THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0712

STATE OF NEW HAMPSHIRE

v.

GEORGE COLBATH

DEFENDANT'S APPEAL PURSUANT TO RULE 7 FROM A DECISION OF THE BELKNAP COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANT

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(15 minutes for oral argument)

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ISSUES PRESENTED

1. Did the trial court err by allowing testimony concerning other bad acts that allegedly took place in Nottingham, NH? See Defendant's Objection to State's *Motion in Limine* to Admit Prior Bad Acts. (Hereinafter "Defendant's Objection.")

2. Did the trial court commit error by allowing testimony from witnesses, including Jeremiah Colbath, regarding comments made by the Defendant about the VB's characteristics? (Trial Transcript at 317, 332, 586, hereinafter "TT").

All issues were preserved via either the Defendant's motions, at hearings on those motions and/or contemporaneously during trial.

STATEMENT OF THE CASE

The Defendant, George Colbath, was indicted by the Belknap County Grand Jury in February of 2017 on multiple charges alleging Aggravated Felonious Sexual Assault and Incest. The State sought to introduce evidence of other acts in Rockingham County and in the State of Georgia under New Hampshire Rule of Evidence 404(b). At trial, Mr. Colbath objected to the introduction of testimony from witnesses regarding statements he allegedly made regarding VB's physical appearance.

The State filed various motions in this case, including a Motion *In Limine* to Admit Prior Bad Acts –404(B), (hereinafter "State's Motion"). It also filed a supplemental motion seeking to admit acts that allegedly occurred in Georgia. See Supplement to State's Motion *in Limine* to Admit Prior Bad Acts-404(b). The court ruled in the State's favor regarding acts that allegedly occurred in Rockingham County and the evidence was admitted. The court did not allow evidence of the Georgia acts. The Defendant objected, claiming "the acts are separate and distinct" and that the "evidence would be much more prejudicial than probative." (Defendant's Objection ¶3, 5).

The State also sought to introduce testimony from two witnesses regarding statements Mr. Colbath allegedly made about VB's physical appearance in the years prior to the charged conduct. (TT at 317, 586). The trial court admitted this evidence under Rule 404(b). (TT at 332, 584). However, neither the State nor the trial court explained how and why such evidence was relevant to any of the issues in dispute and not overly prejudicial to the defendant.

Following a jury trial, Mr. Colbath was convicted of these charges on September 13, 2017. This appeal followed.

STATEMENT OF FACTS

Mr. Colbath was indicted on multiple counts of AFSA and related crimes committed against VB between September 2014 and January 2016. See State's Indictments. The case went to trial in Belknap County in September of 2017. (TT at 1)

Prior to trial, the State filed a motion to admit evidence of other uncharged conduct pursuant to N.H. Rule of Evidence 404 (b). The State sought to admit such evidence "to show (1) opportunity, intent, plan, preparation, knowledge, and absence of mistake, and (2) to provide context to the jury as to the timeline of the assaults and the pattern of the behavior." (State's Motion ¶3). According to the State "[t]his context will help the jury to understand both the defendant and victim's state of mind." Id.

The State claimed that "[p]rior to July of 2016, VB had approached the Defendant with a concern about her body" and that "upon examination of her body the defendant touched and made a statement about her genitalia." (State's Motion at ¶6). These acts allegedly occurred in Nottingham prior to any of the conduct charged in Belknap County. (State's Motion ¶5). The State proffered that "[VB] will testify that in July of 2016, they were watching a movie during which the defendant asked her if she masturbated, and sexually assaulted her." (State's Motion at ¶7). The State then claimed that "[o]ver the following days and weeks the defendant assaulter her in a similar fashion to the Belknap County conduct, including utilizing sex toys during the assaults." (State's Motion at ¶8).

The State argued that "[t]he prior bad act evidence demonstrates that the defendant acted knowingly." Id. ¶15. It further claimed that "[e]vidence concerning the defendant's similar conduct in Nottingham to the alleged acts in Belknap County are admissible because the Nottingham acts are relevant, material and probative." (State's Motion at ¶16). It went on to

state that "[t]he Nottingham acts show an escalation of sexual behaviors that become full-blown penetrative acts in Belknap County. The Nottingham acts show a pattern of the defendant's intended conduct." (State's Motion at ¶16).

In arguing the evidence was admissible to show context, the State noted that Mr. Colbath "is charged with a pattern of sexual assaults." (State's Motion at ¶17). "The context of how, and when, this pattern started is highly relevant to corroborating these allegations. It would also show the state of mind of both the victim and the defendant." Id. According to the State "the defendant's comment and actions show a gradual course of conduct which led to the fulfillment of his plan to commit a violent act against his victim." (State's Motion at ¶28). Defense Counsel objected and the trial court held a hearing on the motion. See Defendant's Objection.

The trial court held that "such testimony would show a progressive, steady desensitization of the victim." Court's Order, January 23, 2017; J. Fauver at 3 (hereinafter "Order") (internal quotations omitted). It found that "the defendant's alleged Rockingham County actions would show the defendant's plan, preparation, and intent to commit the alleged crimes." (Order at 3). The trial court further found that "the danger of unfair prejudice from admitting evidence of the defendant's alleged Rockingham County actions does not substantially outweigh its probative value." (Order at 4).

At trial, the State also sought to introduce testimony regarding statements allegedly made by Mr. Colbath in the months and years preceding the conduct alleged in the indictments. After a hearing outside of the jury's presence, the trial court permitted testimony, over the defendant's objection, from Christine Wentworth about statements George Colbath allegedly made regarding VB's physical appearance. (TT at 332). Ms. Wentworth testified that George, at some point in the years prior to VB's disclosure, said VB "was built like a brick shit house." (TT at 321). She

also testified that at some point George had indicated VB was "very well endowed" when speaking about VB's "boobs." Id. The trial court allowed Ms. Wentworth to testify before the jury about the statements Mr. Colbath allegedly made regarding VB's physical appearance. (TT at 328).

The State also sought to introduce statements allegedly made by Mr. Colbath to his son, Jeremiah Colbath, regarding the physical appearance of VB. (TT at 574). In a hearing, outside the presence of the jury, Jerimiah testified that, while discussing VB, George stated "you should see the tits on her." Id. According to Jeremiah, this statement was made at some point years before the VB's disclosure, when the two men were alone in front of Jeremiah's home. (TT at 575)

The State argued that the statements allegedly made by Mr. Colbath "under 404b goes to intent. It's him talking about a body part, a sexual body part, on the alleged victim of this crime. Its shows the intent for his sexual relationship with the victim." (TT at 584).

The trial court found Jeremiah's testimony "relevant with respect to the testimony of Christine Wentworth because it showed that the defendant was looking at the complaining witness with whom he had a father daughter relationship in a sexualized context." (TT at 585). The Court found the specific use of the testimony, under Rule 404 (b), was to show that the Defendant "intended to commit the acts that he's accused of committing." (TT at 586). The trial court allowed the testimony over the Defendant's objection. (TT at 586).

SUMMARY OF THE ARGUMENT

Prior to trial, the State sought to introduce evidence of prior bad acts that allegedly occurred in Rockingham County under Rule 404 (b) of the New Hampshire Rules of Evidence. See (State's Motion). In its motion, the State argued that admission of the prior uncharged acts would "show (1) opportunity, intent, plan, preparation, knowledge, and absence of mistake, and (2)...provide context to the jury as to the timeline of the assaults and the pattern of behavior." (State's Motion at ¶ 3).

After a hearing on the motion, the trial court allowed evidence of the alleged Rockingham County acts to be admitted at trial. See Order. In its order, the Court found that testimony about those acts "would show a 'progressive, steady desensitization of the victim'." (Order at 3), (citing State v. Haley, 141 N.H. 541, 547 (1997)). The trial court held that "the defendant's alleged Rockingham County actions would show the defendant's plan, preparation, and intent to commit the alleged crimes." (Order at 3).

The Court erred by allowing evidence of such acts to be used at trial because such acts were not relevant for any of the stated purposes. See N.H.R.Evid. 401, 404(b). The evidence did not show the existence of plan and was not properly admitted to show intent. In addition, any probative value the introduction of such evidence might have had was substantially outweighed by its prejudicial effect on the jury. See State v. Melcher, 140 N.H. 823. Furthermore, the State did not articulate a precise chain of reasoning by which such evidence would tend to prove or disprove an issue actually in dispute. See State v. McGlew, 139 N.H. 505. The trial court also failed to articulate how the evidence was relevant without invoking propensity. See State v. Melcher, 140 N.H. 823.

The trial court also erred by allowing testimony from two witnesses about statements the defendant allegedly made regarding VB's physical appearance. Christine Wentworth was allowed to testify that Mr. Colbath stated VB "was built like a brick shit house." (TT at 321). She also testified that he commented on her "boobs" and said that VB was "well endowed." Id. Jeremiah Colbath testified that the Defendant told him "you should see the tits on her" while he was speaking with the defendant outside his home. (TT at 584).

The court found the testimony of Christine relevant because the statements "probative, on something other than character." (TT at 328). Meanwhile, it held that Jeremiah's testimony showed "the intent for [the Defendant's] sexual relationship with the victim. (TT at 584). However, this testimony should not have been allowed because it was not relevant for the purpose the trial court stated: Mr. Colbath's intent in the charged acts. Such prior acts had no bearing on his intent at the time of the charged acts. Instead, the acts force the jury to presume that because Mr. Colbath made the comment in the past he formed the requisite intent later on. However, "when an assumption based upon the defendant's propensity toward certain action is the essential connection in the inferential chain supporting relevance, the evidence is inadmissible under Rule 404(b)." State v. Melcher, 140 N.H. at 830. To the extent it was relevant, such probative value was far outweighed by its prejudicial effect. See Id. Thus, the court erred when it allowed the testimony.

LEGAL ARGUMENT

I. The Court erred by allowing evidence of prior uncharged bad acts to be introduced at trial.

Under Rule 404(b), "[e]vidence of bad acts of other bad acts is only admissible if relevant for a purpose other than to prove the defendant's character or disposition, if there is clear proof that the defendant committed the other acts, and if the prejudice to the defendant does not substantially outweigh the probative value of the evidence." State v. Melcher, 140 N.H. 823, 827-8 (1996) (internal quotations removed). "Rule 404(b) allows for the admission of evidence of other crimes, wrongs, or acts for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." State v. McGlew, 139 N.H. 505, 508 (1995) (internal quotations omitted). "The decision to admit 'bad acts' evidence lies within the trial court's sound discretion and will be overturned only if the defendant can show that the decision was clearly untenable or unreasonable to the prejudice of his case." Id. at 507. "The party offering evidence bears the burden to make an offer of proof to show the relevance of the evidence offered." Id. at 509.

In regard to the State's burden, this Court stated that:

> "[w]here evidence is offered under Rule 404(b), the Government bears the burden of showing how the proffered evidence is relevant to one or more issues in the case. The ... standard is clear. The Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. In addition, the trial court must specifically identify the purpose for which such evidence is offered and **a broad statement merely invoking or restating Rule 404(b) will not suffice.**" Id. (citing United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir. 1985)) (emphasis added).

The Court held "that the State, in offering evidence of other wrongs under Rule 404(b), **must state the specific purpose** for which the evidence is offered and **must articulate the precise chain of reasoning** by which the offered evidence will tend to prove or disprove an issue

actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." State v. McGlew, 139 N.H. at 509-10 (emphasis added). "Furthermore, the trial court must articulate for the record the theory upon which the evidence is admitted." Id. at 510. The Court then added that "[w]hether the court adopts the State's theory, a variation, or an alternative, the court **must explain precisely** how the evidence relates to the disputed issue, **without invoking propensity**." Id. (emphasis added).

A. The evidence does not demonstrate a plan to assault VB.

The trial court erred when it allowed evidence of the Nottingham acts at trial for the purpose of showing that Mr. Colbath had a plan to commit the charged acts. In its order, the trial court found the "alleged Rockingham County actions would show the defendant's plan." (Order at 3).

This Court held that "[t]he distinguishing characteristic of a plan is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution." State v. Melcher, 140 N.H. 823, 828 (1996). "[T]he other bad acts must **clearly** tend to show that the defendant had a definite prior design or system which included the doing of the act charged as a part of its consummation." Id. (emphasis added) (internal quotations omitted). "For prior sexual misconduct to be relevant to show that the defendant had a plan, the mutual dependence between the prior conduct and the charged act still must be divorced from any actual or implicit reliance on the defendant's character." Id. at 829. "Otherwise, the existence of a plan could be claimed indiscriminately in many cases of sexual assault and serve, inappropriately, as a ready avenue to the admission of evidence that Rule 404(b) was expressly designed to exclude." Id.

In Melcher, the "State argue[d] that the defendant's tickling and fondling the victim a few years before the charged act establish that he then had in mind a definite design to fondle the victim while she shaved her legs, and ultimately to force himself upon her." 140 N.H. at 829. The Court held that "[t]hese disparate acts, however, do not tend to show that the defendant had a plan, because the purported goal of the plan--the act with which the defendant was charged--clearly did not hinge on their occurrence. The acts were not mutually dependent." Id. The Court went on to state that "[t]hough the defendant's prior conduct does show that he seized opportunities to abuse the victim as they arose, repeated sexual assault over time does not, in and of itself, demonstrate that the defendant had a plan." Id.

The facts of the case cited by the trial court in support of its finding, State v. Haley, 141 N.H. 541 (1997), are distinguishable from the facts in the present case. In Haley, "the State moved to admit evidence that the defendant had sexually assaulted the victim on other occasions and that he had tickled and kissed her and touched her with a vibrator when she was younger." Id. at 543. In agreeing with the trial court in that case, this Court held that "the escalating uncharged acts which were perpetrated against the victim over several years tended to show the defendant's preparation to commit the crimes charged." Id. at 546.

In the present case, however, there is no evidence of grooming that would suggest Mr. Colbath had some sort of plan to sexually assault VB According to the State, the first act of "grooming" occurred when "VB...approached the Defendant with a concern about her body. Upon examination of her body the defendant touched, and made a statement about her genitalia." (State's Motion ¶6). VB testified at trial that after attending a party in eighth grade she "had a weird liquid in [her] underwear." (TT at 62). She then testified that she "asked George about it" because she "wasn't really comfortable with Marlo [George's girlfriend at the time] yet." (TT at

62). She testified that Mr. Colbath "examine[d] [her] vagina" though little detail was provided as to what that examination entailed. (TT at 63). When asked if anything else happened after that, she stated "[t]hat was the end of the night." Id.

The next step in Mr. Colbath's alleged "plan" the State refers to is an incident where Mr. Colbath allegedly "asked [VB] if she masturbated, and **sexually assaulted** her." (State's Motion ¶7) (emphasis added). However, it should be noted that the timeline between the two acts in unclear.

When asked how much time elapsed between the first event and the aforementioned assault, VB replied she was "not sure." (TT at 63). In its motion to admit prior bad acts, the State indicated she would "testify that the sexual assaults began in July of 2014." (State's Motion ¶5). VB never provided any dates regarding the Nottingham acts. Instead, she described the timing of the acts by remembering what she was watching on television or where she had been that day. (TT 63, 65, 68). Meanwhile, the State also claimed that "prior to July of 2016 VB had approached the Defendant about a concern with her body." (State's Motion ¶6). The motion then states that "[VB] will testify that in July of 2016, they were watching movie during which the defendant...sexually assaulted her." Id. ¶7. However, VB disclosed the acts in January of 2016. There has been no evidence provided to suggest that Mr. Colbath had contact, let alone sexually assaulted, VB after the disclosures were made.

VB's testimony indicates not only that she was unsure of the time that elapsed between the two events, but that she did not know when the first event, the issue with her body, even took place. When asked how old she was when the act occurred she replied "I think it was eighth grade." (TT at 62). She does not indicate if this happened before or at beginning of the school year, towards the end or after. Her testimony does not suggest what time of year it is; she does

not mention snow or whether she was running around inside or outside. Her testimony that she thought the first incident happened in eighth grade could mean that the second incident occurred a year or more after the first incident. Given the ambiguity in her testimony, it is hard to assess the temporal relationship between the various alleged acts and therefore, difficult to ascertain the existence of a plan in this case.

In regard to uncharged conduct that the State refers to after the bathroom encounter, VB testified at trial that while watching television Mr. Colbath, he "asked [her] if [she] had ever masturbated, and [she] said no." (TT at 63). She then testified that Mr. Colbath "proceeded to take [her] underwear off and finger [her]." (TT at 64). She clarified that this meant "[h]e put his fingers inside of [her] vagina." Id.

VB testified to three other uncharged incidents in Nottingham, but was not clear as to when exactly such acts allegedly occurred or how much time elapsed between them. (See TT at 64-68). She testified that she awoke "one day" to find Mr. Colbath fondling her breasts. (TT at 65). She later testified that "one day" she was watching a movie and Mr. Colbath laid down next to her and "proceeded to finger" her. (See TT at 65-67). She also testified that "he performed oral sex on me" but did not provide any details as to when, where, or how the act occurred. (TT at 68). Without more detail about each of the incidents, it is difficult to understand how these acts and the acts charged in Belknap County are mutually dependent with each other. Such lack of dependence is further evidence these acts were not part of a plan.

That Mr. Colbath took steps to address concerns that VB brought up about her body is not an act of grooming as the State contends. VB approached him with a question related to her body. (TT at 62). This fact alone strongly indicates that this incident was not the genesis of a plan to 'desensitize' or 'groom' the alleged victim. After all, she came to him with the issue.

VB testified that he "examined [her] vagina," but did not explain whether or not Mr. Colbath actually touched her at this time. (TT at 63). She testified that he stated "[her] vagina looks like her mother's" and that "kind of freaked her out." Id. However, she did not testify that he said anything more or that she said anything to him about it. Instead her next response was "[t]hat was the end of the night." Id.

These facts do not show an escalating pattern or plan as the State contends and as the trial court found. (Order at 3). Instead, the facts show Mr. Colbath being placed in a situation that most men find awkward: addressing a young girl's issue with her body. There is no evidence that he acted inappropriately in this instance. Though his comment about her vagina's appearance might have been unusual, it certainly does not indicate he was grooming her for later sexual activity. Furthermore, there was no evidence provided to suggest when this act took place in relation to the subsequent uncharged conduct. As such, the testimony should not have been allowed as it is not relevant to prove "plan, preparation and intent" as the trial court allowed. (Order at 3).

Assuming, *arguendo*, the subsequent acts of assault occurred after the bathroom encounter, they do not show a pattern of grooming or desensitization as the State claimed. If anything, they are separate distinct alleged acts of sexual assault. See State v. Melcher, 140 N.H. at 829. In fact, the State's motion clearly states that Mr. Colbath "asked [VB] if she masturbated, and **sexually assaulted** her." Id. ¶7 (emphasis added). The State does not elaborate on this point in its motion. At trial, VB testified that he digitally penetrated her during the incident, which is an act of sexual assault. (TT at 63). There was no evidence to suggest that he somehow fondled her or cajoled her into submission; instead, he asked her a question and then assaulted her according to the evidence.

Meanwhile, the State claims that the Nottingham acts were carried out in a similar fashion to the Belknap conduct. However, in the indictments for this case, the State alleged that Mr. Colbath coerced VB into submitting to multiple acts of sexual assault "by threatening to retaliate against VB and VB believed that [he] had the ability to execute those threats in the future." See State's Indictments. There is no evidence that Mr. Colbath threatened retaliation in order to compel her submission to the Nottingham acts. Instead, the State describes an incident of sexual assault that allegedly occurred while the defendant and alleged victim were watching television. It then goes on to allege other assaults occurred without providing any details about these assaults. While VB offered testimony about those other acts at trial, she did not testify that Mr. Colbath threatened to retaliate against her if she did not submit. There was no evidence offered to suggest that any prior acts (in Nottingham) were the product of threats or coercion. To the extent that this similarity that makes the prior acts relevant to prove a plan, and such similarity does not exist, the State failed to articulate a precise chain or reasoning as to the relevance of the acts. Thus, the evidence should be deemed inadmissible as it did not show the existence of a plan.

According to the State's proffer and VB's testimony, Mr. Colbath did not take steps to groom or desensitize VB. As the State puts it, Mr. Colbath "asked [VB] if she masturbated, and sexually assaulted her." (State's Motion ¶7). At trial, VB testified that Mr. Colbath asked her if she had masturbated and then proceeded to take off her clothes and digitally penetrate her. (TT at 63). VB later testified that three other assaults occurred, but provided little detail about their commission. If true, then these were merely separate acts of sexual assault committed in Rockingham County. There was no evidence that the acts were part of a larger plan to commit the acts with which he would later be charged in Belknap County. There was no evidence

offered to show how the alleged commission of the acts in Belknap County was dependent on the occurrence of the uncharged acts. Thus, the acts were not linked together in a precise chain of reasoning. See State v. Melcher, 140 N.H. 823. Therefore, the evidence should not have been admitted for the purpose of proving Mr. Colbath had a plan to assault VB.

B. There is no precise chain of reasoning offered to link the prior uncharged acts with the charged conduct.

The State did not "articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." State v. McGlew, 139 N.H. at 509-10. Nor did the trial court "explain **precisely** how the evidence relates to the disputed issue, without invoking propensity." Id. at 510.

The State never articulated precisely why admission of the prior bad act evidence is warranted under Rule 404(b) in this particular case. In its motion to admit prior bad acts, the State proffers that VB would testify about assaults that began in July of 2014 and ended in January of 2016. (State's Motion ¶5). In addition, it claimed VB would testify about two prior incidents: VB approaching George about a concern with her body; George sexually assaulting her after asking if she masturbated; and that in the days and weeks that followed he assaulted her in a similar fashion to the Belknap County conduct. Id. ¶6-8. After that, the State goes into the myriad of case law on this topic. Yet, the State does not connect the dots and provide the required precise chain of reasoning as to how the charged and uncharged conduct is related.

According to the State, George asked VB if she masturbated and then sexually assaulted her. Nothing about those allegations connected them to the initial genital inspection for medical purposes described by the State. There was nothing gradual, progressive or steady about this alleged approach. Instead, Mr. Colbath allegedly took the opportunity while watching television

to sexually assault VB. Then "[o]ver the following days and weeks [he] assaulted her in a similar fashion to the Belknap County conduct, including utilizing sex toys during the assaults." (State's Motion ¶ 8). The State failed to link these incidents in a precise chain of reasoning, as such, the evidence should not have been admitted under 404(b).

Both the State and trial court do little to connect the Nottingham acts, which as described are spontaneous acts of sexual assault, to the conduct charged in Belknap County, which were allegedly committed via threats and coercion. The State provides no explanation as to how the conduct shows any escalation or how such evidence demonstrates a plan. Likewise, in its order, the trial court simply repeats the State's proffered evidence, finds it would show a "progressive, steady desensitization of the victim", and that such "actions would show the defendant's plan, preparation and intent to commit the alleged crimes". (Order at 3). The Court then finds the State met is burden under the first prong of 404(b). Id.

The trial court failed to articulate precisely how the evidence was relevant. It did not explain how the uncoerced Nottingham acts provided evidence of a plan to commit the Belknap County acts via threats and coercion. It did not explain how the proffered acts show a progressive, steady desensitization of VB. The trial court found that "the conduct progressed to oral sex and then touching the alleged victim's breast and genitals." (Order at 3). This indicates the oral sex occurred first. However, the court did not explain how touching the victim was somehow an escalation or progression from oral sex. (Order at 3). Because the Court failed to precisely state how the evidence was relevant, it should be deemed inadmissible.

C. The State and the trial court did not show how the prior bad act evidence was relevant to intent without improperly invoking propensity.

The State contends that the admission of the Nottingham Acts would show Mr. Colbath's intent to commit the acts charged in Belknap County. (State's Motion ¶3). However, three of the

six cases cited by the State in support of its position, including Simonds, are distinguishable from the present case in regard to the mens rea the State was required to prove. In two of the remaining cases, this Court ultimately reversed the convictions of defendants where their respective trial courts had improperly admitted evidence under 404 (b).

In State v. Hickey, the defendant was charged with acting purposely. State v. Hickey, 129 N.H. 53, 61 (1986). Similarly, in State v. Simonds "[t]he State was required to prove that the defendant intentionally touched his niece's breasts **for the purpose of sexual arousal or gratification**." State v. Simonds, 135 N.H. at 206 (emphasis added).

This Court, in deciding Simonds, found that "[e]vidence of the defendant's prior sexual contact with the victim was relevant to and probative of his **intent, at the time of the Belknap County incident, to touch her for the purpose of sexual arousal or gratification**." Id. at 207 (emphasis added). The Court held that "[t]he evidence was not admissible to show that the defendant had a propensity to engage in sexual misconduct generally, but was admissible to demonstrate an intent to touch this victim for sexual gratification." Id.

In each of the aforementioned cases, the State was required to prove the defendant acted purposely. In Simonds, the State bore the burden of proving that the defendant committed the acts "for the purpose of sexual gratification." State v. Simonds, 135 N.H. at 206. That is not so in the present case. For all of the indictments in this case, the State was required to prove Mr. Colbath acted knowingly.

In New Hampshire, "[a] person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element." N.H. RSA 626:2, II (a). Meanwhile, "[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." N.H. RSA 626:2, II (b). Unlike the prosecutors in Simonds, the State was not required to prove that Mr. Colbath's alleged conduct was undertaken for a specific purpose (i.e. sexual gratification). Instead, the State only had to prove that George was aware that he was engaging in sexual penetration with VB.

Meanwhile, contrary to the State's assertion, the Court's decisions in State v. Hastings, 137 N.H. 601 (1993) and State v. Bassett, 139 N.H. 493 (1995), do not support the State's position regarding admission of prior bad acts to prove intent. In both cases, the Court reversed the defendants' convictions due to improper admission of evidence under Rule 404(b).

Hastings dealt with bad acts that occurred subsequent to the acts for which the defendant was on trial. At issue was "the defendant's subsequent possession of an automatic rifle and forty-nine rounds of ammunition." Id. The State argued "only that this evidence was relevant to prove the defendant's knowledge and intent on the earlier, charged occasion." Id.

The Court held that "the evidence was not probative of his knowing possession in New Hampshire ten months earlier and was relevant only for the impermissible purpose of showing his propensity to possess firearms." Id. The Court went on to explain that evidence of subsequent firearm possession was "simply evidence of propensity or disposition, prohibited by Rule 404(b), sought to be introduced through the mechanical recitation of 'intent' as the password for admissibility." Id. at 606. Ultimately, the Court did not allow evidence of other bad acts at trial to show that the defendant acted with the requisite state of mind. Id.

In State v. Bassett, the defendant "was convicted of four counts of aggravated felonious sexual assault on his wife." State v. Bassett, 139 N.H. 493, 494 (1995). The acts for which the defendant was charged occurred on December 24th and 25th, 1990; in November or December of 1991; and on February 2, 1992. Id. at 495. Over the defendant's objection, the trial court "ruled

that the defendant's first conviction of aggravated felonious sexual assault, without any explanatory details of the incident, his resulting sentence, as well as evidence of his other abusive behavior toward his wife were admissible to prove intent and motive." Id.

Although "the defendant's intent was sufficiently at issue, as part of the State's burden of proof, to require some evidence at trial, the Court found it difficult...to separate the State's proffer to use the conviction to show that the defendant had the requisite intent to commit the same crime on four other occasions from an impermissible use to show the defendant's propensity to commit the crime and thereby imply his intent." See State v. Bassett. The Court found the "problem [was] that [e]ven if the accused entertained a certain intent during a similar uncharged incident, the accused may not have formed that intent on the charged occasion." Id. (internal quotations omitted).

The Court in Bassett, held that "[w]ithout the necessary clear connection between the first conviction and sentence and proof of the defendant's intent, the only probative value of the evidence is to suggest that because he sexually assaulted his wife with the requisite intent the first time, it is likely that he acted knowingly during the four subsequent assaults." See State v. Bassett at 502. The Court found "that method of persuasion to be indistinguishable from the impermissible use of the conviction to prove the defendant's propensity to commit the charged crime in order to show that he acted in conformity therewith on the subsequent occasions. Id. "Thus, evidence of the defendant's conviction and sentence was not relevant for a purpose other than to show his bad character or propensity to commit the crimes charged, and it was not admissible under Rule 404(b)." Id.

In this case, the State failed to establish a clear connection between the Nottingham acts and the conduct charged in Belknap County. Specifically, the State did not demonstrate how

evidence of the commission of the uncharged conduct will assist the jury in determining his mental state during the charged conduct without invoking "his propensity to commit the crime and thereby imply his intent." Id. In articulating its chain of reasoning regarding intent, the State offered the following five statements:

> In the case at hand, the State must prove that the defendant acted knowingly. The prior bad act evidence demonstrates that the defendant acted knowingly. Evidence concerning the defendant's similar conduct in Nottingham to the alleged acts in Belknap County are relevant, material and probative. The Nottingham acts show an escalation of sexual behaviors that become full-blown penetrative acts in Belknap County. The Nottingham acts show a pattern of the defendant's intended conduct. (State's Motion, ¶15-16).

As in Bassett, the State's reasoning implies that the "only probative value of the evidence is to suggest that because [Mr. Colbath] sexually assaulted [VB] with the requisite intent the first time, it is likely that he acted knowingly during the [] subsequent assaults." State v. Bassett, 139 N.H. at 502. "When, in this manner, an assumption based upon the defendant's propensity toward certain action is the essential connection in the inferential chain supporting relevance, the evidence is inadmissible under Rule 404(b)." State v. Melcher, 140 N.H. at 830. As such, the Court should deem the introduction of Mr. Colbath's prior conduct inadmissible.

The State does not explain how "the prior bad act evidence demonstrates that the defendant acted knowingly." See State v. Melcher. In fact, the statement itself is ambiguous as it does not make clear whether Mr. Colbath was acting knowingly at the time of the Nottingham acts or at the time of the alleged Belknap County conduct.

If the statement that the prior bad act evidence proves Mr. Colbath acted knowingly with respect to the Nottingham acts, then there was no need to introduce the prior bad act evidence to prove his intent to the current charges at trial. After all, if the State's proffer that Mr. Colbath

committed the uncharged acts is sufficient to prove that he knowingly committed such acts, then VB's testimony at trial about his commission of the charged acts should have been sufficient to prove his intent at trial. Thus, there was no need for the introduction of prior uncharged conduct to prove intent in this case.

To the extent that the prior bad act evidence proves Mr. Colbath acted knowingly with respect to the conduct charged in Belknap County, the trial court failed to articulate how the fact that the commission of the uncharged acts will make it more or less likely that Mr. Colbath acted knowingly at the times charged in the indictments without improperly invoking propensity. See State v. Melcher, 140 N.H. at 830.

The State did not indicate how the offered evidence proved Mr. Colbath acted knowingly regarding the uncharged conduct in Nottingham. Nor did it show how such knowledge would have been imputed to him in relation to the Belknap conduct. Regardless of how it's perceived, the State's chain of reasoning in regard to the admission of prior uncharged bad acts to show Mr. Colbath's intent warrants a reversal of the trial court's decision to admit such evidence. Neither the State nor the trial court explained how the evidence was relevant without improperly invoking propensity; therefore, the evidence should be deemed inadmissible.

D. The evidence was improperly admitted to prove context.

In its motion to admit uncharged bad acts, the State claims that "the context of how, and when, this pattern [of sexual assaults] started is highly relevant to corroborating the allegations." (State's Motion ¶18). It goes on to claim that the admission of uncharged acts would "also show the state of mind of both the victim and the defendant." Id.

To meet the relevancy requirement, the other bad acts evidence must have some direct bearing on an issue actually in dispute, and there must be a clear connection between the

particular evidentiary purpose, as articulated to the trial court, and the other bad acts." State v. Davidson, 163 N.H. 462, 469 (2012).

"Rule 404(b) does not specifically provide for the admissibility of other acts evidence to prove context, but it does allow such evidence to be admitted for any purpose other than to prove the character of a person in order to show that the person acted in conformity therewith." Id.

As in Melcher, "[c]ontext, in this instance, is merely a synonym for propensity." 140 N.H. at 830. Although the State claims the evidence will show the state of mind of both parties, it does little to address the issue in its motion. It does not explain how the introduction of the Nottingham acts is "relevant to corroborating the allegations" in Belknap County. (State's Motion ¶18).

As noted before, Mr. Colbath is alleged to have committed the Belknap County acts via threats and coercion. However, there was no evidence that the Nottingham acts were committed via threats or coercion. Furthermore, the State offered no evidence related to VB's mental state at the time of the Nottingham acts. Given the lack of detail about VB's mental state at the time of the uncharged conduct and the lack of similarity between the charged and uncharged acts, it is unclear how such evidence would assist the jury in making any determinations about her mental state in relation to the charged acts. Thus, the evidence should not have been admitted to show context in this case.

E. The probative value of the evidence was substantially outweighed by its prejudicial effect.

To the extent the evidence of the Nottingham acts was relevant, its probative value was greatly outweighed by its prejudicial effect on Mr. Colbath.

Under the third prong of the test for admissibility of evidence under Rule 404(b), evidence of other bad acts may only be admitted "if the prejudice to the defendant does not

substantially outweigh the probative value of the evidence." State v. Melcher, 140 N.H. 823, 827-8 (1996) (internal quotations removed). "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Cassavaugh, 161 N.H. 90, 98 (2010).

In this case, the probative value of the evidence the State sought to admit under rule 404(b) was minimal. The State was only required to prove Mr. Colbath acted knowingly. The jury could have found he acted knowingly based on VB's testimony regarding the charged acts. The State was not required to prove Mr. Colbath's purpose in committing the alleged acts as it was in Simonds. Furthermore, the State alleged Mr. Colbath forced VB to submit to his advances via threats of retaliation and her belief of his ability to carry out such threats. Given that there is no evidence that the Nottingham acts were achieved in such a manner, the probative value of those acts in respect to a plan are diminished even further.

In a prior, similar case, the Court found that "[a]lthough the erroneously admitted testimony about the incidents in Nottingham was not as specific as the testimony about the charged offenses, the victim clearly indicated that the conduct was similar to the charged offenses and that it had occurred many times. This kind of evidence is inherently prejudicial." State v. Crosby, 142 N.H. 134, 138 (1997). The evidence of prior acts the State sought to introduce in this case "is precisely the sort of evidence that could create and undue tendency to induce a decision against the defendant for uncharged acts." State v. Cook, 158 N.H. 708, 715 (2009). Evidence of the Nottingham acts provided no assistance to the jury in determining whether or not Mr. Colbath intended to assault VB in Belknap County. Meanwhile, the

prejudicial effect of such evidence, as noted before, was substantial given the nature of the alleged acts. As such, the probative value of the evidence was substantially outweighed by any probative value that such evidence may have had and should have been deemed inadmissible.

II. The Court erred by allowing testimony from Christine Wentworth and Jeremiah Colbath, regarding comments made by the Defendant about the VB's characteristics.

The Court committed error when it allowed Christine Wentworth and Jerimiah Colbath to testify about statements George Colbath allegedly made to him in the years preceding the allegations in this case. At trial, the State elicited testimony about statements Mr. Colbath made to Christine Wentworth, [VB's aunt], about her physical appearance. (TT at 382). The Court held a hearing, outside of the presence of the jury, to determine whether such testimony would be allowed. (TT at 320).

When asked what comments Mr. Colbath had made about VB, Ms. Wentworth responded "[s]he reminded him of his wife, her mother. That she was built like a brick shit house." (TT at 320-21). The Trial Court allowed Ms. Wentworth to testify about the statements Mr. Colbath allegedly made regarding [VB's] physical appearance. (TT at 328 In doing so, the Court "found that the fact that he made those statements that looked at the complaining – that put the complaining witness in a sexual context at that age is probative, on something other than character." (TT at 328). The Court noted the defendant's objection. (TT at 317).

Once the jury was brought back into the courtroom, the State continued its examination of Ms. Wentworth. She testified that Mr. Colbath had said made comments about VB's "boobs" stating that "she's very well endowed like her mother." (TT at 333).

The State also sought to introduce statements made by Mr. Colbath to his son, Jeremiah Colbath, regarding the physical appearance of VB. The Court held a hearing, outside the presence of the jury, and the State elicited testimony from Jeremiah about those statements.

Jeremiah testified that the defendant said "you should see the tits on her" while the two were outside of Jeremiah's house. (TT at 578).

Afterwards, and still outside of the presence of the jury, the Court heard arguments from both sides regarding the admissibility of Jerimiah's testimony. See (TT at 581, 586). The State argued that the statements allegedly made by Mr. Colbath "under 404b goes to intent. It's him talking about a body part, a sexual body part, on the alleged victim of this crime. Its shows the intent for his sexual relationship with the victim." (TT at 584).

The Trial Court found Jeremiah's testimony "relevant with respect to the testimony of Christine Wentworth because it showed that the defendant was looking at the complaining witness with whom he had a father daughter relationship in a sexualized context." (TT at 585). The Court found the specific use of the testimony, under 404 (b), was to show that the Defendant "intended to commit the acts that he's accused of committing." (TT at 586). Following the trial court's ruling, the testimony was admitted over the defendant's objection. Id.

"Rule 404(b) does not specifically provide for the admissibility of other acts evidence to prove context, but it does allow such evidence to be admitted for any purpose other than to prove the character of a person in order to show that the person acted in conformity therewith." State v. Davidson, 163 N.H. 462, 469 (2012). While the Court has "indicated that context may be among these other purposes...[t]o be relevant, this evidence must still have some direct bearing on an issue actually in dispute, apart from its tendency to show propensity." State v. Melcher, 140 N.H. 823, 829 (1996).

The trial court erred when it allowed Christine Wentworth and Jeremiah Colbath to testify about statements the defendant allegedly made regarding VB. The trial court found the evidence relevant to Mr. Colbath's intent to commit the charged crimes. See (TT at 586). The

statements allegedly made by George Colbath regarding VB's physical appearance are not relevant to the matter at hand and thus, should not have been admitted. Assuming, *arguendo*, that such statements are relevant, their probative value is far outweighed by their prejudicial effect. As such, the Court should not have admitted the statements.

The State elicited testimony about statements allegedly made by Mr. Colbath in the years leading up to the charges to prove that he knew he was performing the charged acts during the time period in the indictments. However, the fact that Mr. Colbath might have made a comment about the size of VB's breasts provides no insight as to whether he was aware of the sexual penetration that allegedly occurred at a later date. "Such reckless generalizations may be tolerable in everyday affairs but courts are understandably reluctant to encourage their use in the jury room." State v. Bassett, 139 N.H. 493 (1995). As noted before, this "is precisely the sort of evidence that could create and undue tendency to induce a decision against the defendant for uncharged acts." State v. Cook, 158 N.H. at 715.

Given the nature and timing of the statements, they did little (if anything) at all to help the jury determine the fact at issue for which they were admitted: Mr. Colbath's intent to commit the Belknap County acts. These statements were allegedly made in the years preceding the charged acts. Meanwhile, neither witness testified that Mr. Colbath stated he wanted to have sexual contact with VB or otherwise touch her "boobs" when the statements were made. He merely noted what were, apparently, obvious changes to VB's body. Although such comments might be considered unusual by some, they do not, without more, provide evidence of Mr. Colbath's intent to commit the crimes alleged at trial. Thus, the evidence had no bearing on an issue actually in dispute. See Id.

Because such statements were irrelevant, their probative value was substantially outweighed by the prejudicial effect they had on the jury. See State v. Melcher, 140 N.H. 828. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Cassavaugh, 161 N.H. 90, 98 (2010).

Testimony about Mr. Colbath's alleged statements provided little evidence into his mental state at the time of the charged conduct. Such evidence was even less probative when one considers the fact that VB offered direct evidence of his knowledge in her testimony before the jury. Ultimately, the State's primary purpose of introducing such evidence was to arouse the jury's sense of horror and provoke its instinct to punish Mr. Colbath. See Id. The introduction of evidence for such purposes is not allowed, therefore, the statements should have been deemed inadmissible.

CONCLUSION

The trial court erred by admitting evidence of prior bad acts to be admitted at trial despite the fact that such evidence was not relevant to the issues in dispute and therefore, overly prejudicial to Mr. Colbath. The evidence suggested that there was no plan to carry out the Belknap conduct and instead showed that any acts that occurred in Nottingham were separated distinct acts that had no bearing on the charged conduct. The court failed to make the required findings as to why the prior act evidence was logically connected to the charged conduct. The court further failed to explain how the evidence, which by its nature is extremely prejudicial, was introduced without improperly invoking Mr. Colbath's propensity to commit the charged acts.

The court further erred when it allowed testimony from two witnesses about statements Mr. Colbath made in the years prior to the charged conduct. Such statements were not relevant for the purpose of proving intent. To the extent they were relevant, their probative value was substantially outweighed by their prejudicial effect on the jury. As such, the testimony should not have been allowed.

This Court has found the improper admission of such evidence to be inherently prejudicial. See State v. Davidson, 163 N.H. at 471. As this Court has held a "defendant must be tried for what he did, not for who he is." See State v. Melcher, 140 N.H. at 831. The prior act evidence prevented this from occurring. Therefore, the Court should find that the improper admission of the evidence challenged in this case warrants a reversal of the jury's verdict.

REQUEST FOR ORAL ARGUMENT

Mr. Colbath requests 15 minutes of oral argument before the full court.

Respectfully Submitted,

GEORGE COLBATH
By his attorney

June 21, 2018

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CERTIFICATE OF SERVICE

State of New Hampshire
Merrimack County, SS.

I, Mark L. Sisti, hereby certify that two (2) copies of the foregoing Brief were forwarded on this 21st day of June, 2018 to Stephen Fuller, Esq. of the Attorney General's Office, 33 Capital Street, Concord, NH 03301.

Mark L. Sisti, Esq.