THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0712

The State of New Hampshire

v.

George J. Colbath

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(5 minutes, 3JX)

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ISSUES PRESENTED

1. Whether evidence of the defendant's prior sexual abuse against the victim in Rockingham County was properly admitted under Rule of Evidence 404(b), where the evidence was introduced for the purpose of demonstrating the defendant's grooming behavior, preparation, and mental state.

2. Whether the defendant's statements to Christine Wentworth and Jeremiah Colbath regarding the victim's body were properly admitted under Rule of Evidence 404(b), where the evidence was introduced for the purpose of demonstrating the defendant's intent and state of mind.

STATEMENT OF THE CASE

The defendant, George J. Colbath, was charged with seventeen felony counts of aggravated felonious sexual assault. *See* RSA 632-A:2 (2016); T 3-20[1]. Eleven of the indictments alleged an additional domestic violence component, and four of the indictments alleged that the defendant engaged in a pattern of sexual assault. T 18-20; *see* RSA 631:2-b (2016).

On January 23, 2017, the Belknap County Superior Court (*Fauver*, J.), held a hearing on the State's motion *in limine*, which sought to introduce prior bad acts evidence, demonstrating that the defendant began his pattern of abuse in July 2014, when he lived with the victim in Rockingham County. SA 34.[2] After hearing argument from both sides, the Court granted the State's motion to admit this evidence. SA 38.

Following a six-day jury trial, the defendant was found guilty on all charges. T 1012-17. This appeal followed.

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[1] References to the records are as follows:
"DB" refers to the defendant's brief;
"SA" refers to the State's appendix; and
"T" refers to the transcript of the six-day jury trial held on September 6-13, 2017.

[2] The defendant did not include pagination in his appendix; as such, the State has duplicated his appendix, which is found in pages 1-41 of the State's appendix.

STATEMENT OF FACTS

On November 11, 2009, Debra Colbath died. T. 56, 295. She was survived by her daughter, who was ten years old. T 55. Although Debra's husband, the defendant, and her sister, Christine Wentworth, shared custody of the victim, the victim lived with the defendant.[3] T 295.

When the victim was in the sixth grade, she moved with the defendant to Nottingham, where they lived with the defendant's girlfriend and her children. T. 60-61. Around the time the victim was in the eighth grade, the victim asked the defendant about discharge in her underwear. T. 62. The defendant asked to see it, and proceeded to look at the victim's vagina. *Id.* The defendant said that the victim's vagina looked like her mother's, and said that the discharge must have been a result of her "excit[ing] herself in some way." T. 63. Also around this time, the defendant made comments about the victim's breasts to Christine, and his son, Jeremiah Colbath. To Christine, the defendant said that the victim was "well-endowed like her mother," and that she was "built like a brick shit house." T. 332-33. To Jeremiah, when referring to the victim, he said, "You should see the tits on her." T. 604.

On another occasion, while living in Nottingham, the defendant and the victim watched the movie, "Hammer of the Gods," together on connected reclining chairs. T 63. The defendant asked the victim whether she had ever masturbated. *Id.* When she said no, he told her that he wanted to show her how to make herself "feel good," and he took off her underwear and put his fingers inside her vagina. T 64. He told her that he liked doing that, and he wanted to do it again. *Id.*

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[3] The State called this witness Christine Moulton, but she identified herself as Christine Wentworth on the record. T. 294. As such, the State will refer to her as Christine Wentworth.

While still living in Nottingham, the victim awoke one night to the defendant touching her breasts while she was sleeping. T 65. When confronted, the defendant said that he "couldn't help himself." *Id.* On another occasion, the defendant and the victim watched the movie, "The Bucket List," and the defendant put his hands inside her vagina and performed oral sex on her. T. 67-68.

When the victim was about fifteen years old and in her freshman year of high school, the defendant and his girlfriend broke up. T 69. The victim and the defendant moved to Alton. *Id.* While moving into their new home, the defendant told the victim that he got her a present, and gave her a vibrator. T. 70. The defendant then used the vibrator both inside and outside the victim's vagina, put his fingers inside her vagina, performed oral sex on her, and then put his penis inside her vagina. T. 71.

At that point, the defendant proceeded to have sex with the victim almost weekly. T. 72. He told the victim that because he had bladder cancer, he had to be sexually active. *Id.* He would make the victim feel guilty and threaten her. *Id.* The defendant would have the victim undress and lie down, and then would "finger" her, lick her vagina, and then put his penis inside her vagina. T. 73. She remembered this occurring more than three times before her sixteenth birthday in December 2014. *Id.* He also used two different vibrators with the victim during this timeframe. T. 77.

Because the defendant claimed to have had a vasectomy, he did not use a condom when having sex with the victim. T. 74. On one occasion, the defendant ejaculated inside the victim, which scared her. *Id.* The victim told the defendant that she did not want to have sex with him anymore. T. 74. The defendant then proceeded to have anal sex with her on multiple occasions. T. 74-75. During one specific encounter, the victim was concerned that she tore her anal tissue, so she

went to a doctor. T. 75. When seeking help for the injury from her mother's close friend, Lisa Boudrow, the victim told her that she had been constipated. T 76.

The defendant began dating Suzanne Sepulveda in November 2014. T. 372. In June 2015, the defendant and the victim moved into Suzanne's home. T. 372, 379. The sexual acts continued, including her performance of oral sex on the defendant. T. 87, 106. If the victim resisted too much, the defendant would make her masturbate with a vibrator, and he would watch her while holding a vibrator against himself. T. 112.

On January 30, 2016, the victim disclosed the abuse to Suzanne. T. 138, 142. That same evening, she disclosed the abuse to other family and the police. T. 144-45. Following her disclosure, she was interviewed about the abuse for two days at the Child Advocacy Center and underwent a physical examination at Dartmouth-Hitchcock. T. 149-50. The present charges followed.

SUMMARY OF THE ARGUMENT

The trial court properly allowed the State to introduce evidence of the defendant's prior sexual acts committed against the victim in Rockingham County, as well as his statements regarding the victim's body to Christine and Jeremiah, pursuant to New Hampshire Rule of Evidence 404(b).

First, in regard to the prior sexual acts in Rockingham County, this issue is not preserved and this Court was not provided with a sufficient record for review because the defendant provided the trial court with just a cursory overview of his arguments in his motion *in limine*, and he failed to provide the transcript of the motion *in limine* on this issue. Nevertheless, the evidence was admissible pursuant to New Hampshire Rule of Evidence 404(b) because it was not offered to show the defendant's conformity with his general character, but was relevant to explain the defendant's grooming of the victim, to show his preparation and progression of the abuse, to prove his intent, and to provide context.

The State proved that the defendant committed these acts by clear proof through its motion *in limine* and a proffer provided at the motion *in limine* hearing. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence demonstrated that the defendant's actions steadily progressed and showed his desensitization of the victim, all while isolating the victim from other close adults in her life. The success of the Belknap County acts was dependent upon the defendant's success in abusing the victim in Rockingham County.

The probative value was not substantially outweighed by the danger of unfair prejudice because this evidence did not evoke the jury's sympathies or sense of horror, as the acts were not more egregious or detailed than the extensive evidence presented to the jury about the abuse inflicted by the defendant against the victim in Belknap County. Additionally, the court provided the jury with an

instruction that this evidence was not to be used to prove that the defendant committed the charged crimes.

Second, the court properly admitted the defendant's statements to Christine and Jeremiah about the victim's body. First, these statements did not require analysis under New Hampshire Rule of Evidence 404(b) because they were statements of the defendant regarding his state of mind, not statements of a prior act. They were relevant because they demonstrated the defendant's intent, as he placed his stepdaughter in a sexual context. The probative value of these statements was not substantially outweighed by the danger of unfair prejudice because the defendant argued that he played a fatherly figure in the victim's life, and this evidence provided the jury with the defendant's own words, which could be used by the jury to prove otherwise.

However, should this Court find that an analysis under New Hampshire Rule of Evidence 404(b) was necessary, the evidence was still admissible. First, the statements were evidence of the defendant's state of mind and his intent, and they were not offered to show any bad character of the defendant. Second, the State demonstrated by clear proof that the defendant made these statements, as the trial court heard testimony from Christine and Jeremiah outside the jury's presence, and properly found that the State met its burden. Last, for the aforementioned reasons, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Additionally, the court provided the jury with an instruction that this evidence was not to be used to prove that the defendant committed the charged crimes.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE ROCKINGHAM COUNTY ACTS AND THE DEFENDANT'S STATEMENTS PURSUANT TO RULE OF EVIDENCE 404(B).

A. Preliminarily, the defendant failed to properly preserve his arguments on appeal because he did not specifically identify why the State did not meet its burden under New Hampshire Rule of Evidence 404(b), and he failed to provide a sufficient record for review.

The defendant argues that the trial court improperly allowed the victim to testify to the sexual acts that occurred in Rockingham County prior to the charged assaults because the evidence did not demonstrate a plan, intent, or context; there was no chain of reasoning offered to link the uncharged acts with the charged conduct; and the probative value of the evidence was substantially outweighed by its prejudicial effect. SA 8-24. However, these claims are not preserved.

"The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review. The objection must state explicitly the specific ground of objection." *State v. Ericson*, 159 N.H. 379, 386 (2009). Judicial review is not required for claims raised without an adequately developed legal argument. *See Lennartz v. Oak Point Ass'n P.A.*, 167 N.H. 459, 464 (2015); *Appeal of Northern New England Tel. Operations LLC*, 165 N.H. 267, 275 (2013).

Here, the defendant filed an objection to the State's motion *in limine* to admit the Rockingham acts, but only offered blanket assertions that: (1) there was no "compelling evidence" establishing that they occurred, (2) there was no link between those acts and the acts occurring in Belknap County, and (3) that the evidence was more prejudicial than probative. SA 1. The defendant failed to provide any factual or legal deficiencies in the State's argument, and failed to provide any legal support for his position that the State failed to meet its burden

under Rule of Evidence 404(b). Thus, he deprived the court of "an opportunity to rule on issues and to correct errors before they [were] presented to [this Court] . . . ." *State v. Ayer*, 150 N.H. 14, 21 (2003). Therefore, his claims must fail.

Additionally, the defendant failed to provide this Court with a complete record on which to determine whether the trial court erred in admitting this evidence. The appealing party has the burden of providing this Court with the pertinent transcripts in order to decide an issue on appeal. *Bean v. Red Oak Prop. Mgmt., Inc.*, 151 N.H. 248, 250 (2004). Absent that provision, this Court "must assume that the evidence was sufficient to support the result reached by the trial court." *Id.* Here, the defendant failed to provide the transcript of the January 23, 2017 motion *in limine* hearing before Judge Fauver, where the parties argued about the admissibility of the Rockingham County acts. Because this Court does not have an adequate record to determine whether the parties further developed their arguments and whether the defense raised additional arguments that were not raised in the objection to the State's motion *in limine*, this Court must assume that the trial court properly admitted the Rockingham County acts. *See id.*

B. Even if this Court finds that the defendant's appellate issues were preserved and an adequate record was provided, the trial court properly admitted the Rockingham County acts and the defendant's statements because the State satisfied the three prongs for admissibility under New Hampshire Rule of Evidence 404(b).

When reviewing a trial court's decision admitting evidence pursuant to Rule of Evidence 404(b), this Court utilizes an unsustainable-exercise-of-discretion standard. *State v. Beltran*, 153 N.H. 643, 647 (2006) (citing *State v. Smalley*, 151 N.H. 193, 196 (2004)). Under a review for an unsustainable exercise of discretion, this Court will reverse the trial court's decision only if the admission of the evidence "was clearly untenable or unreasonable to the prejudice of the defendant's case." *Id.*

New Hampshire Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In order for evidence of other bad acts to be introduced, the State must satisfy the three-prong test for admissibility and demonstrate that: "(1) the evidence [is] relevant for a purpose other than proving the defendant's character or disposition; (2) there [is] clear proof that the defendant committed the act; and (3) the probative value of the evidence [is] not . . . substantially outweighed by its prejudice to the defendant." *Smalley*, 151 N.H. at 196 (citing *State v. McGlew*, 139 N.H. 505, 507 (1995)).

Under the first prong of the 404(b) analysis, the State "is required to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which it will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or

propensity." *Beltran*, 153 N.H. at 647 (citing *Smalley*, 151 N.H. at 196). "[T]o be relevant, prior bad acts must be in some significant way connected to material events constituting the crime charged and not so remote in time as to eliminate the nexus." *McGlew*, 139 N.H. at 507 (citations omitted). "Whether 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." *State v. Davidson*, 163 N.H. 462, 469 (2012) (citing *McGlew*, 139 N.H. at 510).

The second prong of the Rule 404(b) test "is satisfied when the [proponent] presents evidence firmly establishing that the defendant, and not some other person, committed the prior bad act." *State v. Ericson*, 159 N.H. at 388 (quoting *State v. Lesnick*, 141 N.H. 121, 126 (1996)). Whether there is clear proof that the defendant committed the prior bad act "is a preliminary determination concerning the admissibility of evidence, and the trial court is not bound by the rules of evidence in making this determination." *Id.*

Under the third prong of the test for admission under Rule 404(b), the Court must consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Beltran*, 153 N.H. at 649. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, or provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision upon something other than the established propositions in the case." *Id.* Detrimental evidence is not unfairly prejudicial simply because "it tends to prove [the defendant's] guilt." *Id.* The trial court is given "considerable deference in its determination of whether the prejudice substantially outweighs the probative value." *State v. Castine*, 141 N.H. 300, 304 (1996).

The State will analyze the Rockingham County acts and the defendant's statements to Christine Wentworth and Jeremiah Colbath separately, and will address each of these prongs therein.

1. The State properly argued, and the Court correctly found, that the Rockingham County acts were admissible to establish the defendant's plan, preparation, and intent; the State proved these acts by clear proof; and the probative value of the acts was not substantially outweighed by the danger of unfair prejudice.

Under the first prong of Rule 404(b) analysis, the State articulated in its motion *in limine*, that the Rockingham County acts were admissible under Rule 404(b) as evidence of intent, preparation, and context. SA 3. The State argued that the prior acts were not offered as evidence of the defendant's character, but offered to show that the defendant acted knowingly, demonstrated a pattern of his intended conduct, and was proof of his escalation of sexual behaviors that progressed to sexual penetration in Belknap County. SA 6-7.

In regard to context, the State relied on *State v. Haley*, 141 N.H. 541, 546-47 (1997), and argued that the Rockingham County conduct demonstrated the defendant's "progressive, steady desensitization of the victim," and exhibited his "grooming" behaviors. SA 8. The State proffered that the victim would testify that the Rockingham County acts began with discussion about her genitalia, then progressed to touching, oral sex, and then penetration. *Id.* The State additionally argued that the evidence demonstrated the defendant's preparation to commit the crime charged, as it showed a "gradual course of conduct which led to the fulfillment of his plan . . . ." SA 9. Following a hearing on January 23, 2017, the court ruled that the victim's testimony regarding the Rockingham County acts would show a "progressive, steady desensitization of the victim," and would show the defendant's plan, preparation, and intent to commit the alleged crimes. SA 36.

As both the State and the trial court specifically articulated, the Rockingham County acts were admissible to demonstrate the defendant's plan and preparation. In *Haley*, where the defendant was charged with sexual assault, the State sought "to admit evidence that the defendant began tickling and kissing the victim and used a vibrator over [her] body when she was a child," and that he had "progressed to tickling the victim in her genital areas and then to digital penetrations as charged in the indictments." *Id.* at 545-46 (quotations omitted). 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," and they were "therefore, relevant for a purpose other than to show [his] bad character or disposition . . . ." *Id.* at 546 (quotation omitted).

In its analysis, this Court distinguished the facts of *Haley* from the facts in *State v. Melcher*, 140 N.H. 823 (1996), a case heavily relied upon by the defendant here. *See id.* at 546-47. In *Melcher*, the defendant, charged with sexual assault, argued that the court erred in failing to exclude "evidence that within three or four years of the charged offense, [he] had 'tickled' and fondled the victim; that [he] later, and on several occasions, had fondled the victim's breasts and genitals while she was shaving her legs; and that [he] once had the victim sit naked on the couch between him and her mother so that she would 'feel better about her body.'" *Melcher*, 140 N.H. at 826 (brackets omitted). This Court held that the acts were not "mutually dependent," and repeated assaults over time "[did] not, in and of [themselves], demonstrate that the defendant had a plan." *Id.* at 829. The Court distinguished the facts of *Melcher* from *Haley* by recognizing that the uncharged acts in *Melcher* "did not involve a progressive, steady desensitization of the victim." *Haley*, 141 N.H. at 546-47 (citing *Melcher*, 140 N.H. at 829).

This Court further distinguished *Melcher* in *State v. McIntyre*, 151 N.H. 465 (2004). In *McIntyre*, the defendant, in about a six-week period, touched the juvenile victim's breast twice over her objection, touched her lower leg and then placed his hand on her upper leg, and entered the room where she was sleeping, kissed her, partially disrobed her, digitally penetrated her, performed cunnilingus on her, and forced her to perform fellatio on him. *McIntyre*, 151 N.H. at 466-68. The victim did not disclose the defendant's acts of touching her breasts or her legs, but she reported the abuse that occurred while she was sleeping to the police. *Id.* at 466. The Court found that this case was distinguishable from *Melcher* "because the occurrence of the final assaults hinged upon the success of the earlier incidents. Had the victim reported the breast touching or leg touching incidents to anyone, the defendant would not have had the opportunity to commit the final assaults." *Id.* at 467. In contrast, the victim's mother in *Melcher* was present for the prior incidents, "indicating that the victim's silence was not a necessary element of the plan." *Id.* The Court continued by repeating its holding in *State v. Castine*, 141 N.H. 300 (1996), stating that "a calculated progression of each stage of sexual abuse insures that the existence of a plan can be objectively determined. Such a progression forecloses reliance upon the prohibited inference that because the defendant was predisposed to abusing the victim, he must have had a plan." *McIntyre*, 151 N.H. at 467-68 (citing *Castine*, 141 N.H. at 304).

In this case, the Rockingham County acts similarly resemble the preparation and plan identified in both *Haley* and *McIntyre*. The defendant's actions began in Rockingham County with his inspection of the victim's vagina, and his comment that it looked like her mother's vagina. T. 62-63. On a different evening, he asked the victim if she masturbated, told her that he wanted to show her how to make herself "feel good," took off her underwear, and put his fingers

inside her vagina. T 64. He then told her that he liked doing that, and he wanted to do it again. *Id.*

On a separate occasion, the victim awoke to the defendant touching her breasts while she was sleeping. T 65. On another occasion, the defendant put his hands inside her vagina and performed oral sex on her. T. 67-68. All this occurred while the victim was living with the defendant as her sole parental figure, while he progressively isolated her from other close adults as time passed. T. 298-99, 342-43. The victim never disclosed the defendant's actions.

The defendant's steady isolation from loved ones and his escalation of behavior demonstrated the defendant's grooming, his preparation, his plan, and his intent to sexually abuse the victim. The charged acts hinged on the success of the Rockingham County acts, because if the victim had disclosed the Rockingham County acts, the defendant would not have been able to continue and escalate his abuse into penile penetration in Alton and Barnstead. *See McIntyre*, 151 N.H. at 467. The defendant's grooming behavior demonstrates a true plan, not a series of unrelated crimes of opportunity. *Cf. Melcher*, 140 N.H. at 829. Because the use of this evidence does not invoke propensity or character inferences, but instead, is probative and relevant for the aforementioned reasons, the trial court properly found that the State satisfied its burden under the first prong of the Rule 404(b) test for admissibility.

The defendant asserts that the Rockingham County acts are inadmissible as evidence of intent because the mental state at issue in this case was knowing and not purposeful. DB 17. While it is true that this Court has found that Rule 404(b) evidence can be very probative for cases involving a purposeful mental state, this Court has not held that Rule 404(b) evidence is probative of intent *only* where a purposeful mental state is at issue. *See State v. Simonds*, 135 N.H. 203, 207 (1991) (emphasis added). Here, the Rockingham County acts were extremely

probative of the defendant's true plan, of his intent, to sexually assault the victim by grooming her through escalating behavior that ultimately led to penile penetration with her in Belknap County. Whether the mental state was purposeful or knowing in this case is irrelevant; the Rockingham County acts had a probative, relevant purpose other than to show the defendant's general character, and that purpose was not substantially outweighed by the danger of unfair prejudice.

The defendant also argues that the State failed to prove a temporal relationship between the Rockingham County acts themselves, and between the Rockingham County acts and the Belknap County acts, thus failing to demonstrate that the acts were mutually dependent and evidence of a plan. DB 12. The record belies this argument. Preliminarily, the State is not required to prove the exact dates that a sexual assault occurred, in part because there is no statutory mandate, and in part because victims have difficulty recalling specific dates of abuse if the abuse occurred over a long period of time. *State v. Dixon*, 144 N.H. 273, 276-77 (1999) (abrogated on different grounds).

Nevertheless, in this case, the victim did provide timeframes for the abuse in Rockingham County, as she testified that: (1) the abuse occurred after the defendant talked to her about her vagina when she was in the eighth grade; (2) the defendant first touched her vagina after the discussion in the eighth grade but before July 2014; and (3) the defendant touched her again and performed oral sex after mentioning in July 2014 that he wanted to do it again. T. 63-68; *see* T. 71, 73. She knew that these instances occurred before she moved to Alton because she testified that when she lived in Alton, she was still commuting to her high school in Dover, where she was a freshman. T. 68-69. She testified that these acts occurred before the defendant had vaginal sex with her, which occurred in Alton, prior to her sixteenth birthday in December 2014. T. 71-73. These acts occurred in 2014, just months before the commission of the charged conduct, creating a

nexus between the Rockingham and Belknap County acts. As such, his argument fails.

Turning to the second prong of Rule of Evidence 404(b), the trial court determined that the State satisfied the clear poof prong under the test for admission under Rule 404(b) following an offer of proof. SA 36-37. Because no evidence or argument has been presented to this Court to the contrary, this Court should affirm the trial court's finding as to this prong.

Last, under the third prong for admissibility, the probative value of the Rockingham County acts was not substantially outweighed by the danger of unfair prejudice. The evidence of sexual abuse is, by its very nature, prejudicial, in that it references potentially criminal conduct. However, the purpose for its admission was not to prove the defendant's propensity for sexual abuse, but to demonstrate the defendant was grooming the victim, executing a plan to steadily desensitize her, and to ultimately fulfill his plan and engage in the penetrative acts that occurred in Belknap County. The mere prejudicial impact of the relevant evidence does not warrant preclusion, even if this Court finds that the acts were similar to the charged conduct. *See State v. Howe*, 159 N.H. 366, 378 (2009) (finding that introducing uncharged acts of possession of child pornography was identical to the offense for which the defendant was charged; however, the other acts evidence "was not likely to have any greater emotional impact upon the jury than the charged images," and was very probative of the defendant's mental state, a contested issue at trial).

Moreover, the jury heard extensive testimony regarding the Belknap County sexual abuse inflicted by the defendant over the course of the six-day trial. The victim's testimony regarding the Rockingham County acts was limited to acts occurring within the months leading up to the charged assaults, and was not extensive or repetitious. *Cf. Castine*, 141 N.H. at 305 (finding that the probative

value of the defendant's prior, progressive, sexual acts against the victim were not substantially outweighed by the danger of unfair prejudice because the testimony was limited to acts occurring within months of the charged assaults, and was limited to acts that were part of the defendant's progressive plan). As the State argued in its motion *in limine*, the Rockingham County acts "pale[d] in scope and duration compared to the 18-month pattern of sexual assaults the defendant [was] charged with in Belknap County . . . ." SA 7; *see State v. Wells*, 166 N.H. 73, 80–81 (2014) (finding that evidence of the defendant's digital penetration of the victim was not "likely to have any greater emotional impact upon the jury than the evidence of the charged intercourse"). As such, the trial court properly found that any unfair prejudice did not substantially outweigh the probative value, which showed the defendant's plan, preparation, and intent. *See* SA 4.

Additionally, the jury was instructed to use the Rockingham County acts not to make a determination about the defendant's character, but "solely for the purpose of assessing his intent at the time of the charged conduct." T. 604-05. The trial court provided an extensive instruction during jury instructions:

> Some evidence was introduced for a limited purpose. Specifically, the State has offered evidence of the defendant's conduct and statements made when he and [the victim] lived in Nottingham in Rockingham County. If you find such evidence to be credible, you may consider it only for the limited purpose of determining whether the State has met its burden of proving the defendant's mental state, that he acted knowingly. Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to infer that because the defendant committed the other acts, he must also have committed the acts charged in the indictments. The defendant is on trial only for the acts charged in the indictments. He is not on trial for committing acts that are not alleged in the indictments. You may not consider this evidence of similar acts as a substitute for proof that the defendant committed crimes with which he is charged. Nor may you consider the evidence as proof that the defendant has a criminal personality, that

> he has a bad character, or that he has the propensity to commit the crime. The evidence of the other acts was admitted for a much more limited purpose and you may consider it only for that limited purpose.

T. 986.

Because the jury is presumed to follow instructions, any potential for unfair prejudice was diminished. *See State v. Costello,* 159 N.H. 113, 123 (2009); *see also State v. Berry*, 148 N.H. 88, 93 (2002) (finding that the use of domestic abuse evidence was not unfairly prejudicial when the evidence was very probative of the victim's delay in disclosure, it was used for a non-propensity purpose, and the trial court issued an instruction).

2. The State properly argued and the Court correctly found that the defendant's statements to Christine Wentworth and Jeremiah Colbath were admissible to establish the defendant's intent; the State proved these acts by clear proof; and the probative value of the acts was not substantially outweighed by the danger of unfair prejudice.

During trial, the State sought to introduce the defendant's statements to Christine Wentworth, which occurred while the defendant and the victim lived in Rockingham County. T. 321. Specifically, the defendant, commenting on the victim's breasts, told Christine that the victim was "well-endowed like her mother," and that she was "built like a brick shit house." T. 332-33. Additionally, the State sought to introduce the defendant's statement to Jeremiah Colbath, when, referring to the victim, he said, "You should see the tits on her." T. 574, 604.

The State argued that the statements to Christine were relevant to show that the defendant was viewing his stepdaughter in a sexual way as she developed through puberty, and the statements were evidence of his intent. T. 317. The trial court did not find that the statements were subject to Rule 404(b), but because the

defendant contested their admissibility based on the clear proof prong, the court held a hearing out of the presence of the jury and heard testimony from Christine. T. 317-19. The court adopted the State's theory–that this evidence was not being introduced for character purposes, but for intent, as the defendant put the victim in a sexual context. T. 325-26, 328; *see* T. 318. The trial court also found that the State met its burden of proving that the defendant made the statements by clear proof, and that the danger of unfair prejudice was not substantially greater than the probative value in the context of the sexual abuse case. T. 325-26.

In regard to the defendant's statement to Jeremiah, the State argued that the statement was relevant because it occurred around the time the grooming process began in Rockingham County, was a sexualized comment regarding his stepdaughter, and was evidence of his intent in developing a sexual relationship with her. T. 583-84. The court, although not finding that the statement was evidence subject to Rule 404(b) analysis, conducted a hearing out of the presence of the jury, and then held that the State still met its higher burden of proof for admissibility under the Rule 404(b) standard. T. 571-80, 584-86.

The court found that the statement was evidence of the defendant's intent to commit the acts that he was accused of committing, that the State sustained the clear proof prong, and that the probative value of the statement outweighed the danger of unfair prejudice. T. 586. The court reiterated on the record, out of the presence of the jury, when excluding another statement by the defendant, that the defendant's statements to both Jeremiah and Christine were evidence of intent. T. 616-17. The court provided an example, stating that if the defendant had said, "I'm sexually attracted to the complaining witness and I'm going to start engaging an act to fulfill sexual needs," that statement would be admissible as non-character evidence. T. 616. Although the defendant was not as explicit as that, the trial court found that the statements to Jeremiah and Christine were "small pieces of

that puzzle that clearly had implications that the defendant was looking at someone of that age with whom he had a father-daughter relationship with in a sexualized context," and that was "a rational inference that could be drawn from those statements." T. 616-17.

As both the State and the trial court specifically articulated, the defendant's statements to Christine and Jeremiah were relevant to demonstrate the defendant's intent, as he was viewing the victim in a sexualized context. Preliminarily, these statements are not subject to Rule 404(b) analysis because these statements were not statements about *acts*, but were solely *statements* from a party opponent. *Cf. State v. Belonga*, 163 N.H. 343, 357-360 (2012) (finding that a defendant's statement about a prior act was subject to Rule 404(b) analysis because the statement was "undeniably evidence of other wrongs . . . or acts" that the defendant committed); *Lesnick*, 141 N.H. at 129-30 (finding that a defendant's threats to kill the victim on two prior occasions were not subject to Rule 404(b) because they were not evidence of a prior wrongful act). These statements were not assertions of past conduct, thereby invoking the protections of Rule 404(b), but were the defendant's statements regarding the victim's physical appearance. As such, the trial court needed only to evaluate the relevancy of the statements, and whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See N.H. R. Ev.* 401, 403.

Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Perri*, 164 N.H. 400, 412 (2012) (citing *N.H. R. Ev.* 401). Here, the defendant's statements were relevant to show his intent and state of mind. The sexual assaults did not occur in a vacuum–they were premeditated, as the defendant was eyeing his stepdaughter in a sexual way prior to the Belknap County assaults. *See State v. Cassavaugh,*

161 N.H. 90, 97-98 (2010) (finding that the defendant's prior threats to the victim were relevant to show his intent and whether he acted deliberately and with premeditation when murdering her); *Lesnick*, 141 N.H. at 128-30 (finding the defendant's threatening statements about the victim to his friend and the victim's stepfather, made over a year prior to the victim's homicide, demonstrated the defendant's intent).

Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. In this case, the jury heard more than one day of testimony from the victim, where she detailed the sexual abuse inflicted by the defendant. Additionally, the jury heard the victim testify about the sex toys used on her by the defendant, viewed sex toys taken from her home, and heard testimony that one of those sex toys had both the defendant's and the victim's DNA on it. T. 70, 89, 105, 112, 113, 766-67. In light of the graphic, detailed testimony provided by the victim, the defendant's three statements about the victim's body and breasts were not overly prejudicial.

These statements were highly probative of the defendant's intent and state of mind. The defendant, in his opening statement and closing argument, told the jury that he loved the victim as his daughter, that he was her "father figure," and that he raised her. T. 44-45, 923, 940. Other than the victim and the defendant, no one was present for the sexual abuse. The defendant's statements were highly probative to contradict his opening and closing, and demonstrate that he did not view the victim in a paternal way, but instead, viewed her and spoke of her in a sexual context. These statements were highly probative of the defendant's intent and his state of mind, and the probative value was not substantially outweighed by the danger of any unfair prejudice. *See N.H. R. Ev.* 403.

However, if this court finds that these statements constitute other acts evidence as contemplated by Rule 404(b), the State and the court sufficiently

articulated the chain of reasoning by which this evidence was relevant, without invoking propensity. *See Beltran*, 153 N.H. at 647. The State argued, and the court found, that the defendant's statements were probative of the defendant's intent, as it demonstrated that the defendant viewed his stepdaughter in a sexual way, evidencing his intent to commence a sexual relationship with her. T. 325-26, 328, 583-84, 616-17. The statements were relevant and probative, as articulated above.

Additionally, the State proved that the defendant made the statements by clear proof, as the court held a preliminary hearing out of the presence of the jury, heard Christine and Jeremiah's testimony, and found that the State had met its burden. T. 320-28, 571-80, 584-86. Moreover, as demonstrated previously, this evidence was highly probative, and the probative value was not substantially outweighed by the danger of unfair prejudice. *See Lesnick*, 141 N.H. at 130 (quoting *State v. Marti*, 140 N.H. 692, 694 (1992), for the proposition that the balancing tests under Rules 403 and 404(b) are identical).

Lastly, jury instructions were issued regarding the use of these statements. Specifically, after Jeremiah's testimony, the court issued a jury instruction about his statement, Christine's statement, and the Nottingham sexual acts. T. 604-05. The court stated that all the listed evidence was introduced for a limited purpose, not to show that the defendant was of a particular character, but solely for the purpose of assessing intent at the time of the charged conduct. T. 605. This instruction was repeated and detailed during the charge of the jury. T. 986. As such, any potential prejudice was minimized. *See State v. Pepin*, 156 N.H. 269, 279 (2007).

C. Should this Court find that it was error to admit the Rockingham County acts and the defendant's statements about the victim's body, any error was harmless.

Alternatively, should this Court conclude that the testimony was inadmissible, the convictions still must be affirmed because the error was harmless. "The State bears the burden of proving that an error is harmless, a burden satisfied by proof beyond a reasonable doubt that the erroneously admitted evidence did not affect the verdict." *State v. Cook*, 148 N.H. 735, 741 (2002). To determine whether the State has met its burden, this Court looks to the strength of the alternative evidence presented at trial. *Id.* "An error may be harmless beyond a reasonable doubt if the alternative evidence of the 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. Botelho*, 165 N.H. 751, 756 (2013) (quotation omitted).

The evidence in this case was overwhelming because the victim was able to provide a detailed description, to the best of her memory, of the abuse, which was corroborated by independent evidence. *State v. Wells*, 166 N.H. 73, 83 (2014) (finding that error was harmless where the victim was able to "provid[e] specific details about the . . . assaults, including the location[] of the assault[], sequence of events, time of day, outdoor temperature, and her attire[,] [t]he jury was able to assess her tone and demeanor[] and to evaluate her credibility," and her testimony was corroborated by independent evidence).

The victim testified that she and the defendant moved to Alton when she was about 15 years old. T. 70-71. She was never married to the defendant. T. 122. On moving day, the defendant bought her a vibrator as a present, and proceeded to use the vibrator on the outside and inside of her vagina, and then

proceeded to digitally penetrate her, perform oral sex on her, and have vaginal sex with her. *Id.* At that point, he began having sex with her weekly, and used two different vibrators on her a number of different times. T. 72, 76-77. He would tell her that because he had bladder cancer and did not have a girlfriend, he needed to remain sexually active, and he would "guilt trip her," or threaten to sell her horses. T. 72.

The victim testified that there was a pattern of behavior to the sex act–he would make her undress and lie down, and he would then digitally penetrate her, perform oral sex on her, and then have vaginal sex with her. T. 72-73. She testified that on every occasion before the two had sex, the defendant would rub his penis on her vagina for about 15 minutes in order to get an erection. T. 88. The defendant's wife at the time of trial, Susan Sepulveda, corroborated the defendant's pattern for getting an erection, and testified that he did the same thing with his penis when he had sex with her. T. 442. The victim also testified that she and the defendant did not use a condom, as the defendant had had a vasectomy. T. 74. The victim's comforter was tested at the New Hampshire State Laboratory, and it tested positive for the defendant's semen. T. 752, 759.

The victim testified that during the winter in Alton, the defendant performed anal sex on her. T 75. The victim testified that it hurt her, and she thought that she had torn her anal tissue. *Id.* She told her deceased mother's best friend, Lisa Boudrow, that she was constipated and had hurt herself. T. 76. Lisa recommended using coconut pills. *Id.* This conversation was corroborated by Lisa at trial, who testified that it occurred in December 2015. T. 354.

In 2015, the defendant began dating Suzanne. T. 79. That year, the defendant took the victim to Suzanne's house to watch the Super Bowl, but had sex with her prior to arriving. T. 81-82. The defendant and the victim ultimately moved to Suzanne's home in Barnstead, but continued going to the Alton house to

feed the victim's horses. T. 85-87. The victim testified to the last day that they were in Alton, when the defendant had sex with her and she wanted to shower afterward because he had ejaculated inside her. T. 85-86. She testified that she believed the electricity was off, so there was no hot water. *Id.* The Alton home was actually owned by Christine, and she testified that when she returned from Florida to sell the home after the defendant and the victim had moved out, there was no power or oil. T. 301.

While living in Barnstead, the defendant continued having sex with the victim. T. 87-88. The victim performed oral sex on the defendant a few times. T. 106. Sometimes, the defendant would be tired of the victim's resistance, and would watch her masturbate with a vibrator while he held a vibrator against himself. T. 112. She testified that the defendant would normally ejaculate on her leg, and that the ejaculation was dark yellow, sometimes containing blood. *Id.* The victim identified multiple vibrators, which were taken as evidence. *Id.* Three vibrators were recovered from the Barnstead home, and they were sent to the New Hampshire State Laboratory for testing. T. 635, 682. One of the vibrators tested positive for both the victim and defendant's DNA, another tested positive for the victim's DNA, and no conclusion could be reached for a third vibrator. T. 765-67, 775.

The victim also testified that she recalled having sex with the defendant on Halloween, and on Martin Luther King Day. T. 101-04, 113. On Halloween, the victim and her friend went trick-or-treating, and the victim testified that she disclosed the abuse to her friend. T. 102-03. The friend testified and corroborated this account. T. 655. The victim testified that when she got home, the defendant had sex with her as a "repercussion for hanging out with friends." T. 104.

On January 18, 2016, which was Martin Luther King Day, the victim was out with friends. T. 114, 243. While out, the victim received a text message from

"Dad" which stated, "No one home, I need you here around 3:30. I let you go, don't take advantage of me. Call me." T. 800-01. The victim testified that as a repercussion, the defendant had sex with her. T. 115. In addition to making the victim have sex with him after she spent time with friends, the defendant threatened to take away the victim's car privileges, her phone, and her horses if she refused to have sex with him. T. 136.

On January 30, 2016, the victim disclosed the sexual abuse to Suzanne. T. 138. Suzanne confronted the defendant, who said that he "wasn't going to go to jail for this," said he never did anything to the victim, fled the home, and threatened suicide. T 422-24. A group assembled at Suzanne's home and the police were called. T. 427-28. Suzanne testified that the victim was crying heavily and was very upset, which was corroborated by another family member and the police. T. 420-21, 621, 630. Both Lisa and Christine came to New Hampshire to be with the victim following her disclosure, and testified that she was very upset and crying. T. 305, 347. The victim participated in two forensic interviews at the Child Advocacy Center, where she was upset and distraught. T. 651-52.

On the evening of January 30, the police were trying to find the defendant. T. 147. The defendant called the victim and left her a voicemail message, which was introduced as State's Exhibit 9. T. 148. In the message, the defendant repeatedly told the victim that he loved her, and said, "You understand, right, if you testify, if you press charges against me, I'm going to jail, I just want you to know that, alright, but that's alright, Suzanne will take care of you." State's Ex. 9. He ended the message by telling her to get therapy, that "Dad will see you whenever," and that he loved her. *Id.* The police found the defendant.

The victim and Suzanne were issued restraining orders against the defendant. T. 433. After the orders were issued, the defendant drove past

Suzanne's home, where the victim was still living. T. 664-66. The police were at Suzanne's residence at the time, and initiated a motor vehicle stop. T. 666. The defendant told the police that he tried to kill himself. T. 668. The police searched his vehicle and found a letter that was written to Suzanne, the victim, and his sister, which repeatedly said that he loved all of them and that Suzanne should take care of the victim. T. 672-73.

Accordingly, the evidence was overwhelming in its consistency with the victim's testimony and cast significant doubt on the defendant's claims. Thus, the jury could find beyond a reasonable doubt that the defendant sexually assaulted the victim, despite the introduction of the Rockingham County acts and the defendant's statements to Christine and Jeremiah. *See State v. Dupont*, 149 N.H. 70, 76 (2003) (finding that corroboration of the victim's rendition of events by substantive evidence factors favorably in concluding an error was harmless).

CONCLUSION

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

The State requests a five-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 8,417 words.

September 19, 2018

Heather A. Cherniske

CERTIFICATE OF SERVICE

I, Heather A. Cherniske, hereby certify that I have sent two copies of this brief to counsel for the defendant, Mark L. Sisti, by first-class mail postage prepaid, at the following address:

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