of the crimes specifically named in the warrant. SH 63–64, 98. Although the standard forensic processing procedure extracted all data from the cellphone, Pickering's review of that data did not extend to any data that was not expressly

delineated in the warrant. SH 76. Moreover, Pickering did not review any data delineated by the warrant that was associated with features on the phone for which the warrant did not authorize a search, such as Internet history, web downloads, and applications, although such features are commonly found on and related data is routinely extracted from cellphones such as the defendant's. SH 68–69, 76.

The defendant's cellphone was a "smartphone" that had several advanced features, such as the ability to access and browse the Internet and run multiple applications. SH 65–66. The phone also had standard features that had been present on cellphones for several years. SH 66, 73. Among those features were the ability to take photographs and videos, and the capacity readily to transmit them in text messages. SH 65–66, 71–73. The phone also could take "screen shots"—photos of data that can be seen on a cellphone, such as undeleted sent and received text messages. SH 73, 88. The phone could send and receive a variety of different forms of communication, such as calls, text messages, e-mail, and instant messages, all with or without accompanying photos or videos. SH 70–71.

Pickering described how data extracted from the defendant's cellphone could be present and found in various locations within the phone's electronic database. SH 57. For example, text messages could be located not only in data folders specifically dedicated for such information and so labeled electronically, but also could be documented by photographs and stored on folders dedicated to, commonly associated with, or labeled as image files. *Id.* Data also could be moved to and among different folders within the cellphone's database, and the very same data could be located in several different folders. SH 99. So too could data be saved in several types of formats, such as documents saved in image formats commonly associated with photos. SH 53–54. In addition, a piece of data's file extension, which may or may not shed light on the

nature of the particular data, could be changed intentionally or inadvertently, including to extensions not commonly associated with that type of data. SH 52–54, 99–100.

As to date signifiers for stored data, Pickering explained that digital data such as a text or image file may not have any corresponding date information at all. SH 59–60. Furthermore, the same piece of data, such as the very same photo, could have multiple different dates associated with it. SH 60. Last, even if an image or text file had a corresponding date or time, that information may not accurately reflect when the photo or writing was actually created, and such information also could be altered or deleted altogether. *Id.*

During Pickering's limited search of data downloaded from the defendant's cellphone conducted under the authority of the warrant, and while looking for evidence of the crimes specifically listed in the warrant, he saw several photos of what appeared to be child pornography—the photos at issue. SH 78, 98. Pickering was not looking for such images, and immediately notified investigators when he saw apparent contraband. SH 78. Those found photos had been deleted, but nonetheless they were retrieved from the phone through the use of the special forensic software that Pickering used to extract data. SH 61, 80. As a result of the unexpected discovery of those photos, investigators sought and obtained a second warrant to search the defendant's cellphone for specifically-delineated evidence of the crimes of assault, sexual assault, and possession of child sex abuse images. SH 127–28.

2. The Court's Factual Findings And Legal Conclusions.

After the hearing court received the information outlined above, as well as additional evidence, at the suppression hearing, the court issued a written ruling that set forth its factual findings and legal conclusions. The court separately addressed and expressly ruled on the defendant's voiced challenges to probable cause and to particularity. DS 1, 8.

As to probable cause, the hearing court noted that "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." DS 13. The court also found that "[i]t is well known that modern smartphones have the capability to send and receive photographs attached to text messages and that users do in fact commonly communicate in this manner"; that "at least some, if not most, smartphones have functions built into their text messaging applications designed to transmit, or even to take, photographs"; and that "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." DS 11–12, 15. Based on these and other factual findings, the court determined that the issuing magistrate "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 [Sylvester] had communicated using photographs." DS 12.

The court also ruled, in the alternative, that even if there was only a sufficient basis to search for text messages, the warrant authorized a search of image files for such data. DS 13–15. As to that alternative basis for rejecting the defendant's probable cause challenge, the court noted that it was "undisputed" that the warrant affidavit sufficiently established probable cause to search for text messages, and reasoned that given the particular nature of digital data such text messages reasonably could be found within the cellphone's image files. *Id.*

Turning to the defendant's particularity challenge, the hearing court found that "[p]hotograph 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" and that "of these myriad file categories, photograph files are certainly among the more

commonly associated with text messages." DS 15. The court also found that given the various ways in which data itself could be altered and information such as date indicators and file extensions could be manipulated, "it would [not] have been reasonably possible for the search warrant to distinguish which photographs could have evidentiary significance from those with no such value." DS 17. Based on these and other express factual findings, the court determined that the warrant was sufficiently particular under the circumstances as established at the hearing. DS 18–19.

B. The Court Properly Found That The Investigators Could Look For Photographs.

On appeal, the defendant first argues that the hearing court applied an incorrect legal standard in reviewing the challenged search warrant. DB 17–24. That argument is unpreserved. As noted, below the defendant raised two distinct and clear challenges to the warrant: (1) that there was no probable cause to search for photos, and (2) that the warrant was insufficiently particular. Those were the two claims articulated and briefed by the defendant below, DA 12–15, 104–08, acknowledged by the hearing court as presented to it, DS 1, and ultimately ruled upon by that court based on the relevant factual findings. DS 8–20. At no point did the defendant raise his current appellate challenge, premised on a claimed analytical distinction between "containers to be opened, rather than … items sought." DB 17. *See, e.g.*, *State v. McGinnis*, 169 N.H. 565, 574 (2017) (defendant's specifically-articulated attacks on a bench warrant's validity made to the trial court did not preserve different claims on validity made on appeal). Nor did the defendant file a motion to reconsider below on the grounds that the hearing court had applied an erroneous standard. *See, e.g.*, *id.* "The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in [his appellate] brief before the trial court [and g]enerally, the failure to do so bars a party from raising such claims on appeal." *Id.* (internal

quotation marks omitted). Because the defendant has not preserved this particular argument, this Court should decline to consider it.

In any event, the claim lacks merit. The defendant's new challenge rests upon an incorrect factual premise. Namely, the defendant asserts that the court below considered the "photographs" identified in the warrant not as evidence that investigators could look for, but instead only as places where investigators could look for other evidence. But that is not what the court did. Rather, the court analyzed the place that was searched as the defendant's cellphone, and considered whether photographs validly could be among the evidence that could be searched for in that item under the challenged warrant. *See*, *e.g.*, DS 7 ("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.").

As to photographs, the hearing court determined that the search warrant affidavit provided probable cause to search for such evidence, which plainly "were among the objects sought" under the warrant. DB 22. Specifically, the court found that photographs could entail text messages—for which the defendant did not dispute probable cause to search existed—in two respects. First, the court found that photographs could be part and parcel of such a common mode of cellphone communication. DA 11–12. Second, the court found that text messages could readily be documented by photographs and stored on the cellphone as separate image files. DA 12. Thus, contrary to the defendant's claim, the court did not find that photographs "were not the items sought," but rather were containers that could be opened. DB 23. These factual findings by the court, grounded in uncontradicted facts educed at the evidentiary hearing on the defendant's motion to suppress, are controlling. So too do these found facts, and the hearing

court's discussion of them, demonstrate that the court did not engage in the purportedly faulty legal analysis claimed by the defendant for the first time on appeal.[5]

As a final point on the defendant's unpreserved argument, in making that argument he cites to cases in which courts have invalidated searches that *exceeded the scope* of the warrant, as well as cases in which courts rejected claims in support of such expanded searches that they were permissible because of the possibility of mislabeling files. DB 19–20. So too does the defendant suggest that a search protocol was necessary to limit the discretion of those performing the search. DB 23. But the defendant's cases address the execution of a particular search warrant, rather than the validity of the warrant itself, which is the sole issue on appeal here. Accordingly, these other cases are inapposite, and the defendant's complaints premised on them are unpreserved. *State v. Germain*, No. 2017-0301, slip op. at p. 5 (N.H. May 4, 2018) (unpublished opinion) ("To the extent that the defendant argues that the warrant was defective because it lacked 'a protocol for ensuring the investigating officers do not have access to documents not authorized' and 'to protect the data on the devices,' he has failed to demonstrate that he raised this issue in the trial court. Accordingly, the issue is not preserved for review."). And, as to the issue of mislabeled files, although evidence was educed at the suppression hearing on that matter, the fact is that the photos at issue were recovered as image files and found where photos were likely to be located on the defendant's cellphone. SH 77–78.

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[5] The defendant's newly-mounted appellate challenge appears to address the hearing court's alternative ground for rejecting the probable cause challenge made below, *see above* at 12, a ruling for which he never sought reconsideration. It also is a ruling that this Court need not address. Even apart from the preservation issue, the hearing court's separate ruling and associated findings that the issuing magistrate had a sufficient basis to find that probable cause existed to search for photos was correct. *See* § I.C.1, *below*.

C. The Court Properly Determined that the Issuing Magistrate had a Sufficient Basis to Find Probable Cause to Search for Photographs, and that the Warrant was Sufficiently Particular.

Addressing the defendant's preserved claims, he contends, as he did below, that the search warrant was constitutionally infirm because: (1) there was no probable cause to search for photographs; and (2) the warrant was insufficiently particular because it permitted a search for a "broad range of data" without date restrictions. These arguments are unavailing.

To begin, the hearing court held a full evidentiary hearing on the defendant's motion. Additionally, the court made several factual findings directly pertinent to the two claims raised by the defendant, and directly ruled on the issues of probable cause and particularity. These circumstances define the contours of this Court's review on appeal. In particular, the Court affords "great deference" to the determinations made below, *State v. Zwicker*, 151 N.H. 179, 185 (2004); *State v. Decoteau*, 137 N.H. 106, 111 (1993), and decides close cases "by the preference to be accorded to warrants," *State v. Ball*, 164 N.H. 204, 207 (2012); *Decoteau*, 137 N.H. at 111.

Moreover, although this Court reviews a ruling on a motion to suppress *de novo*, that standard of review only applies to conclusions of law, not to findings of facts. As to the latter, facts found by the hearing court in the first instance typically are controlling on appeal. *See State v. Hammell*, 147 N.H. 313, 317 (2001); *Decoteau*, 137 N.H. at 111–12. "In reviewing the trial court's order on a motion to suppress, [this Court] accept[s] its factual findings unless they lack support in the record or are clearly erroneous." *State v. Daoud*, 158 N.H. 779, 782 (2009); *accord State v. Davis*, 161 N.H. 292, 294–95 (2010).

1. Probable Cause

It is axiomatic that search warrants can be issued only upon a finding of probable cause. *State v. Letoile*, 166 N.H. 269, 272 (2014). "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. Ward*, 163 N.H. 156, 159 (2012) (internal quotation marks omitted). "[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." *Letoile*, 166 N.H. at 274. Instead, the reviewing magistrate is to make a practical, common-sense decision whether there is a "fair probability" that evidence of a crime will be found in the particular place described in the warrant, here, the defendant's cellphone. *Ball*, 164 N.H. at 207; *see*, *e.g.*, *State v. Johnson,* 140 N.H. 573, 577 (1995).

In making that decision, the issuing court can consider not only the totality of circumstances set forth in the warrant affidavit, but also reasonable inferences that may be drawn from that information. *See Ball*, 164 N.H. at 209; *Ward*, 163 N.H. at 160–61. So too can the court use its common sense and look to matters of common knowledge, even if such information is not contained within the four corners of the affidavit. Thus, in *State v. Kirsch*, 139 N.H. 647, 651 (1995), the Court determined that the issuing magistrate there could draw a "common-sense inference" about the longevity of child pornography retained by sexual abusers in assessing whether the submitted warrant was supported by probable cause. Similarly, in *State v. Ward*, 163 N.H. at 162, the Court concluded that the absence of information in a supporting affidavit that the defendant or his wife had a printer did not invalidate a warrant that allowed a search for such equipment, because a "common-sense inference that a printer would likely be found in the defendant's home may be reasonably drawn from the fact that the affidavit contained information indicating both the defendant and his wife owned laptop computers, which they used in the home on a daily basis." As a final example, in *State v. Letoile*, 166 N.H. at 275, this Court determined that in assessing whether a warrant established probable cause, the hearing court

properly considered "that it is now 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." (Internal quotation marks omitted.)

On appeal, this Court applies a totality-of-the-circumstances test to review the sufficiency of the probable-cause finding, and will not invalidate a warrant by reading the evidence submitted in a hyper-technical sense. *Ward*, 163 N.H. at 159; *Zwicker*, 151 N.H. at 185. In the end, this Court's duty is to ensure that, in light of any controlling factual findings, the issuing magistrate had a substantial basis for concluding that probable cause existed. *Ball*, 164 N.H. at 209; *State v. Daniel*, 142 N.H. 54, 57–58 (1997).

The defendant's challenge to the hearing court's determination that the issuing magistrate had a substantial basis for finding probable cause is his claim that the affidavit in support of the search warrant "failed to show that it was 'probable' that photographs constituted the fruit, instrumentalities, or evidence of any crime." DB 25. The defendant is correct that the affidavit made no mention of photographs. However, the hearing court made specific, controlling, and directly relevant factual findings that there was a fair probability that the text messages for which the defendant conceded the affidavit had established probable cause to search could entail photos in two independent respects. Specifically, the court expressly found that it was "well known" that a smartphone such as the defendant's readily could send and receive photos attached to text messages "and that users do in fact commonly communicate in this manner," and also expressly found that the phone also could take and retain photographic "screen captures" of text messages. DS 11–12, 15. These explicit factual findings—acknowledged by the defendant, DB 14—have ample evidentiary basis from the record developed at the hearing. *E.g.*, SH 65–66, 71–73, 88, 140–41.

Nor has the defendant made an argument that any of these findings were clearly erroneous. Moreover, as the hearing court recognized, these findings also constitute the very type of matters subject to common knowledge that this Court has stated an issuing magistrate could draw upon and rely on in approving a warrant, even if they are neither contained within the accompanying affidavit nor expressly cited by the court. DS 12; *see, e.g.*, *Letoile*, 166 N.H. at 275; *Ward*, 163 N.H. at 162; *Kirsch*, 139 N.H. at 651; *see also In re Search Warrant for 1832 Candia Road*, No. 2017-0346, slip op. at 1, 6–7 (N.H. June 8, 2018) (holding that the magistrate had a substantial basis for finding probable cause to search, *inter alia*, "cellular telephone[s] and smartphone[s]" for evidence of fraudulent e-mail, although no information in the accompanying affidavit actually stated that cellphones were used in connection with the crimes). In addition, the affidavit in support of the warrant did set forth claimed incidents by the defendant and Sylvester that could have caused visible injuries to the victim, any of which could be documented by photograph. DS 2–4. These controlling facts and circumstances properly tied "photographs" sought in the warrant to the "messages" for which the defendant has conceded probable cause existed.

In *Commonwealth v. Dorelas*, 43 N.E.3d 306 (Mass. 2016), the Massachusetts Supreme Judicial Court rejected a challenge to probable cause substantively identical to that voiced by the defendant here. The issue squarely before the Supreme Judicial Court in *Dorelas* was the validity of a warrant that allowed a search for photographs on a cellphone despite any mention of photos in the accompanying affidavit.

As part of a shooting investigation, the police sought a warrant to search the defendant's cellphone. *Id.* at 308–09. Although the warrant affidavit established that the defendant may have sent or received calls and text messages on his phone in connection with the crimes under

investigation, the affidavit did not set forth any information to the effect that the subject phone had been used to take, send, receive, or store any photos. *See id.* at 312–13, 316–17. Nor did the affidavit set forth any information in general that any images had been taken, sent, or received in connection with the shootings under investigation. *See id.* In other words, "[a]t no point did the affidavit mention photographs." DB 25. Nevertheless, the warrant at issue in *Dorelas* authorized a search the defendant's cellphone for, among other the information, "saved and deleted photographs [with no corresponding date restrictions]." *Id.* at 309–10.

The defendant in that case moved to suppress incriminating pictures found on his phone from the search conducted under the warrant, arguing that the warrant impermissibly allowed for a search for photos. *Id.* at 310. After the lower court held an evidentiary hearing, it denied the motion to suppress, reasoning that "it was appropriate for the police to search the files on the defendant's [cellphone] that contained his photographs because the affidavit 'furnished probable cause to conduct an electronic search of [his] cell phone' and because threats can be communicated by way of photographs and stored in the [cellphone's] photograph file." *Id.* at 310–11.

On appeal, the defendant repeated his claim that there was no probable cause to search his cellphone for photos. *Id.* at 311. In language directly applicable to this case, the Supreme Judicial Court held that "where there was probable cause that evidence of *communications* relating to and linking the defendant to the crimes under investigation would be found in the electronic files on the [cellphone], and because such communications can be conveyed or stored in photographic form, a search of the photograph files was reasonable." *Id.* at 308 (emphasis added). In analyzing the issue, the court reasoned that a search for photographs was proper

although there was no evidence presented to the judge who issued the warrant that any photos had ever been taken, sent, or received by the defendant's cellphone:

> Communications can come in many forms including photographic, which the defendant freely admits. So long as such evidence may reasonably be found in the file containing the defendant's photographs, that file may be searched. We agree with the motion judge that the evidence sought, for which there was probable cause, might reasonably have been found in the photograph file. Therefore, a search for such evidence in that file was neither outside the scope of the warrant nor unreasonable.

Id. at 313. The court also disagreed with the defendant that a more focused search could have been conducted to look only for photos associated with communications, without searching all of his cellphone's photograph files:

> 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 [cellphone's] photograph file. In addition … where texts and their attachments may be overwritten by new data, the saved photographic attachment may only be found in the [cellphone's] photograph file. Accordingly, in determining the nexus between the items sought and the place to be searched, it was reasonable here to infer that the targeted evidence might not exist exclusively in the text and call log folders.

Id. at 313–14.

Dorelas is on point, and properly should guide this Court's analysis and rejection of the defendant's challenge to the findings of probable cause made in the first instance by the issuing magistrate, and then by the hearing court after receiving evidence on the matter. Like the lower court in *Dorelas*, the hearing court here made specific factual findings, supported by the record, regarding the common-sense and commonly-understood association of photos with text communications in cellular telephones. As the Supreme Judicial Court reasonably concluded, such a connection did not need to be spelled out in the warrant affidavit. This Court has likewise concluded with respect to other obvious, routine, or well-known—for a judge—matters and

relations, as well as reasonable inferences that draw on such information not contained within the affidavit. *See, e.g.*, *In re Search Warrant for 1832 Candia Road*, slip op. at 6–7; *Letoile*, 166 N.H. at 275; *Ward*, 163 N.H. at 162; *Kirsch*, 139 N.H. at 651. This case should be no different.

Moreover, as in *Dorelas*, here there exists the requisite nexus between the phone being searched, the information sought, and the investigation for which a warrant was obtained. *See, e.g.*, *Letoile*, 166 N.H. at 273 ("In order to meet constitutional muster, affidavits must establish a sufficient nexus between the illicit objects and the place to be searched." (Internal quotation marks omitted.)). This simply is not a case in which law enforcement sought access to a cellphone simply because a crime occurred, a suspect had a cellphone, and the cellphone may have been used in some manner in connection with the crime. *See, e.g.*, *Commonwealth v. Morin*, 85 N.E.3d 949, 960–61 (Mass. 2017) (distinguishing *Dorelas*, and holding that "information that an individual communicated with another person, who may have been linked to a crime, without more, is insufficient to establish probable cause to search either individual's cellular telephone"). Rather, there was evidence before the issuing magistrate that the phone at issue here had a clear tie to the investigation into the victim's hospitalization with grave injuries. DS 4 ("According to [Sylvester] and [the defendant], they have been in communication with each other through their cellular telephones regarding [the victim's] condition and what may have happened to him."). Indeed, as bears repeating, the defendant has conceded that probable cause existed and was set forth in the affidavit to search his cellphone for text messages in connection with the crimes under active investigation.

For all these reasons, the defendant's challenge to the findings of probable cause made below must fail.

2. Particularity

The defendant fares no better in his challenge to the hearing court's determination that the search warrant was sufficiently particular. He argues that the warrant was constitutionally infirm because it permitted a search: (1) for a "broad range of data," (2) without any temporal limitation. DB 25–31. But here, too, the hearing court made controlling factual findings based on the developed record, and then correctly ruled based on those uncontradicted pertinent facts.

"[W]arrants must describe with particularity the area to be searched and the things to be seized." *State v. Moreau*, 113 N.H. 303, 308 (1973). The rationale underpinning the particularity requirement is to avoid converting a search warrant for evidence into a "general exploratory search," whereby the warrant fails to place limits upon the police's power to search property for criminal evidence. *See Kirsch*, 139 N.H. at 652. The degree of specificity required in a search warrant "is not readily described in the abstract," *State v. Tucker*, 133 N.H. 204, 206 (1990), but rather, "depends upon the nature of the items to be seized," *State v. Emery*, 123 N.H. 630, 633 (1983); *accord Kirsch*, 139 N.H. at 652.

That is especially so with respect to authorized searches for digital data. Courts repeatedly have recognized the need for flexibility given that such information can be readily altered and moved to various locations within an electronic device. As one of many courts has aptly observed:

> Courts have recognized that searching a computer for evidence of a crime can be as much an art as a science. Unlike warrants seeking readily identifiable evidence such as narcotics or firearms, an onsite search of a computer for the evidence sought by a warrant is not practical or even possible in some instances....
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> As technology and white collar and other complex criminal litigation evolved, courts began distinguishing between the execution of search warrants seeking physical evidence such as guns or narcotics, and the execution of search warrants seeking documents (whether in electronic or paper form). As the Supreme Court explained more than thirty-five years ago, "In searches for papers, it is certain that

> some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Thus, courts began permitting the government to examine paper documents that might otherwise fall outside the scope of a search warrant to make that determination, recognizing that different types of evidence present different tactical issues.
>
> Computers and electronic information present a more complex situation, given the extraordinary number of documents a computer can contain and store and the owner's ability to password protect and/or encrypt files, documents, and electronic communications. As a result, the principle of permitting law enforcement some flexibility or latitude in reviewing paper documents just described, has been extended to computerized or electronic evidence. Courts have applied the principles recognized in *Andresen* in analyzing the method used by the police in searching computers and have afforded them leeway in searching computers for incriminating evidence within the scope of materials specified in the warrant. Thus, courts developed a more flexible approach to the execution of search warrants for electronic evidence, holding the government to a standard of reasonableness.

United States v. Metter, 860 F. Supp. 2d 205, 213–14 (E.D.N.Y. 2012) (internal quotation marks, brackets, and citations omitted). Or, as the United States Court of Appeals for the First Circuit more succinctly has observed, "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." *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999); *see also, e.g., United States v. Grimmet*, 439 F.3d 1263, 1270 (10th Cir. 2006) ("we note we have adopted a somewhat forgiving stance when faced with a 'particularity' challenge to a warrant authorizing the seizure of computers"); *United States v. Bazar*, 2015 U.S. Dist. LEXIS 143278, at *5–*6 (S.D. Cal. Oct. 21, 2015) ("[I]n the world of digital evidence, file names can be changed to suggest innocent information while hiding evidence of criminal activity. As a result, it is difficult to limit the breadth of a digital memory search where, as here, both written

communications and images between numerous parties may contain evidence of the alleged crime.").[6]

For these reasons, courts routinely have concluded that searches for digital evidence can include a review of all of the various files and data on a device that reasonably may contain the information for which probable cause existed. "[I]n general, [s]o long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence." *United States v. Richards*, 659 F.3d 527, 540 (6th Cir. 2011) (internal quotation marks omitted); *see also, e.g.*, *United States v. Triplett*, 684 F.3d 500, 506 (5th Cir. 2012) ("Although officers should limit exposure to innocent files, for a computer search, in the end, there may be no practical substitute for actually looking in many [perhaps all] folders and sometimes the documents contained within those folders." (Internal quotation marks omitted.)); *United States v. Evers*, 669 F3d 645, 653 (6th Cir. 2012) ("[G]iven the unique problems encountered in computer searches and the practical difficulties inherent in implementing universal search methodologies … a computer search may be as extensive as

[6] Such judicial recognition simply is a logical extension to electronic repositories of digital information of the similar latitude traditionally afforded to reviews of documents for printed information. *See, e.g.*, *United States v. Riley*, 906 F.2d 841, 845 (2d Cir. 1990) ("It is true that a warrant authorizing seizure of records of criminal activity permits officers to examine many papers in a suspect's possession to determine if they are within the described category. But allowing some latitude in this regard simply recognizes the reality that few people keep documents of their criminal transactions in a folder marked 'drug records.'"); *United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985) (finding a search reasonable even though agents removed large number of documents that were unrelated to loansharking activity because "the agents were entitled to examine each document in the bedroom or in the filing cabinet to determine whether it constituted evidence they were entitled to seize under the warrant"); *United States v. Mannino*, 635 F.2d 110, 115 (2d Cir. 1980) ("Ample case authority sanctions some perusal, generally fairly brief, of … documents [seized during an otherwise valid search] … in order for the police to perceive the relevance of the documents to crime." (Internal quotation marks omitted.)); *United States v. Scarfo*, 180 F. Supp. 2d 572, 578 (D.N.J. 2001) ("Where proof of wrongdoing depends upon documents … whose precise nature cannot be known in advance, law enforcement officers must be afforded the leeway to wade through a potential morass of information in the target location to find the particular evidence which is properly specified in the warrant.").

reasonably required to locate the items."). So too have courts eschewed particular *ex ante* requirements, including date restrictions. *See below*.

Viewed within this proper framework, the defendant's particularity challenge must fail. Although the defendant raises the specter of an impermissible general search, DB 31, the challenged warrant here allowed nothing of the sort. In fact, the warrant contained legitimate search parameters that placed significant limitations on police discretion. As an obvious starting point, the warrant limited the place that could be searched to a single item—the defendant's cellphone. The warrant did not permit blanket access to a host of other media and electronic devices that readily could contain the same type of data sought, such as computers and storage devices. *But see, e.g.*, *Germain*, slip op. at 5 (under factual circumstances of that case, warrant that authorized seizure of "any and all computer equipment," and "any electronic devices capable of collecting … storing … or transmitting electronic data, including cell phones and other electronic mobile devices" was sufficiently particularized). Moreover, the single item investigators were authorized to search under the warrant was an item that the defendant does not dispute had a direct connection to legitimately sought evidence.

The warrant also did not grant authority to search any and all data found on the cellphone that may be evidence of any crime. First in that regard, the warrant delineated particular offenses under investigation, which further limited discretion. Specifically, the warrant noted that the affidavit provided probable cause for evidence of the identified crimes of assault, sexual assault, endangering the welfare of a child, and hindering apprehension.[7] This was a circumscribed list of

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[7] Although the defendant acknowledges that these specific crimes were delineated in the warrant, he contends that "no such limitation was included in the warrant's command." DB 29. However, the defendant never made that particular argument below, and thus it is unpreserved. *See, e.g.*, *State v. Mouser*, 168 N.H. 19, 26–28 (2015) (Court held unpreserved appellate arguments about car search different from those articulated below). In any event, the defendant's appellate attack fails properly to view the warrant as a whole in a common-sense manner. *See, e.g.*, *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009) ("It is true that practical accuracy rather than technical precision controls the determination of whether a search warrant adequately describes the place to be searched. A

offenses under investigation. Just as importantly, probable cause for these particular crimes was laid out in the affidavit, and the defendant does not suggest otherwise.

Next, an important restriction explicitly set forth in the warrant was on the type of data that investigators could search for. As was developed at the suppression hearing, the defendant's cellphone had numerous advanced functions, and a broad spectrum of digital information could be stored on it. SH 65–73. However, the warrant allowed access to only some of that wealth of information. Not included within the permissible search parameters defined by the warrant was a wide array of functions. Additionally, even within the limited portion of the many functions of the cellphone that could be accessed pursuant to the warrant, the warrant only allowed a search of some of the data corresponding to those functions. As examples, the warrant did not authorize a search of Internet browsing history, usage data, and download information;[8] any form of geolocation data;[9] calendar data; or any of the thousands of possible applications that could be readily found on the defendant's cellphone.[10]

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warrant need not necessarily survive a hyper-technical sentence diagraming and comply with the best practices of *Strunk & White* to satisfy the particularity requirement." (Internal quotation marks and citations omitted.)); *United States v. Srivastava*, 540 F.3d 277, 289 (4th Cir. 2008) ("[A] search warrant is not to be assessed in a hypertechnical manner [and need not satisfy the t]echnical requirements of elaborate specificity once exacted under common law pleadings." (Internal quotation marks and citations omitted.)). Notably, the person who actually conducted the search of the defendant's cellphone under the authority of the warrant did read the warrant as a whole, and as he testified at the suppression hearing, before searching the cellphone's contents, he had read the warrant and was looking for evidence only of the crimes that were listed therein. SH 63–64, 76, 98, 102.

[8] *See Riley v. California*, 134 S. Ct. 2473, 2490 (2014) ("An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.").

[9] *See Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (geolocation data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations" (internal quotation marks omitted)).

[10] *See Riley*, 134 S. Ct. at 2490 ("Mobile application software on a cell phone, or 'apps,' offer a range of tools for managing detailed information about all aspects of a person's life. There are 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. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the

Moreover, even with respect to "communications"—referenced in the accompanying affidavit—the warrant was circumscribed to a degree as to what communications could be looked for by investigators. The warrant did not permit a search of all possible communications that the defendant's cellphone could send, receive, or store. For example, the warrant did not allow for a search of sent or received emails or instant messages, two readily available and commonly used forms of communication. Nor did the warrant permit a search of communications by any number of applicable and commonplace cellphone apps—such as Facebook, Snapchat, Twitter, and Instagram—in which the exchange of written and graphic messages go hand-in-hand similar to text messages.

These were substantive, significant, and meaningful limitations. With them, the warrant did not allow for a perusal of "any and all" available digital data that could be located on the defendant's cellphone, an expansive search determined to be impermissible by many of the factually inapposite cases that he cites. *See* DB 29–30 (citing cases that determined that warrants that permitted searches for "any and all" evidence, or utilized similarly broad language, were impermissibly broad). Furthermore, those limited data fields that the warrant permitted a search of directly related to the evidence legitimately sought as set forth in the accompanying affidavit—communications between the defendant and Sylvester on their cellphones.

Just as importantly, these significant search limitations were adhered to in the warrant's ultimate execution. As Pickering, who conducted the search, testified, all of the contents of the defendant's cellphone were downloaded pursuant to generally accepted and applied procedure. But according to the limitations set in the warrant, he only reviewed the particular data specified

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two major app stores; the phrase 'there's an app for that' is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.").

therein, and only for those functions expressly delineated therein, and only for evidence of the identified crimes under investigation. SH 63–64, 76, 98, 102.

For all of these reasons, the challenged warrant did not allow for a search "for a broad array of data," as the defendant claims. DB 31. Again, the hearing court made a specific finding to the contrary: "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." DS 15. That controlling fact is supported by the record, *see, e.g*, SH 65–73, is not clearly erroneous, and belies the defendant's characterization to the contrary.

The defendant fares no better with the second of his particularity challenges: that the warrant should have had a temporal restriction, but instead allowed for a search for photos "for as far back as possible." DB 30–31. At the outset, date restrictions are not constitutionally required. To the contrary, courts have concluded that "[t]he absence of a temporal limitation will not automatically render the warrant a prohibited general warrant." *State v. McCrory*, 2011 Ohio App. LEXIS 475, at *20 (6th App. Dist. Feb 8, 2011) (collecting cases); *see, e.g.*, *United States v. DSD Shipping, A.S.*, 2015 U.S. Dist. LEXIS 116865, at *24–*25 (S.D. Ala. Sept. 2, 2015) ("Defendants cite no binding precedent to support the assertion that temporal restrictions are a mandatory requirement of a digital search. Rather ... courts consider the totality of the circumstances and in some cases, find that a temporal restriction is part of a series of factors considered rather than a threshold requirement."); *United States v. Triumph Capital Group*, 211 F.R.D. 31, 58 (D. Conn. 2002) ("A temporal limitation in a warrant is not an absolute necessity, but is only one indicia of particularity," and therefore "the absence of a temporal limitation does not render the warrant a prohibited general warrant."). Indeed, "[t]emporal delineations are but

one method of tailoring a warrant description to suit the scope of the probable cause showing." *United States v. Bucuvalas*, 970 F.2d 937, 942 n.7 (1st Cir. 1992).[11]

Courts have recognized practical problems inherent with placing date restrictions in warrants in the context of searches for digital data on electronic devices, and the risk that such limitations could erroneously exclude relevant evidence and would not be reasonable. An example is *United States v. Loera*, 59 F. Supp. 3d 1089 (D.N.M. 2014). The defendant in *Loera* argued that the warrant authorizing the search of his laptop computer did not satisfy the particularity requirement, in part because the warrant did not place any date limitations on the data sought in the device. The reviewing court rejected that claim, relying on the nature of the digital data at issue as factually developed at the hearing on the defendant's motion to suppress:

> The agents also could not feasibly limit their search to a particular date range. [Witnesses] testified that the last-modified and created dates on files could be changed either intentionally or unintentionally .... Given the ease with which an individual may change the file dates on his or her computer, and the fact that this case concerned electronic mail hijacking and computer fraud—crimes that inherently involve using technology to deceive others—the [w]arrant could not have imposed a date restriction without running the risk of losing a significant amount of relevant evidence.
>
> Moreover, although the Tenth Circuit has not directly addressed the issue, multiple Tenth Circuit cases have found search warrants sufficiently particular despite not specifying a date range. Consequently, the [w]arrant did not lack sufficient particularity for failing to prescribe a limit the agents' search to a particular date range.

Id. at 1153 (citations omitted); *see, e.g.*, *United States v. Rarick*, 2014 U.S. Dist. LEXIS 953, at *13–*15 (N.D. Ohio Jan. 6, 2014) (lack of temporal restrictions in cellphone search warrant did

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[11] As discussed above, other methods were actually employed in this case, such as limitations on searchable data and functions, and reference to the crimes under investigation. *See, e.g.*, *United States v. Capote*, 2016 U.S. Dist. LEXIS 70301, at *9 (N.D. Ga. May 5, 2016) (noting that temporal limitations were unwarranted where the warrant was specific as to the crimes under investigation); *United States v. Harvey*, 2015 U.S. Dist. LEXIS 174276, at *46 (N.D. Ga. Nov. 30, 2015) (same); *United States v. El Khateeb*, 2015 U.S. Dist. LEXIS 143007, at *15 (M.D. Fla. Aug. 4, 2015) (same).

not render the warrant unconstitutionally broad because the digital information sought "may be created and stored in a number of different formats and with or without dates" and had "capabilities of being remotely accessed" in order to "manipulate data").[12]

The cases cited by the defendant in support of his argument that the absence of temporal limitations violates the particularity requirement are readily distinguishable from this case, as well as from the number of cases cited above that have rejected such a claim. DB 30–31. Although the court in *Wheeler v. State*, 135 A.3d 282 (Del. 2016), determined that under the particular circumstances presented there, relevant date parameters were available to the police and should have been included in the warrants at issue, the court also recognized that "[s]atisfying the particularity requirement is difficult in the electronic search warrant context, given the commingling of relevant and irrelevant information and the complexities of segregating responsive files *ex ante*," and that it was not "prescrib[ing] rigid rules." *Id.* at 299–300, 304. Notably in that case as well, prosecutors conceded that the warrants, which had language cut and pasted from other warrants for unrelated types of crimes, "did not contain *anything particularized* from the evidence that they were searching," and permitted a search of a

[12] This practical reality also has been recognized by the legal commentator referenced by the defendant in his brief to this Court, DB 22–23:

> Although this sounds promising in theory [placing date restrictions on digital data searches], I fear it doesn't work in practice. To be sure, agents sometimes will have ways of targeting searches that will often succeed. If agents are looking for a specific file with a known date, for example, they could start their search by using the known name or date parameter. If they find the file quickly, the search can be over and it will have been a limited search indeed. The problem is that if the file isn't there, the agents cannot know with certainty if the file is not on that device or is simply marked in a way that their search query won't find it. Data can always be changed. Maybe the modification will be easy or maybe it will be hard. But it can always be done. As a result, a negative result for a particular query never offers complete assurance that the evidence isn't there.

Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case For Use Restrictions on Nonresponsive Data*, 48 Tex. Tech. L. Rev. 1, 16 (2015).

device that was last used at a time before the crime under investigation even occurred. *See id.* at 291–92, 305 (emphasis added).

Also fundamentally dissimilar are the other cases relied upon by the defendant. The warrant determined to be deficient in *State v. Mansor*, 381 P.3d 930 (Or. Ct. App. 2016), in addition to not containing an available time limitation, permitted a boundless search of all of the contents of the defendant's computers, including of files and functions wholly unrelated to the crimes under investigation. *Id.* at 943–44. The appellate court in *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980), concluded that the warrant, which authorized a search for all physical documents, allowed for "unfettered" investigator discretion because "there [was] no limitation as to time *and there [was] no description as to what specific records are to be seized*" *Id.* at 543 (emphasis added). And, the warrant at issue in *State v. Keodara*, 364 P.3d 777 (Wash. Ct. App. 2015), was defective, not because it lacked a temporal restriction, but because the affidavit failed to establish a nexus between the cellphone the warrant authorized a search of and any illicit activity. *Id.* at 782. The warrant at issue here simply did not have the same infirmities and, as discussed, did not allow for the same discretionless searches, either in form or in execution.

Nor is the absence of date restrictions—and, relatedly, authorization to look for photos "as far back as possible"—unreasonable, both generally in connection with digital data, and specifically under the uncontradicted facts developed in this case. The hearing court, after receiving evidence explaining the practical realities attendant to searches for digital data, as well as the valid concerns for manipulation of data on the defendant's cellphone, made specific findings regarding the matter. In particular, the court found that in light of evidence presented at the hearing, "it would [not] have been reasonably possible for the search warrant to distinguish which photographs could have evidentiary significance from those with no such value."

DS 17–18; *accord*, *e.g.*, *Dorelas*, 43 N.E.3d at 313–14. And, specifically as to temporal limitations, the court gave as an example how, even if a piece of data such as a photo had corresponding information indicating when it had been taken, "a user could employ various applications or methods to manipulate [the] file's … date and time signifiers." DS 17.

These controlling facts also are supported by the record, *see*, *e.g.*, SH 59–60, and are not clearly erroneous. Moreover, the hearing court, in taking into account these relevant circumstances, correctly considered "the nature of the items to be seized." *Kirsch*, 139 N.H. at 652; *Emery*, 123 N.H. at 633. That is, the digital evidence at issue here was readily susceptible to alteration, deletion, manipulation, duplication, reclassification, and transfer. This practical reality was properly recognized by the hearing court, as it has been recognized by many other courts that have addressed the issue of particularity in the context of digital data, as noted above.

And, as to intentional concealment, the warrant affidavit set forth how the defendant gave an evolving account to investigators as to how the victim may have suffered injuries, DS 4, which demonstrated his willingness and ability to attempt to hinder the investigation into what happened to the victim. So too did someone delete the subject photos from the defendant's cellphone a short period after they had been taken. DS 8. These controlling facts, some particular to the case and others inherent in the type of digital data and the storage device at issue, demonstrate that the date restrictions argued by the defendant were likely not feasible, and in any event were not practical and were not constitutionally required in this case.

Last, even if the warrant had set forth the parameters that the defendant argues, the search conducted would have been the same, and so too would have been the results—lawful observation and recovery of the photographs at issue. Again, as the hearing court found, "[T]he 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." DS 18. That finding was based on uncontradicted testimony provided by the forensic examiner who conducted the search and explained why review of all data that could contain the information for which there was authorization to search was necessary. DS 15, 17; *see, e.g.*, SH 99–102. And, as bears repeating, that necessary review still encompassed only a limited and discrete portion of the data contained on the defendant's cellphone, and only that data that might constitute the evidence for which probable cause existed. The examiner, guided by the warrant, never even attempted to search all of the remaining data and functions contained on the phone.[13]

Nor is the hearing court's finding clearly erroneous. To the contrary, the impracticality of date restrictions for digital data such as photos is highlighted by the similar realities of a permissible search for their non-digital equivalents. A physical photograph typically has no corresponding date indicators, and visual inspection of the actual picture is warranted, and indeed necessary, to determine whether a particular photo properly falls within a warrant's

[13] Because the photos at issue actually fell within the time period for which probable cause plainly existed—the defendant took them just hours before the victim was hospitalized—to the extent the absence of time parameters, or the inclusion of the "for as far back as possible" language, rendered the warrant insufficiently particular, the error was harmless. As the Massachusetts Supreme Judicial Court reasoned in similar circumstances:

> The warrant here [which allowed for search of cellphone for "all stored contents of electronic or wire communications" and "stored files" for period that extended weeks before crime under investigation] was hardly a model of particularity, and did not sufficiently limit the scope of the search so as to prevent "exploratory rummaging." .... [However, t]he only stored communications used at trial consisted of [the defendant's] text messages, which the Commonwealth had redacted so that only the content relevant to the crime under investigation was presented to the jury. The redacted text messages were all sent or received in the two days before the shooting, when the drug transaction was arranged; on the day of the shooting, when the crime was carried out; or on the day after the shooting, when [the defendant] discussed the disposition of the proceeds of the armed robbery. On this record, [the defendant] suffered no prejudice because the text messages were sufficiently limited in content and scope such that the Commonwealth did not capitalize on the lack of particularity in the warrant. We cannot say that the judge erred in denying the motion to suppress on this basis.

Commonwealth v. Holley, 87 N.E.3d 77, 92–93 (Mass. 2017) (internal citations omitted). Just like a violation of the dictates of *Miranda* or the constitutional right to counsel does not render inadmissible statements given before the violation occurred, so too should the State not be penalized by the exclusion of evidence obtained within the lawful parameters of an inartfully-worded warrant that was lawfully sought.

parameters. *See Dorelas*, 43 N.E.3d at 314 ("there is no conceivable way for the police to detect whether a picture is of a threatening nature without opening it first"). Not only is the same true with respect to a digital image, but also as well to the extent that a corresponding date indicator actually exists on the digital image, that information can be incorrect or even altered. So too can a date indicator, if actually present, reflect the date not when the image was created, but rather when it was uploaded, stored, or duplicated.

Consequently, review of the actual digital file, like a review of a physical photo, is warranted and reasonable. Moreover, as the trial court validly reasoned, "The court … is not convinced that the photographs searched in this case should be afforded significantly greater protection than photographs stored in the physical world." DS 15. This finding as well both distinguishes this case from the others cited by the defendant, and underscores the reasonableness of the limited search authorized and undertaken here.

For all these reasons, and based on facts specifically found by the court below, the defendant's appellate challenges to the search warrant must fail.[14]

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[14] In support of the State's objection to the defendant's motion to suppress, the State fully articulated, litigated at the suppression hearing, and briefed an alternate ground upon which the lower court could deny that motion: that the evidence at issue would have been inevitably discovered. DA 25–26, 85–102. The hearing court did not address this alternative argument, given its dispositive ruling that upheld the warrant attacked by the defendant. DS 20. Thus, were this Court to conclude that the defendant has established that the lower court's suppression ruling was erroneous, this Court should remand the case to the lower court in order for it to make factual findings and legal conclusions on that alternative ground advocated by the State below.

II. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN EXCLUDING AS SUBSTANTIVE EVIDENCE AN AMBIGUOUS STATEMENT MADE BY THE VICTIM'S MOTHER MONTHS BEFORE THE MURDER.

The defendant faults the trial court's ruling that excluded as substantive evidence a statement attributed to the victim's mother, although the court expressly allowed the defendant to admit that very same statement to impeach the mother's credibility. DB 32–41. There was no evidentiary error, and even if the court did err, it was harmless.

One of the issues litigated before trial was the admissibility of a single statement attributed to Danielle Sylvester, to the effect that she did not want to be left alone with the victim because she had been having "bad thoughts." It was undisputed that Sylvester made the statement, if at all, only once; that she voiced it about six months before the victim's death; and that there was no evidence that she acted in any way against him in connection with it. DS 28–29; DA 121; MH 23–24, 26–27. The State argued that the statement was inadmissible as hearsay, and also under New Hampshire Rules of Evidence 403 and 404(a). DA 113–14. The defendant countered that the statement evinced Sylvester's motive to harm the victim, was "highly probative … of an extreme indifference, if not outright hostility, that [she] had towards [him]," and fell under Rule 803(3)'s "state of mind" hearsay exception. DA 120–23; MH 30.

After the trial court held a hearing on this and other evidentiary matters—in which the defendant called to testify the woman who heard the statement at issue—the court issued a written ruling. DS 28–33. The court determined that a part of the statement—that Sylvester did not want to be left alone with the victim—satisfied the hearsay exception in Rule 803(3), but that portion in which she said that she had been having bad thoughts did not because it referenced prior, instead of then-present, feelings or thoughts. DS 30–31.

As to the State's alternative basis for objection, the court found that the statement was "hardly relevant to proving that [Sylvester] had a motive to murder [the victim]," given the

statement's lack of temporal proximity to the crime and the absence of any evidence that she had ever actually harmed him. DS 33. The court also found that the statement "would likely have a great emotional impact on the jury because it implie[d] Ms. Sylvester did not act as a responsible and caring parent." *Id.* Nevertheless, the court ruled that the defendant could question Sylvester about her feelings toward her son, and that the statement at issue could be offered as extrinsic impeachment evidence. *Id.* At trial, the defendant questioned Sylvester about the statement, and also called as a witness the woman who claimed that Sylvester once made that statement and elicited it from her. T 726–27, 821–22.

The defendant contends that the evidentiary ruling was erroneous. "The trial court has broad discretion to determine the admissibility of evidence, and [this Court] will not upset its ruling absent an unsustainable exercise of discretion." *State v. Towle*, 167 N.H. 315, 320 (2015). "To show that the trial court's exercise of discretion was unsustainable, the defendant bears the burden of establishing that the decision was clearly unreasonable to the prejudice of his case." *State v. Morrill*, 154 N.H. 547, 550 (2006). Here, the defendant has not met his burden.

The trial court precluded a portion of the statement at issue as hearsay, and its entirety after conducting a Rule 403 balancing test. As to hearsay, the court correctly ruled that a portion of the statement as presented—that Sylvester "had been having bad thoughts"—did not fall within the "state of mind" hearsay exception under Rule 803(3). After all, that exception applies to a statement of the declarant's "then existing state of mind." That particular portion of the statement relayed not Sylvester's then-existing mental state, but rather purported thoughts that she had formed at some unknown point in the past.[15]

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[15] The defendant argues, alternatively, that the statement at issue was admissible as a present sense impression under Rule 803(1). DB 35–36. The factual basis for that argument is the defense witness's "yes" answers at trial to defense counsel's questions, "[Sylvester] responded, 'I don't want to be alone with [the victim],'" and "I am having bad thoughts." T 822. It was only at that point that the defense argued that the statement at issue was a present sense

Turning to the trial court's analysis under Rule 403, it properly exercised its discretion in ruling that the statement at issue was not sufficiently relevant for the purpose advanced by the defendant, and that its admission substantively would be unduly prejudicial. As to the former determination, the defendant's theory of relevance was that the statement evinced motive by reflecting that Sylvester was hostile toward, and had a reason to hurt, the victim. DB 32, 37–38. However, the trial court reasonably found a logical nexus lacking between that single statement and Sylvester's possible motive at the time of the murder. That is, that Sylvester may have once voiced that remark—to the extent it could be interpreted as hostility toward the victim—did not tend to make it more probable that she had reason to harm him about half a year later. *See N.H. R. Ev.* 401. After all, that single remark was not acted upon—or even repeated, either verbatim or in substance—either at the time when voiced or in the many months that followed, which demonstrated that any actual hostility reflected therein was passing at best.

Given the long time period between the remark and the murder, as well as the absence of any evidence that Sylvester ever acted on the remark in a manner consistent with the defendant's claimed theory of animus, the trial court correctly determined that his argument for the remark's relevance was strained. And, in making that discretionary determination, the court grounded it on attendant circumstances, such as temporal proximity, which this Court has considered pertinent in similar contexts. *Compare, e.g.*, *State v. Belonga*, 163 N.H. 343, 359–61 (2012) ("The probative value of the evidence [that defendant had struck the victim moths before the charged crime] was minimal. The prior incident could not have been the cause of [the victim's] death—it occurred months prior to her injuries.... *Furthermore, given that several months had lapsed between the charged crime and the prior wrong, it had negligible, if any, probative value to her*

impression. Although the changed tense of the statement as presented by defense counsel in leading questions may affect whether that statement fit within an applicable hearsay exception, it does not change the trial court's relevance and prejudice analyses, and the defendant does not argue otherwise.

state of mind on the day in question." (Emphasis added.)); *State v. Cassavaugh*, 161 N.H. 90, 97–98 (2010) (considering temporal proximity in assessing the relevance of voiced threats). For these reasons, the trial court's exercise of discretion was eminently sound and reasonable.

Nor do the cases relied upon by the defendant undermine the trial court's reasoning that the statement at issue lacked temporal proximity to the charged murder. In particular, the defendant cites to a few cases in which trial courts allowed evidence more remote to the charged crimes than the remark at issue here. DB 38–39. But notably, those particular cases addressed evidence either of unequivocal threats voiced against, or of actual misconduct committed against, a victim. Although such circumstances have a direct and unambiguous bearing on an actor's animus toward a victim, and thus motive, this case involves nothing of the sort. Instead, it was a solitary, vague, and unacted-upon remark. For these reasons, the trial court sustainably exercised its discretion when it ruled that the remark was not relevant for the purpose advanced by the defendant.

So too does the record support the court's determination that the proffered evidence's probative value as substantive evidence—as opposed to impeachment evidence, which the court freely allowed defense use as—was substantially outweighed by the danger of unfair prejudice. As to prejudice, attributing motive to that single statement would require jurors to draw an improper propensity-based inference. Specifically, the jurors would have to infer from that statement that (1) it reflected animus toward the victim, and (2) Sylvester acted on that animus. The first inference relies on one possible interpretation of an ambiguous statement, that is, that Sylvester's "bad thoughts" had to do with harming her child. But there were any number of other possible connotations, such as "bad thoughts" Sylvester had about herself and her relationship with the victim due to separation anxiety arising from her upcoming incarceration at the time—

that is, she was having "bad thoughts" that she may not see her child again, that she could not bear to be without him, or that her absence from him would adversely affect their relationship. DB 39.

Even if the remark reflected actual animus, the second necessary inference that jurors would have to draw from it to establish motive relies on an improper attack on character. In this respect, this Court's decision in *State v. Roy*, 167 N.H. 276 (2015), is instructive. Although the Court in *Roy* reviewed evidence of prior misconduct under Rule 404(b), in doing so this Court accepted the lower court's analysis of the potential for prejudice of alleged prior violent acts committed by the victims' mother in an attempt to establish her as an alternative perpetrator of the charged crimes. *Id.* at 281, 289. In particular, the lower court reasoned that "the only manner such evidence becomes relevant is through the inference that because of [the mother's] bad character as a mother, she is more likely to have perpetrated the assault at question. This is precisely the type of propensity evidence inadmissible under [Rule] 404(b)." *Id.* at 290.

Here, any inference that the defendant sought to draw from the remark at issue is even more attenuated and prejudicial than that disavowed in *Roy*. After all, and as the trial court rightly considered, there is no evidence whatsoever that Sylvester ever acted on the statement attributed to her, let alone acted in a way evincing the claimed animus motive. Such an unacted-upon expression, devoid of relevance, temporal or otherwise, to the charged crimes at issue constitutes no more than an improper attempt to attack character. The defendant acknowledges as much. DB 40 ("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."). The trial court rightly found that such an inference was unduly prejudicial as relying on emotion rather than reason, and thus impermissible.

Last, the defendant's reliance on *State v. Sawtell*, 152 N.H. 177 (2005), is misplaced. DB 38. This Court in *Sawtell* simply upheld the trial court's exercise of discretion under the particular circumstances of that case. *Id.* at 181. The evidence at issue there noted by the defendant—certain acts towards the victim as well as stated discontent about being a parent—was closer in time to the charged murder, was a compilation of directed acts and statements rather than a single ambiguous remark said under unknown circumstances, and had a direct link to motive. All of these circumstances are lacking with respect to the ambiguous statement here. At best for the defendant, *Sawtell*, as well as the other cases that he cites, may support an argument that another judge reviewing the same evidentiary issue might have exercised his or her discretion differently. That does not constitute reversible error on appeal.

For all these reasons, the trial court's evidentiary ruling was a sustainable exercise of its discretion. But even if it were clearly unreasonable for the trial court to exclude the comment at issue as substantive evidence, the error was harmless. "An error may be harmless beyond a reasonable doubt if the alternative evidence of a defendant's guilt is of an overwhelming nature, quantity or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *State v. Garcia*, 162 N.H. 423, 431 (2011). "In making this determination, [this Court] consider[s] the alternative evidence presented at trial as well as the character of the inadmissible evidence itself." *Id.*

First, the trial court did not preclude the defendant from eliciting evidence of the remark. To the contrary, the defendant cross-examined Sylvester about it, and then called a witness who testified that she made it. Although the defendant is correct that the jury could use that evidence to assess Sylvester's credibility, DB 41, that limitation had little practical impact in this case as to the proffered defense. After all, the defendant's claim at trial was that Sylvester had killed the

victim. *E.g.*, DB 9. Thus, impeachment on her feelings toward him had much the same possible effect as admission of the same statement substantively—suggesting that she, rather than the defendant, committed the murder. Also, from the same witness who claimed that Sylvester made the remark, the defendant also elicited her opinion that Sylvester was a disinterested parent, more interested in "running the roads" than spending time with the victim, and that she had said "she didn't really want [the victim]." T 818, 821. From this other evidence, the defendant was able to present his claimed motive, the very reason he sought to present the remark substantively.

Any error was harmless for another reason. Overwhelming evidence established that the defendant killed the victim. This proof included photos taken with the defendant's cellphone—during a time when he undeniably was alone with the victim and well before he claimed Sylvester committed the murder—of him molesting the victim, who appeared to be unconscious and had visible injuries to his head and face consistent with the fatal wounds. T 345–46. Moreover, Sylvester's account of the day of the murder was fully corroborated by eyewitnesses as well as by video surveillance from various places, including the home where the victim was killed and from where she called for medical assistance. *E.g.*, T 202–04, 263–64. In sharp contrast, the defendant lied and materially changed his story about how the victim could have been injured, ultimately giving a medically implausible account that the victim sustained his various severe injuries falling down stairs. *E.g.*, T 322–26, 512–16, 757–59, 809. For all these reasons, the jury's substantive use of the remark at issue would not have changed its verdict.

III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ITS FINAL CHARGE.

The defendant claims that the trial court had to include in the definition of "knowingly" in the final jury instructions language that he was aware that it was "practically certain" that his conduct would cause the victim's death. DB 42–44. The defendant did not object to the instructions as given, and argues that the omission of his proffered language constitutes plain error. This argument must fail.

This Court will apply the plain error rule "sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *State v. Pennock*, 168 N.H. 294, 310 (2015). The defendant bears the burden of establishing that: (1) there was error; (2) it was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *State v. Lopez*, 156 N.H. 416, 423 (2007).

The defendant cannot meet this heavy burden. With respect to the actual instructions given, as long as the trial court adequately informs the jury on the applicable law, the court is under no obligation to include the specific language, even when requested to do so by a party. *State v. Sands*, 123 N.H. 570, 613 (1983). Moreover, the scope and wording of jury instructions is generally within the trial court's sound discretion. *State v. Lamprey*, 149 N.H. 364, 366 (2003); *State v. Cegelis*, 138 N.H. 249, 251–52 (1994).

The trial court instructed the jurors 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 added that "[t]he State does not have to prove that the defendant specifically desired or intended a particular result. What the State must prove is that the defendant was aware of the nature of his conduct or the circumstances under which he engaged in the conduct." *Id.* This instruction substantively tracked the statutory definition. RSA 626:2, II(b) (2016) ("A person acts knowingly with respect

to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist."). So too did the instruction state nearly verbatim the applicable model instruction. *N.H. Criminal Jury Instructions* 2.04 (1985) ("['knowingly'] means that the State must prove that the defendant was aware that his acts would cause the prohibited result. The State does not have to prove that the defendant specifically intended or desired a particular result. What the State must prove is that the defendant was aware or knew that his conduct would cause the result.").

There was no error, let alone error that was plain. Simply put, it cannot be error for a trial court to use language that is substantively identical to the applicable statutory definition, as well as the model instruction that this Court has advised trial courts to utilize. *State v. Leveille*, 160 N.H. 630, 633 (2010) ("We take this opportunity to recommend that trial courts use New Hampshire Model Jury Instructions when practicable, in order to avoid needless litigation."). This Court has never criticized, let alone forbidden, the use of the "standard" instruction given by the trial court here. Nor has the Court ever recommended, let alone mandated, that courts employ the "practically certain" language advocated by the defendant. To the contrary, this Court has equated such language with the language actually utilized by the trial court. *See State v. Bergen*, 141 N.H. 61, 63 (1996) (after quoting statutory definition of "knowingly," "[i]n other words, a defendant acts knowingly when he is aware that it is practically certain that his conduct will cause a prohibited result" (internal quotation marks omitted)).[16]

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[16] Also, this Court will find prejudice only when it "cannot confidently state that the jury would have returned the same verdict in the absence of the error." *State v. Mueller*, 166 N.H. 65, 70 (2014). That is not the case here. The jury heard from medical experts regarding the severity of the victim's injuries. Given the nature and extent of his wounds—including multiple skull fractures, a broken arm and leg, and extensive bruising—the jurors would have come to the very same conclusion they did whether they were properly instructed on the "knowingly" element of first-degree murder, as they were here, or instructed on that concept as the defendant argues.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully submitted,

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I, Peter Hinckley, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Thomas Barnard, by first-class mail postage prepaid, at the following address:

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