THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0029

The State of New Hampshire

v.

Jonathan Folds

STATE'S APPEAL PURSUANT TO RSA 606:10 FROM AN ORDER OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Joseph A, Foster
Attorney General

Susan P. McGinnis, Bar ID No. 13806
Senior Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

(15 Minutes)

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ISSUES PRESENTED

I. During a search of the defendant's residence pursuant to a warrant authorizing the officers to search for drugs and related items, an officer discovered a gun rolled up in a T-shirt. The issue is whether the trial court erred in ruling that the incriminating nature of the gun was not immediately apparent where the officer who found the gun knew the defendant was a convicted felon.

Issue preserved by the State's objection to the motion to suppress, ASB 103–09;[1] its arguments at the motion hearing, MH 110–12; the court's order granting the motion, A 1–23; the State's motion to reconsider, ASB 123–25; the court's order denying the motion, A 24; and the State's notice of appeal, NOA 3.

II. Whether the trial court erred in ruling that the defendant could not be convicted under RSA 159:3-a where his prior felony convictions had arisen out of only two criminal episodes, and the statute requires proof that a defendant has "been convicted of any combination of 3 or more felonies."

Issue preserved by the State's objection to the motion to dismiss, ASB 69–80; its arguments at the motion hearing, MH 110–12; its supplemental objection, ASB 120–22; the court's order granting the motion, A 1–22; the State's motion to reconsider, ASB 131–33; the court's order denying the motion, A 25; and the State's notice of appeal, NOA 3.

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[1] "A" refers to the attached appendix to the State's brief; "ASB" refers to the separately-bound appendix to the State's brief; "MH" refers to the transcript of the motion hearing on September 13, 2017; and "NOA" refers to the State's notice of appeal.

TEXT OF RELEVANT AUTHORITIES

United States Constitution, amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Hampshire Constitution, part I, article 19

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases and with the formalities, prescribed by law.

RSA 159:3-a (2014)

I. No person who has been convicted of any combination of 3 or more felonies in this state or any other state under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child pornography, or controlled drug laws, shall own or have in his possession or under his control, a pistol, revolver, rifle, shotgun, or any other firearm.

II. Any person who violates paragraph I shall be guilty of a felony and, notwithstanding RSA 651:2, II, shall be sentenced to a minimum mandatory term of 10 years imprisonment and a maximum term of imprisonment of not more than 40 years and shall be fined not more than $25,000.

III. Notwithstanding any other provision of law, neither the whole, nor any part of the minimum mandatory sentence provided under paragraph II shall be served concurrently with any other term, nor shall the whole or any part of such additional term of imprisonment be suspended or deferred. No action brought to enforce sentencing under this section shall be continued for sentencing, nor shall the provisions of RSA 651:20 relative to suspensions or RSA 651-A relative to parole apply to any sentence of imprisonment imposed.

18 U.S.C. § 924(e)(1) (2012)

In the case of a person who violates section 922(g) of this title … and has three previous convictions by any court referred to in section 922(g)(1) of this title … for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of the law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) ….

STATEMENT OF THE CASE

The defendant, Jonathan Folds, was indicted by the Carroll County Grand Jury on one felony count of possession of 5 grams or more of heroin with the intent to sell or dispense, a subsequent offense; two felony counts of sale of 5 grams or more of heroin, subsequent offenses; and one class B felony count of falsifying physical evidence. ASB 3–4, 11–12, 15–19. *See* RSA 318-B:2, I (2017) (possession or sale of controlled substances); RSA 318-B:26, I(a)(3) (Supp. 2017) (sentence for 5 grams or more of heroin); RSA 641:6 (2016) (falsifying physical evidence). He was also indicted on five alternative firearm counts, including three class B felony counts of violation of the convicted felon statute, and two felony counts of violation of the armed career criminal statute. ASB 1–2, 5–10, 13–14. *See* RSA 159:3 (2014) (convicted felon); RSA 159:3-a (2014) (amended 2017) (armed career criminal).

In May 2017, the defendant filed a motion to dismiss the charges brought under RSA 159:3-a, ASB 20–68, and the State filed an objection, ASB 69–80. In June 2017, the defendant filed a motion to suppress the gun that was seized from his apartment, ASB 81–102, and the State filed an objection, ASB 103–09. In November 2017, the Carroll County Superior Court (*Ignatius*, J.) granted the motion to suppress and the motion to dismiss. A 1–23. The State filed timely motions to reconsider, ASB 123–33, and the defendant filed objections, ASB 134–38. In December 2017, the court denied the State's motions to reconsider. A 25–26. This State's appeal followed.

STATEMENT OF FACTS

On June 18, 2013, the defendant pled guilty to one class B felony count of possession of a controlled drug, and two class B felony counts of possession of a controlled drug with intent to deliver, all of which alleged that he possessed the drugs at issue in Conway on October 11, 2012. ASB 37–48. Then, on February 4, 2016, he pled guilty to one felony count of burglary. ASB 32–35.

In September 2016, a confidential informant (CI) told officers from the Attorney General's Drug Task Force (DTF) that the defendant picked up large quantities of heroin "down south" at least once a week and then sold it from his apartment in Intervale, where he lived with his girlfriend, Megan Ferron, and her two young children. MH 48–49; ASB 90.[2] The officers then checked the defendant's criminal record and determined that he had numerous prior convictions, including the foregoing felony convictions. ASB 91.

In September and October 2016, DTF officers obtained one-party authorizations and then recorded the CI going into the defendant's apartment and making controlled buys of 50 grams of heroin from him. MH 37–38, 56–60; ASB 91–94. Each time, the heroin was in "fingers," which are 10-gram, approximately 2½-inch long cylinders of compressed heroin, and the "fingers" were held together by a rubber band and wrapped in cellophane. MH 38, 64–67, 83. The CI told officers that

[2] The search warrant affidavit was admitted at the suppression hearing. ASB 36.

the defendant sold him the second bag of heroin "fingers" in the master bedroom, and that the defendant had more drugs on his bed. MH 66.

On October 11, 2016, Sergeant Suzanne Scott, the DTF case agent, applied for and obtained a warrant to search the defendant, the apartment, the curtilage, the common areas and buildings he had access to, his vehicle, other vehicles under his control, and any other persons who were present. ASB 88–102; MH 35–36. The warrant authorized the officers to seize "controlled drugs, drug scales, drug packaging material and devices, drug paraphernalia, U.S. currency, … drug ledgers, … cellular telephone memories and records, personal papers …, bank books, bank statements, and firearms." ASB 99; *see also* MH 39–42.

Sgt. Scott and other DTF officers almost always asked to seize firearms because they knew from their training and experience that people "who utilize or traffic large quantities of drugs often [have] firearms … on their person, within their vehicles, or in their residence." MH 47. However, she never mentioned firearms in the supporting affidavit for the warrant or discussed firearms with the judge who issued it because they did not have any information that the defendant or Ferron had firearms. MH 46, 48–49, 61; ASB 89–97.

After Sgt. Scott obtained the warrant, she and other officers working on the case met with officers who were going to assist them in executing it, including Detective Sergeant Nicholas Blodgett, who had been assigned to the DTF since 2010. MH 49, 51, 69–71. They briefed the officers on the information they had about the

defendant and Ferron, including the fact that the defendant had prior felony convictions, and about the circumstances that led them to apply for the warrant, including the controlled buys. MH 49–50. They also discussed operational plans and each officer's role. MH 50. The defendant was on probation, so plan A was to have a probation officer and a sheriff's deputy make contact with him at the door, which was the "normal procedure" for "a routine probation check," and then detain him before officers entered the apartment. MH 50.

The DTF case officers instructed the other officers to search "anywhere and everywhere" because they knew from their training and experience that drugs like heroin could be "packaged in … baggies as small as … the size of [a] thumbnail" and could be found "anywhere that [a person] could possibly hide something [that] small …." MH 43. They also knew that some drugs scales were the size of small cell phones, that drug paraphernalia could include small pieces of foil and cotton balls, and that drug ledgers could be written on small pieces of paper. MH 41–42.

About half an hour after the briefing, the officers executed the plan. MH 52. The defendant and Ferron were taken into custody and Sgt. Blodgett and other officers then entered the apartment and searched everything they could for drugs and drug-related items. MH 52–53, 71. They started in the master bedroom, which the defendant and Ferron shared. MH 76–83. They found $3,200 in cash, a large amount of heroin, a syringe, and Ferron's purse and wallet on the bed. They found a small bag of marijuana in Ferron's purse, $416 in cash in her wallet, and $403 in cash, syringes,

foil with residue on it, a charred spoon, Suboxone strips, and a large folding knife elsewhere in the room. MH 80–86, ASB 110–15.

After Sgt. Blodgett helped with that search, he and an evidence technician moved a pile of objects that had been stacked in front of the door to a closet near the kitchen and bathroom. MH 72, 87, 91–92, 98; ASB 116. Sgt. Blodgett then opened the door and saw a box on the shelf at the back of the closet, so he picked up the box, opened it, and found Christmas decorations and a tightly rolled up T-shirt. MH 73, 92; ASB 117–18. He could not tell if there was anything in the T-shirt, so he grabbed one end of it, held it up, and let it unroll. MH 73, 92. At that point, a black handgun fell out of the T-shirt and hit the floor, which surprised him and the evidence technician. MH 92; ASB 119.

Sgt. Blodgett knew weapons when he saw them and he knew the defendant was a convicted felon, so he had the evidence technician photograph the gun. MH 92, 104; ASB 119. He then picked it up, removed the loaded magazine, and looked inside the slide and chamber, which were not loaded. MH 92–93, 105. After he secured the gun, which was a Kel Tec .380, he seized it and gave it to the evidence technician, who marked it as evidence and secured it. MH 93; ASB 110.

SUMMARY OF THE ARGUMENT

I. The trial court erred in holding that the plain-view exception to the warrant requirement did not justify Sgt. Blodgett's seizure of the firearm because the incriminating nature of it did not have to be immediately apparent until he seized the gun, and by the time he did so, he knew that it was real, and that the defendant was a convicted felon and on probation. He also knew that people who traffic in and use drugs often have weapons, that the defendant had sold a large amount of heroin to a CI twice, that he and Ferron were the only adults living in the apartment, and that officers had found drug paraphernalia and a large amount of cash and drugs in their bedroom. Therefore, this Court must reverse the order suppressing the evidence, and remand this matter to the trial court.

II. The trial court erred in dismissing the defendant's charges under RSA 159:3-a. The plain language of the statute requires proof that a defendant "has been convicted of any combination of 3 or more felonies." However, unlike the federal statute it was modeled after, it does not require proof that the crimes were "committed on occasions different from one another …." 18 U.S.C. § 924(e)(1). Therefore, this Court will not interpret it in that manner because doing so would require it to ignore the plain language of the statute and to add language to it that the legislature did not see fit to include. Accordingly, this Court must reverse the order dismissing the charges, and remand this matter to the trial court.

ARGUMENT

I. THE TRIAL COURT ERRED IN SUPPRESSING THE GUN BECAUSE THE OFFICER DID NOT KNOW ANYTHING WAS IN THE T-SHIRT UNTIL HE UNROLLED IT AND THE GUN FELL OUT, AT WHICH POINT, THE GUN'S INCRIMINATING NATURE WAS IMMEDIATELY APPARENT BECAUSE THE OFFICER KNEW THAT THE DEFENDANT WAS A CONVICTED FELON AND ON PROBATION, AND THAT HE AND FERRON HAD A LARGE AMOUNT OF DRUGS AND CASH.

In his motion to suppress, the defendant argued that the gun was obtained in violation of his state and federal constitutional rights because the search warrant affidavit did not establish probable cause to search for firearms. ASB 81–86. The State objected, arguing that the seizure fell within the plain-view exception to the warrant requirement. ASB 105–09. Specifically, it argued that the initial intrusion into the apartment, the closet, the box, and the tightly rolled up T-shirt were all justified by the warrant because it authorized officers to search for drugs and related items, all of which could reasonably be found in them. ASB 106. The State also argued that the incriminating nature of the gun was immediately apparent because Sgt. Blodgett knew that the defendant was a convicted felon and on probation, and that large amounts of drugs and cash had been found in the bedroom the defendant and Ferron shared. ASB 108.

During the motion hearing, the State conceded that the warrant affidavit did not establish probable cause to search for firearms. MH 46. Then, after the officers testified, the defendant argued that the incriminating nature of the gun had not been immediately apparent because not all felons were prohibited from having firearms

and Sgt. Blodgett had said he did not know what felonies the defendant had been convicted of, because there was no evidence tying the defendant to the gun, and because Sgt. Blodgett would not have been able to tell it was real until he manipulated it. MH 108–10.

The State argued that the warrant affidavit explicitly stated the defendant had convictions for felony drug offenses and burglary, that the convictions were known to the officers, and that they "could form the basis for felon[in] possession." MH 110–11. The State also argued that it did not matter whether the gun was connected to the defendant, that Sgt. Blodgett testified he knew firearms, that he needed to pick up and secure the gun for safety reasons, and that the State did not have to prove the gun was real until the trial. MH 109–10.

In its order granting the motion to suppress, the court found that Sgt. Blodgett "could not identify what was inside the shirt or even tell if there was anything inside it," and that the photographs "show[ed] a semi-automatic pistol …." A7. The court held that "there was no probable cause for firearms to be included in the warrant," so "the search and seizure of the firearm was not authorized by [it]." A 21. It then addressed whether the plain-view exception applied. A 21. In doing so, it held that "[t]here [was] no dispute that the search of the residence for drugs was lawful," and that "[t]he inadvertency requirement d[id] not apply …." A 21. It then held that the "incriminating nature of the firearm was not immediately apparent" because "it was only after [Sgt. Blodgett] manipulated the T-shirt and unfurled it that he was able to

deduce there was a gun located inside" and because "there was no reason to think they would find a firearm" before he did so. A 21.

In its motion to reconsider, the State argued that the court erred because "[t]he point at which the 'immediately apparent' analysis [was] used [was] *at the time of the seizure*" and Sgt. Blodgett had become aware of the firearm only after it had landed on the floor, at which point, "its incriminating nature [had been] immediately apparent." ASB 128. The State also argued that the court erred because it "emphasi[zed] that the police [had not found] any other evidence of gun possession," but that "ha[d] no bearing upon the 'immediately apparent' analysis." ASB 129. It then argued that suppressing the evidence did not serve the purposes of the exclusionary rule because there was no police misconduct or injury to the defendant's privacy interests. ASB 129.

In his objection, the defendant argued that the incriminating nature of the firearm had not been immediately apparent because although the officers knew he was a convicted felon, he was not the sole occupant of the residence and the State had presented no evidence that he knew the firearm was in it. ASB 137–38. The court then denied the motion to reconsider. A 24. The trial court thus erred in granting the defendant's motion to suppress, and in denying the State's motion to reconsider.

"When reviewing a trial court's ruling on a motion to suppress, [this Court will] accept the trial court's factual findings unless they lack support in the record or are clearly erroneous, and [will] review its legal conclusions *de novo*." *State v.*

Schultz, 164 N.H. 217, 221 (2012). In reviewing the trial court's order, this Court will "first address the issues under the State Constitution and rely on federal law only to aid in [its] analysis." *State v. Dalton*, 165 N.H. 263, 264 (2013).

> Part I, Article 19 of the New Hampshire Constitution protects an individual from "all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." A warrantless search is *per se* unreasonable and invalid unless it comes within one of a few recognized exceptions. Absent a warrant, the burden is on the State to prove that the search was valid pursuant to one of these exceptions.

State v. Cora, 170 N.H. 186, 190–91 (2017) (quotations and citations omitted). "The State [also] has the burden to demonstrate the legality of a seizure that is not authorized by warrant." *State v. Cote*, 126 N.H. 514, 525 (1985). Here, the trial court erred in suppressing the gun because the State met its burden.

> One exception to the warrant requirement is the plain view exception, which authorizes the police to seize an item. In order for an item's warrantless seizure to be justified under the plain view exception: (1) the item must be in plain view; (2) the officer must not have violated the constitution in arriving at the place from which the evidence could be plainly viewed; and (3) the officer must also have a lawful right of access to the object itself. In addition, the incriminating nature of the item seized must be "immediately apparent," which means that, at the time of the seizure, the police must have probable cause to believe that the item seized constitutes incriminating evidence.

Cora, 170 N.H. at 191 (quotations, citations, and parentheticals omitted). The requirement "that the officer have a lawful right of access to the object" refers to "where [the officer] must be to retrieve the items." *Boone v. Spurgess,* 385 F.3d 923, 928 (6th Cir. 2004).

Here, the firearm was in plain view as soon as it fell out of the T-shirt and hit the floor. A 7; MH 73, 92; ASB 119. Furthermore, there was "no dispute that the search of the residence for drugs was lawful." A 21. There was also no dispute that the closet, the box, and the rolled up T-shirt were all places where drugs and drug-related items could have been found. A 4–5. Therefore, the officer did not violate the constitution in arriving at the place from which the firearm could be plainly viewed, and he had a lawful right of access to it. *See United States v. Wells,* 98 F.3d 808, 810 (4th Cir. 1996) (holding that officers had "a lawful right of access to the weapon" because they "were lawfully searching [the] apartment pursuant to a warrant, and the weapon was located in plain view in a place where items … described in the warrant reasonably could have been found"); *United States v. Hughes*, 940 F.2d 1125, 1127 (8th Cir. 1991) (same).

Moreover, because the item at issue was a firearm, there was no requirement that the officer's view of it be inadvertent. *See Horton v. California*, 496 U.S. 128, 130, 141–42 (1990) (abolishing the inadvertence requirement under the federal constitution); *State v. Nieves*, 160 N.H. 245, 251 (2010) ("with respect to drugs, weapons, and other items 'dangerous in themselves,' there is no longer an inadvertency requirement under our State Constitution"). Therefore, the only remaining question is whether the trial court erred in holding that the incriminating nature of the firearm was not immediately apparent because "it was only after [Sgt. Blodgett] manipulated the T-shirt and unfurled it that he was able to deduce there was

a gun located inside," and because "there was no reason to think [the officers] would find a firearm" before he did so. A 21. It did.

"The 'immediately apparent' requirement is met if, *at the time of the seizure*, the officer has probable cause to believe that *the object seized* is incriminating evidence." *State v. Davis*, 149 N.H. 698, 701 (2003) (emphasis added) (quotation omitted). Here, the officer did not seize the firearm until after it fell out of the T-shirt and hit the floor. In fact, he did not know there was anything in the T-shirt until it did so. A 20. Therefore, the incriminating nature of the gun did not have to be immediately apparent before he unrolled the T-shirt.[3] Instead, it had to be immediately apparent "at the time of the seizure." *See State v. Donovan*, 128 N.H. 702, 705 (1986) (holding that removing the plastic bag from Donovan's pocket was lawful because it was consistent with the protective custody statute, and that once it was removed, "the marijuana was in plain view, and its seizure was appropriate"). That being the case, the question is whether he had probable cause to believe the firearm was incriminating evidence when he seized it. He did.

"[F]or the incriminating nature of the firearm[] to be immediately apparent, the officer[] only needed probable cause to associate [it] with criminal activity." *United States v. Hastings*, 685 F.3d 724, 729 (8th Cir. 2012) (quotation and brackets omitted). "Absolute certainty of illegality was not required." *Davis,* 149 N.H. at 703. Instead, all that was required was "that the facts available to [Sgt. Blodgett] would

[3] It appears that the trial court conducted an analysis under the "plain feel" or "plain touch" doctrine, which does require proof that the incriminating nature of the object was immediately apparent when the officer felt it. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993).

warrant a man of reasonable caution in the belief … that [the firearm] m[ight] be contraband … or useful as evidence of a crime ...." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quotation omitted).

"In addition, the expertise and experience of [Sgt. Blodgett were] relevant to the probable cause determination." *Davis*, 149 N.H. at 701 (quotation omitted). "Officers are entitled to draw reasonable inferences from the facts available to them in light of their knowledge and prior experience." *Id.* at 701–02 (quotation omitted). "Thus, in some situations, a trained policeman's observations of certain types of contraband will be deemed sufficient to meet the requirements of the plain view doctrine." *Id.* at 702 (quotation omitted).

Here, in the trial court, the defendant argued that the incriminating nature of the gun was not immediately apparent because not all felons were prohibited from having weapons and Sgt. Blodgett testified that he did not know the specific felonies the defendant had been convicted of. MH 108. However, after Sgt. Blodgett testified that he went to the briefing, the following exchange occurred:

> Q Okay. And did you learn anything about the Defendant's felony convictions at that briefing?
>
> A That I didn't already know?
>
> Q Well, did you know about the Defendant's felony convictions?
>
> A Specifically, sir, and Your Honor, the specific felonies *right at this point* I don't know exactly what they were, but I was aware that … the person was [a] convicted felon.

MH 71 (emphasis added). Therefore, it is clear that he was already familiar with the defendant, and that he knew the felonies the defendant had been convicted of at the time of the search, but did not remember them at the time of the hearing.

In addition, Sgt. Scott had already testified that they gave an "overview" of the defendant and Ferron at the briefing, MH 49, and that they discussed the information that had led them to apply for the warrant, MH 50. The State had also admitted the search warrant affidavit, MH 37, which stated that the defendant had prior felony convictions for drug offenses and burglary, MH 86, all of which prohibited him from having weapons, *see* RSA 159:3, I (2014); RSA 159:3-a, I (2014) (amended 2017). Sgt. Scott did not say that they told the officers what the prior convictions were for. However, common sense dictates that they would have at least mentioned the prior drug convictions because they were going to be executing a warrant for drugs. Therefore, the only reasonable conclusion is that Sgt. Blodgett knew the defendant had been convicted of drug offenses when he seized the gun.

In the trial court, the defendant also argued that the incriminating nature of the firearm was not immediately apparent because Sgt. Blodgett would not have been able to tell it was real until he picked it up and manipulated it. MH 108–09. However, "[a] 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Brown*, 460 U.S. at 742. Here, Det. Blodgett testified that he had been to numerous trainings, including a "Guns and Drugs Conference," MH 70, and that he "kn[e]w weapons," MH 104. Therefore, it is clear that he had sufficient

knowledge and experience to identify the firearm "to at least the level of probable cause." *Davis*, 149 N.H. at 703 (holding that because officers had been trained "on how to recognize illegal weapons," it was not unreasonable to find that they had "at least the level of probable cause").

It is also worth noting that other courts have held that if an officer sees a firearm in plain view while he is executing a warrant that does not authorize a search for firearms, he may properly secure it by removing any ammunition, and that if its incriminating nature becomes apparent while he is doing so, he may lawfully seize it. *United States v. Rosa*, No. 03-10177-GAO, 2004 U.S. Dist. LEXIS 7522, at *4–5 (D. Mass. Apr. 30, 2004) (memorandum order); *see also United States v. Malchesen*, 597 F.2d 1232, 1234–35 (8th Cir.) (holding that "the incriminating nature of the handgun may not have been immediately apparent," but "its temporary seizure, unloading, and retention by … the inventory officer[was] a reasonable precaution to assure the safety of all persons on the premises during the search"), *cert. denied*, 444 U.S. 902 (1979). Therefore, even if Sgt. Blodgett had not known the gun was real before he picked it up, he could properly secure it for safety reasons and then seize it after he determined that it was in fact a real gun.

In any event, Sgt. Scott testified that they discussed the operational plans at the briefing, and that plan A was to have a probation officer and a sheriff's deputy make contact with the defendant at the door, which was "normal procedure" for "a routine probation check," and then detain him. MH 50. She also testified that the defendant

was taken into custody and transported to the station. MH 52. Sgt. Blodgett then testified that he had been a police officer since well before 2005, MH 69–70, and that he had some brief contact with the defendant at the apartment, MH 97. Therefore, the only reasonable conclusions are that the defendant was on probation, that Sgt. Blodgett knew he was, and that he also knew that, as a probationer, the defendant was prohibited from having or controlling real or simulated firearms. *See N.H. R. Crim. P.* 29(f)(6) (a "probationer shall … [n]ot receive, possess, control or transport any … firearm, or simulated …. firearm").

In the trial court, the defendant also argued that the incriminating nature of the firearm was not immediately apparent because he was not the only resident of the apartment and there was no evidence tying him to the gun. MH 108–09. However, Sgt. Scott testified that the defendant and Ferron were the only adults living there, and that Ferron's children were young. MH 48–49. Common sense dictates that she would have shared that information with officers who were going to search the apartment. Therefore, the only reasonable conclusion Sgt. Blodgett could have reached was that the defendant or Ferron had hidden the gun.

Sgt. Scott also testified that DTF officers know that people who use and traffic in large amounts of drugs often have firearms in their residences. MH 47. Sgt. Blodgett then testified that he had been with the DTF for seven years, MH 69, and that he had attended many trainings, including a "Guns and Drugs Conference," MH 70. He also testified that he searched the closet after he and other officers found a

large amount of drugs, cash, and paraphernalia in the bedroom, some of which was in Ferron's purse and wallet. MH 80–86; ASB 104, 110–15. Therefore, it was reasonable for him to conclude that the defendant and Ferron were both involved in drug use and drug trafficking. That being the case, the evidentiary significance of the gun would have been immediately apparent to him. *See, e.g., United States v. Caggiana*, 899 F.2d 99, 103–04 (1st Cir. 1990) ("[a]ny reasonably competent police officer who discovered firearms while searching for drugs would be immediately aware of their evidentiary significance"), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 152 (1990); *United States v. Terzado-Madruga*, 805 F.2d 1464, 1474 (11th Cir. 1990) ("It is uniformly recognized that weapons are often as much 'tools of the trade' as the most commonly recognized narcotics paraphernalia.")

It is also worth noting that courts have held that "when a group of officers is conducting an operation and there exists at least minimal communication between them, their collective knowledge is determinative of probable cause." *United States v. Wilson*, 894 F.2d 1245, 1254 (11th Cir. 1990). In fact, courts have "allowed the knowledge of officers working closely together on a scene to be mutually imputed … even in the face of a specific finding that pertinent facts were not communicated." *United States v. Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996) (gathering cases).

Here, it is clear that Sgt. Scott knew that the defendant had convictions for felony drug offenses and burglary, that he was on probation, and that he was one of only two adults living in the apartment. It is also clear that she and other DTF officers

briefed Sgt. Blodgett before the search, and that the other DTF officers worked closely with him at the scene. Therefore, their knowledge should be imputed to him. That being the case, for all the foregoing reasons, the trial court erred in finding that the incriminating nature of the firearm was not immediately apparent. Accordingly, this Court must reverse the order granting the motion to suppress, and remand this matter for further proceedings.

II. THE TRIAL COURT ERRED IN DISMISSING THE CHARGES UNDER RSA 159:3-a BECAUSE THE STATUTE REQUIRES PROOF THAT A DEFENDANT "HAS BEEN CONVICTED OF ANY COMBINATION OF 3 OR MORE FELONIES," BUT IT DOES NOT REQUIRE PROOF THAT HE COMMITTED THOSE FELONIES DURING THREE SEPARATE CRIMINAL EPISODES.

The defendant was charged with two counts of violating RSA 159:3-a, ASB 7–10, which provides, in relevant part, that "[n]o person who has been convicted of any combination of 3 or more felonies … under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child pornography, or controlled drug laws, shall own or have in his possession or under his control, a … firearm." RSA 159:3-a, I (2014) (amended 2017). The indictments alleged that he had three felony convictions for drug offenses and one felony conviction for burglary. ASB 7, 9.

In his motion to dismiss, the defendant noted that he pled guilty to the drug charges on June 18, 2013, that they "arose from a single search … on October 11, 2012, and that he then pled guilty to the burglary charge on February 4, 2016. ASB 21. He next argued that the court had to interpret the phrase "has been convicted of any combination of 3 or more felonies," and that it had to dismiss the charges because "the statute, the legislative history, th[is] Court's interpretation of criminal statutes with similar verbiage, and the federal courts' interpretation of the same words in the federal armed career criminal statute" all made it "clear that [RSA 159:3-a] require[d] at least three separate criminal episodes." ASB 22.

The defendant next noted that in *State v. Gordon*, 148 N.H. 710 (2002), this Court held that the phrase "previously convicted of two or more offenses" in the

AFSA sentencing statute "was ambiguous," so it looked at legislative history and the statutory scheme and held that the statute was intended to target "repeat offenders," and that "it was not intended to apply to a case where multiple convictions arose simultaneously from a single spasm of criminal activity." ASB 23 (citing *Gordon*, 148 N.H. at 714). He then argued that because RSA 159:3-a "similarly expands punishments for those who are repeat offenders," the *Gordon* opinion "require[d] the [trial court to] reach the same conclusion …." ASB 24.

The defendant next noted that this Court cited *United States v. Towne*, 870 F.2d 880 (2d Cir.), *cert. denied* 490 U.S. 1101 (1989), in *Gordon*, and that the *Towne* court held that the phrase "three previous convictions" in the federal armed career criminal act, 18 U.S.C. § 924(e)(1) (2012), "should be construed as a reference to the number of prior occasions on which a defendant has engaged in, and been convicted of, violent criminal conduct." ASB 25 (quoting *Towne*, 870 F.2d at 889). He also noted that in doing so, the *Towne* court said that it was well-established in other circuits "that the 'reference to "convictions" [in the statute] pertains to single "episodes" of felonious criminal activity that are distinct in time, rather than literal convictions.'" ASB 26 (quoting *Towne*, 870 F.2d at 889).

The defendant further noted that the court reviewed the legislative history of the federal statute and held "that the clear intent of congress was to punish recidivists, *i.e.,* those who have engaged in violent criminal activity on at least three separate occasions." ASB 27 (quoting *Towne*, 870 F.2d at 889). He then argued that the New

Hampshire legislature clearly had the same intent in enacting RSA 159:3-a, because speakers at the hearings on the bill that created the statute, 1989 HB 669-FN, said that it was intended to impose the mandatory sentence "for any person [who has] been convicted 3 or more times," and that it "was modeled after a federal law." ASB 27–28.[4]

The defendant next noted that the title of the statute is "Armed *Career* Criminals." ASB 28. He argued that "[t]hree convictions arising from a single criminal episode would not reasonably lead to the labeling of that person as a *career* criminal." ASB 28. He also argued that "the legislative history clearly indicate[d that the statute] was not intended to [reach] those who [were] involved in a limited number of criminal episodes" because speakers at the 1989 hearings had also said that it was "designed to get the read [sic] bad person off the street," and that it was "not taking people who had a bad day off the street, the people it would lock up [were] violent people." ASB 28. He argued that the indictments against him had to be dismissed because they alleged "four prior charges" that had arisen from "only two criminal episodes." ASB 29.

In its objection, the State argued that the statute was unambiguous, and that it required only "at least 3 statutorily-enumerated felony convictions in any combination." ASB 71. It also argued that if the legislature had intended "to require

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[4] The defendant also noted that the Rockingham County Superior Court (*Delker*, J.) had held that RSA 637:11, II(b), which provides that theft "is a class B felony if …[t]he actor has been twice before convicted of theft of property or services, as a felony or class A misdemeanor," was clearly intended "to punish 'habitual offenders' and deter separate 'spasm[s] of criminal activity." ASB 28 n.1 (quotation omitted)).

'at least three separate criminal episodes,' ... it could have included ... language [such as] 'committed on occasions different from one another,'" which was the language in the federal statute. ASB 71 (quoting 18 U.S.C. § 924(e)(1)).

The State next noted that in *People v. Gardner*, 753 N.W.2d 81 (Mich. 2008), the Michigan Supreme Court held that the phrase "convicted of any combination of 2 or more felonies" in the Michigan habitual offender statute "clearly contemplates the *number* of times a person has been 'convicted,'" and that nothing in it "suggests that the felony convictions must have arisen from separate incidents." ASB 72 (quoting *Gardner*, 753 N.W.2d at 85). The State also noted that the court held that "the statutory language defie[d] the importation of a same-incident test because it states that *any combination* of convictions must be counted." ASB 73 (quoting *Gardner*, 753 N.W.2d at 85). The State then argued that RSA 159:3-a also used the phrase "convicted of any combination of [X] or more felonies," so the *Gardener* opinion was more compelling and relevant than the state and federal opinions the defendant had cited. ASB 73.

The State next argued that the statutory language was unambiguous, so the court should not examine legislative history. ASB 74. It then argued that the text of the statutes at issue in the opinions the defendant had cited "differ[ed] significantly from the text of RSA 159:3-a," and that they punished recidivism by enhancing sentences for persons who had previously been convicted of similar crimes, but RSA 159:3-a prohibited conduct. ASB 75; *see also* ASB 76–78.

The State then noted that in *State v. McKeown*, 159 N.H. 434 (2009), this Court held "that the phrase 'more than one offense' [in the extended term statute was] not intended to apply to two … convictions arising from a single episode.'" ASB 78 (quoting *McKeown*, 159 N.H. at 437). It then argued that the *McKeown* and *Gordon* opinions demonstrated that this Court interpreted the word "offense" to mean "criminal episode," but the legislature did not use the word "offense" in RSA 159:3-a, so the court could not "use the single episode test." ASB 78–79.

At the hearing on the motion, the defendant argued that the Michigan opinion had no controlling value, and that federal opinions were more compelling because RSA 159:3-a had been modeled on the federal statute. MH 7–8. He also argued that there was more than one reasonable interpretation of RSA 159:3-a, thus requiring an analysis of the legislative history. MH 9. He then argued that there was no meaningful distinction between the language in RSA 159:3-a, and the language this Court had found ambiguous in *McKeown* and *Gordon*. MH 9–13. The State argued that the phrase "convicted of any combination of three or more felonies" was not ambiguous, and that the statute clearly applied even if the convictions arose from only a single criminal episode. MH 19–20.

The court said that the statute's title was "armed career criminals," and that one day would be a short career. MH 20. The State responded that the title was from the federal act, and that it could have been just poor phrasing by the legislature. MH 21. The court responded that "titles of statutes [did not] carry any particular legal

weight, but it [was] interesting that that[was] the phrase that seem[ed] to describe this statute." MH 21. The State then argued that the statute was clear, and that the legislature had limited only the types of convictions that applied under it. MH 21.

The court asked defense counsel why "the phrase any combination of [did not change] the question of whether [the statute was] ambiguous" because it "seem[ed] significant." MH 25–26. Defense counsel said that there was "enough from both federal and state law to say that there[was] ambiguity and possibly two … reasonable, but conflicting interpretations." MH 26. He then argued that the legislative history and the title of the statute demonstrated that it was intended to apply only to those who committed felonies "on multiple different days." MH 28.

In its order granting the motion, the court first set out the holdings in the cases the parties had cited. A 10–16. It then held that "[b]ecause the provisions of RSA 159:3-a are not identical to the provisions of the state and federal statutes previously considered, … [it is] ambiguous …." A 16. It then turned to "legislative history for guidance" and noted that in 1989 HB 699-FN, the statute was "described as 'prohibiting the possession of firearms by *career criminals*.'" A 16. It also noted that the amended analysis said it applied to "any person who had been convicted *3 or more times* …." A 16. The court noted that speakers had said that it "was modeled after a federal law," that "[m]ost violent crimes [were] committed by repeat offenders," that it was "not taking people who had a bad day off the street," and that "it would lock up … the violent people." A 16–17.

Finding the language ambiguous, the court declined to follow the decision from Michigan. A 17. It agreed with "the cautions of the *McKeown* court—that a prosecutor could easily seek three or more felonies from a single episode and thus meet the threshold for an armed career criminal charge—a result that [was] both absurd, unjust, and not in keeping with the overarching goals of the justice system." A 17. The court concluded, "After review of the statutory language, case law and legislative history, the court determine[d] that 'any combination of 3 or more felonies' require[d] three separate criminal episodes." A 17. It then dismissed the armed career criminal charges. A 18.

In its motion to reconsider, the State argued that the court "mistakenly found ambiguity in the statutory text …." ASB 133. The court then denied the motion to reconsider. A 25. It erred in dismissing the armed career criminal charges.

> The interpretation of a statute is a question of law, which [this Court will] decide *de novo*. In matters of statutory interpretation, [it is] the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. [This Court will] construe the Criminal Code according to the fair import of [its] terms and to promote justice. In doing so, [it] must first look to the plain language of the statute to determine legislative intent.

McKeown, 159 N.H. at 435–36 (quotations and citations omitted). This Court "will not consider what the legislature might have said or add language [it] did not see fit to include." *State v. Balch*, 167 N.H. 329, 332 (2015). "This enables [this Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.* "Absent an

ambiguity [this Court] will not look beyond the language of the statute to discern legislative intent." *McKeown*, 159 N.H. at 436 (citations omitted).

This Court has never interpreted the phrase "has been convicted of any combination of 3 or more felonies." However, the Michigan Supreme Court has interpreted the phrase "has been convicted of any combination of 2 or more felonies" in the Michigan habitual offender statute, and it has held that it "clearly contemplates the *number* of times a person has been 'convicted' of 'felonies,'" and that it "defies the importation of a same-incident test because it states that *any combination* of convictions must be counted." *Gardner*, 753 N.W.2d at 85. The court then said that although it had previously held that "each predicate felony must arise from separate criminal incidents," *id.* at 83 (quotation omitted), it had erred in doing so because it had "essentially acknowledged the clear import of the language," but had then "explicitly ignored [it], turning instead to legislative history and the Court's own views regarding [legislative intent]," *id.* at 85.

The court then noted that "legislatures throughout the country have enacted habitual offender statutes that explicitly include same-incident methods for counting prior felonies." *Id.* at 60 (citing statutes from Arizona, California, and Illinois); *id.* at 60 n.21 (citing statutes from Missouri and Oklahoma). It also noted that the United States Congress included the phrase "*committed on occasions different from one another*" in the federal statute. *Id.* (quoting 18 U.S.C. § 924(e)(1)).

Here, in drafting RSA 159:3-a, the legislature did not use the phrase "three previous convictions," which is the phrase used in the federal statute. *See* 18 U.S.C. § 924(e)(1). It also did not use the phrase "committed on occasions different from one another," which is the phrase that was added to the federal statute the year before RSA 159:3-a was enacted. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7056, 102 Stat. 4181, 4402. Instead, it used the phrase "has been convicted of any combination of 3 or more felonies," which is essentially identical to the phrase the Michigan Supreme Court held is unambiguous and "defies the importation of a same-incident test because it states that *any combination* of convictions must be counted." *Gardner*, 753 N.W.2d at 85. Therefore, this Court cannot interpret RSA 159:3-a as requiring proof that the convictions arose from felonies "committed on occasions different from one another" because doing so would require it to ignore the plain language of the statute and to "add language that the legislature did not see fit to include." *State v. Lantagne*, 165 N.H. 774, 777 (2013).

Furthermore, in *Gordon*, this Court said that it had never "interpreted the words 'previously convicted' in the context of multiple convictions arising out of one criminal transaction." *Gordon*, 148 N.H. at 714. This Court noted that there was "a split of authority on this issue, the resolution of which often depend[ed] on the language of the particular statute under consideration and the court's opinion of what purpose such a statute is intended to serve." *Id.* (quotation omitted). Here, however, there is no split of authority on the issue of whether convictions must arise from

separate criminal episodes when the statute at issue uses the phrase "convicted of any combination of [X] or more felonies." Instead, the Michigan Supreme Court appears to be the only court that has considered the issue.

Therefore, this Court should hold, as that court did, that the phrase is not ambiguous, and that it "defies the importation of a same-incident test because it states that *any combination* of convictions must be counted." *Gardner*, 753 N.W. 2d at 85. It should also hold that resort to the legislative history of it "run[s] counter to principles of statutory construction." *Id.* at 88; *see McKeown*, 159 N.H. at 436 ("Absent an ambiguity [this Court] will not look beyond the language of the statute to discern legislative intent." (Quotation omitted.)).

Moreover, as the *Gardner* court noted, "construing an unambiguous statute by relying on legislative history at the very most allowed the reader, with equal plausibility to pose a conclusion of his own that differs from that of the majority." *Gardner*, 753 N.W.2d at 89 (quotation, brackets, and ellipsis omitted). Here, at a public hearing on HB 699-FN, one of the speakers said that the "bill was modeled after a federal law," and that "[m]ost violent crimes are committed by repeat offenders." ASB 143. However, he was not a legislator, and at the time, the bill contained the phrase "has been convicted 3 or more times," ASB 140, rather than the phrase "has three previous convictions," which was in 18 U.S.C. § 924(e)(1).

At some point, a representative proposed an amendment that would have changed "has been convicted 3 or more times" to "has been three times previously

convicted." ASB 146. However, he later withdrew it. ASB 148. The bill was then "amended to include arson and extortion in [the] list of felonies to be considered when a person has been convicted 3 or more times and has a firearm in their control." ASB 149. It was then amended to its current form. ASB 151.

During a subsequent hearing, a representative said, "I find that the bill speaks to a felon after having 3 convictions something shall happen in his third conviction." ASB 154. Another representative said it would send "a message to [felons] that if they … [did] in fact possess or use a firearm in the commission of further crime that they [were] going away for a[ ]while." ASB 154. Other speakers then said that they needed to "[g]o after … repeated criminals," ASB 154, and that it was good "having stiff mandatory sentences for repeat offenders," ASB 155. However, they were not legislators.

In fact, none of the legislators ever said that the statute was intended to apply only to repeat offenders or that it was intended to apply only to persons who had "three previous convictions … committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Instead, the analysis of the enacted bill said that it applied to "any person who has been convicted 3 or more times of certain felonies and uses or possesses or has under his control certain firearms." ASB 145. In other words, when the legislature used the phrase "has been convicted of any combination of 3 or more felonies," it "clearly contemplate[d] the number of times a person ha[d] been 'convicted' of felonies," rather than the number of times a person had engaged in

"separate incidents" of felonious conduct. *Gardner*, 753 N.W.2d at 81. Therefore, for all the foregoing reasons, this Court must reverse the order dismissing the charges, and remand this matter for further proceedings.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the order below granting the defendant's motion to suppress and motion to dismiss, and remand the instant case to the Carroll County Superior Court for trial.

The State requests a 15-minute oral argument.

The appealed decisions are in writing and are appended to this brief.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
By its attorneys,

Joseph A. Foster
Attorney General

May 24, 2018

Susan P. McGinnis, NH Bar ID #13806
Senior Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that two copies of this brief were mailed this day, postage prepaid, to the New Hampshire Appellate Defender, counsel of record, at the following address:

N.H. Appellate Defender Program
20 Ferry Street, Suite 202
Concord, NH 03301

May 24, 2018

Susan P. McGinnis

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **State v. Jonathan Folds**
Case Number: **212-2016-CR-00218**

Enclosed please find a copy of the court's order of November 07, 2017 relative to:

ORDER ON DEFENDANT'S MOTION TO DISMISS, MOTION TO SUPPRESS

November 08, 2017

Abigail Albee
Clerk of Court

(405)

C: John H. Harding, ESQ; Eric S. Wolpin, ESQ

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Jonathan Folds

Docket No. 212-2016-CR-00218

ORDER ON DEFENDANT'S MOTION TO DISMISS, MOTION TO SUPPRESS

The defendant, Jonathan Folds ("Folds"), is charged with three counts of Felon in possession of a firearm (1286971C, 1326577C, and 1326581C), two counts of Armed Career Criminal (1326578C and 1326579C), and two violations of the Controlled Drug Act (1361326C and 1361327C). Folds moves to dismiss the felony charges of Armed Career Criminal, stating that the indictment fails to properly allege a felony offense as required by Part 1, Article 15 of the New Hampshire Constitution. (Court index #18.) The State objects. (Court index #23.) Folds also moves to suppress the evidence obtained as a result of an illegal search and seizure, relying on his rights under Part I, Article 19 of the State Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. (Court index #20). The State objects. (Court index #30.) The court held a hearing on these motions on September 13, 2017. After considering the parties' arguments and exhibits, the factual circumstances of the case, and the applicable law, the court finds and rules as follows.

FACTS[1] [BM1]

On October 11, 2016, Detective Sergeant Suzanne Scott ("Scott") and Detective Sergeant Nicholas Blodgett ("Blodgett") were part of a task force in charge of executing a search warrant at the apartment of Folds, girlfriend Megan Ferron, and two young children on Emery Lane in Bartlett, NH.[2] [BM2] Scott, a member of the Conway Police Department ("Conway PD"), and currently assigned to the Attorney General's Drug Task Force ("AG task force"), was the case agent for the investigation that led up to the execution of the search warrant. She was initially asked to be involved in the case by the Conway PD, who requested that she meet with investigators about the use of a cooperating individual ("CI"). Scott first came into contact with the CI in September of 2016. Officers are required to meet with a potential CI at least once to discuss what they can do, how they can be of any help, and what they are looking for in return. During that conversation, they typically talk about what they consider to be potential targets, and go over the cooperating individual agreement, their contract, and what they call the "CI packet" which must be approved by the Assistant Commander Mike Foherty. From there, they typically communicate with a CI through text messages or phone calls, which is how they set up the first controlled purchase on September 27, 2016.

In each of the controlled purchases, the CI had purchased 50 grams of heroin (five fingers), and handed the drugs right to Scott after making the purchase. At the time the drugs were handed over, she observed that they were packaged almost like children's sidewalk chalk

[1] The court's factual findings are based on evidence adduced at the hearing, consisting of the testimony of officers Scott and Blodgett (under masks per order of the court), as well as the exhibits presented (Exhibit 1: a CD with photo of the Folds residence; Exhibit 2: a copy of the search warrant packet and inventory list; Exhibit 3: a diagram of the Folds residence made by Blodgett.

[2] Although she is employed by the Conway PD, Scott is assigned exclusively to the AG task force. Blodgett has been assigned to the AG's task force since 2010. Both officers have extensive training and experience in drug investigations, search warrants, and drug searches.

and fit in the palm of her hand. They were in powder form, but compressed into a harder form, and each finger was side by side wrapped in a tight cellophane wrapper. The five pieces in the cellophane wrapper were inside of another plastic bag, and she believes they were also held together by a rubber band.

Scott cannot recall if, on September 27 or prior to the 27th, the CI talked about Folds using drugs.[3] She testified that she is sure he mentioned at some point the use of illegal drugs, but couldn't recall whether or not he specified how much Folds was using or if he was using anything more than heroin. Scott also does not recall the CI reporting that he saw drug paraphernalia in the house. The second controlled purchase took place in Folds bedroom, and it was during that purchase that the CI stated there were other quantities of drugs on the bed or somewhere in the bedroom, and Folds had separated out the 50 grams that the CI agreed to purchase. After the second purchase, Scott had knowledge that there were additional quantities of drug. The CI couldn't say for sure, but believed there were a couple more fingers of heroin present. The CI never mentioned Folds or Ferron having a firearm.

Scott drafted a search warrant application as a result of the two separate controlled purchases made by the CI. In the search warrant application, she requested authorization to seize, among other things, heroin, drug scales, drug packaging and devices, drug paraphernalia, drug ledgers, personal papers, bank books and bank statements. Scott expected to find heroin in the residence packaged in a similar manner as it was when they conducted the controlled purchases.

The purpose of the drug search was to search anywhere and everywhere looking for drugs, as heroin can be packaged in baggies as small as a thumbnail. Scott stated they have

[3] Scott testified that she thinks she discussed Folds drug use at some point with the CI since they like to know if an individual is utilizing large quantities of drugs from a safety perspective.

located controlled drugs, specifically heroin, inside of tools, including a nail gun, book with the pages torn out, window casings, windows sills, inside walls, and in ceiling tiles. When they go through a residence and there are books and DVD's, every single one of them is opened to ensure there is nothing inside. Scott said they are trained to look anywhere that you could possible hide something as small as a tiny baggy of heroin.

The search warrant listed firearms as one of the items sought to be recovered through the search, although Scott did not have knowledge based on the controlled purchases that there would be firearms in the residence, and did not include firearms in her affidavit in applying for the search warrant. Scott testified that when they are dealing with individuals who are involved in trafficking in large quantities of heroin or any other controlled drugs, they often ask for firearms to be included in the search warrant because based on their training and experience, individuals who utilize or traffic large quantities of drugs often have firearms on their person, in their car, or in their residence for protection purposes. In this case, however, they had no information leading up to the execution of the search warrant that Folds had a firearm, the recorded controlled purchases with the CI revealed no discussions of firearms, and Scott had specifically asked the CI if he had ever seen Folds with a firearm or ever seen one in the residence, and the answer was always "no." Scott admits that she asked for things that she typically asks for in warrants, including firearms, but acknowledges this isn't a case that she would typically have asked for firearms, even though firearms were inadvertently listed in the warrant. She testified that she considers this an oversight because she agrees there wasn't any information leading up to the search that indicated Folds or Ferron had a firearm in the residence.

Before the execution of the search warrant on October 11, there was a briefing conducted at approximately 10:00 a.m. at the Conway PD. During the briefing, Blodgett became aware that

Folds was a convicted felon, although he doesn't remember specifically what he was convicted of. --Shortly after the briefing was conducted, there were two surveillance units placed at the residence prior to executing the search warrant. The time between the briefing and making contact at the door of the residence was approximately 30 minutes or less. [BM3]

During the search itself, Scott was assigned to a team with two other individuals that were going to secure areas of the perimeter, and her role was that once any individuals inside were secured and they knew the residence was safe, the entry team would go in. She was not part of the search team, but rather would interview Folds once he was in custody. Folds was placed in custody, transported to the Conway PD and, after waiving his Miranda rights, was interviewed by Scott and Lieutenant Mattei.

Blodgett assisted with the search of the residence. At the time he entered, he had no knowledge of Folds having a firearm, nor did he learn of a potential firearm being present through his brief contact with Folds upon entering the apartment. According to the search warrant inventory form completed by Trooper Steve Riendeau ("Riendeau"), the search began around 11:51 a.m. and was completed by 1:17 p.m. (Ex. 2, Inventory list.) Having already assisted with the search of other rooms, Blodgett was searching a closet in the residence that was located just off the kitchen bathroom area. The closet was more like a water pump room with plumbing, but Blodgett doesn't recall if there was specifically a water heater, although he remembers seeing some type of tank. Once he removed the items in front of the closet (described as a blue tub with a book bag in it and tools), he opened the door of the closet. On a shelf that ran along the back of the closet was a box which he described as a couple of inches thick top to bottom, and essentially the size of a piece of note paper. He could not recall if there were other items on the shelf as well. Inside the box there were Christmas decorations and a

blue t-shirt that appeared to be wrapped tightly. (Ex. 1, Photo # 0439.)[4] He could not identify what was inside the shirt or even tell if there was anything inside it because nothing stood out to him as indicting there was necessarily an object inside it. Blodgett took the wrapped t-shirt out of the box, took one end of it, and let the shirt roll down the front of him. As he let the shirt roll down, a gun hit the floor and took him by surprise. Riendeau, in his role as Evidence Technician, took two photos of the gun as it sat on the floor exactly where it fell from the t-shirt. (Ex. 1, Photos ## 0437–0438.)[5] The gun appeared to be all black, with no wording of any kind. At that point, he did not seek a further search warrant. Blodgett picked the gun up and removed the magazine. Then, using his right hand which was holding the gun, he used his left hand to pull the slide of the of the rear and used his right thumb to block the slide to the rear, and observed that no rounds came out of the gun, and there were no rounds in the chamber. He was not aware of other firearms present in the home, or ammunition or firearm packaging in other rooms of the residence. He brought the cleared weapon to Riendeau and he marked it as evidence and secured it from there. The gun was recovered at approximately 12:32 p.m. (Ex. 2, Inventory list.) Blodgett wrote a report after the search, and a second report when asked by the State. The details about the gun and how it got from the closet to the floor were included in the second report, but not the first. Blodgett was unable to explain why he excluded the information from his first report.

ANALYSIS

I. Motion to Dismiss

[4] Photo # 0439 shows an arm wearing a rubber glove and holding a blue t-shirt. Blodgett testified that the t-shirt looked to be dark blue with white pinstripes on the edge of it.
[5] Photos # 0437 and # 0438 show a semi-automatic pistol on a tile floor, with a toe of someone's shoe visible in the upper left hand corner of the photo.

Folds moves to dismiss the alleged felony charges of Armed Career Criminal (Indictments 1326578C and 1326579C), arguing that his prior felony offenses are insufficient as a matter of law to satisfy the statutory requirements of RSA 159:3-a. (Def.'s Mot. Dismiss at 1.) Specifically, Folds argues the indictments fail to properly allege a felony offense, as required by Part 1, Article 15 of the New Hampshire Constitution. (Id.) He argues there is ambiguity in the statute, and the requirement that the person charged "has been convicted of any combination of 3 or more felonies" should be read as three separate incidents as opposed to a single criminal episode resulting in three convictions. He relies on legislative history, the New Hampshire Supreme Court's interpretation of criminal statutes with similar language, and the federal courts interpretation of similar provisions in the federal armed career criminal statute. (Id.) The State argues the motion to dismiss should be denied because the statute is clear and unambiguous and differs from the provisions addressed in the cases cited by the defendant. (State's Obj. Mot. Dismiss at 1.)

When interpreting a statute, the court must glean the legislature's intent as expressed in the words of the statute considered as a whole. State v. McGill, 167 N.H. 423, 426 (2015); State v. Addison, 160 N.H. 732, 754 (2010). The court must look to the plain language of the statute itself, and construe that language, where possible, according to its plain and ordinary meaning and in the context of the overall statutory scheme. Id. Words and phrases are not considered in isolation, but instead within the context of the statute as a whole, which enables the court to better determine the legislature's intent and to interpret statutory language "in light of the policy or purpose sought to be advanced by the statutory scheme." Zorn v. Demetri, 158 N.H. 437, 438–39 (2009) (quoting In re Alexis O., 157 N.H. 781, 785 (2008)). The court reads all parts of a statute together to

achieve its overall purpose and to "avoid an absurd or unjust result." Id. at 438. "If a statute is ambiguous, however, we consider legislative history to aid our analysis." Petition of Carrier, 165 N.H. 719, 721 (2013) (quoting Petition of State Employees' Assoc., 161 N.H. 476, 479 (2011)) (quotation omitted). A statute is considered ambiguous when the "language is subject to more than one reasonable interpretation." Attorney Gen. v. Loreto Publications, Inc., 169 N.H. 68, 74 (2016) (quoting Appeal of Naswa Motor Inn, 144 N.H. 89, 90 (1999)).

On February 4, 2016, Folds pled guilty to one felony level offense of Burglary (See Docket 212-2015-CR-85, Indictment 1078155C) alleging unlawful entry into a residence on May 1, 2015. (Def.'s Mot. Dismiss ¶ 3.) On June 18, 2013, Folds pled guilty to three violations of the controlled drug laws, with each offense stating that Folds possessed a controlled drug in Conway, NH on October 11, 2012. (Id.) The three drug charges arose from a single search of Folds' person and residence by the Conway PD on October 11, 2012. (Id.)

In the instant case, the State brought two indictments alleging violations of RSA 159:3-a, Armed Career Criminal, as follows: indictment 1326578C alleges Folds had in his possession or control a Kel Tec firearm on October 11, 2016; indictment 1326579C alleges Folds owned a Kel Tec firearm on October 11, 2016. Both charges are Special Felonies. (Id. at ¶ 1.) Folds argues that the State is presenting alternate theories of the same offense because both indictments rely on the same predicate criminal offense. (Id. at ¶ 1–2.) Folds proposes that the question before the court is whether the statutory language "has been convicted of any combination of 3 or more felonies" in RSA 159:3-a should be construed to mean literally any three or more convictions regardless of whether some or all were committed simultaneously, or whether that phrase

references the number of prior occasions on which a defendant has engaged in and been convicted of an enumerated felony offense.[6] (Id. at ¶ 5.) Folds argues the statute requires three separate incidents and he has only been convicted of felony charges from two separate incidents. (Id.)

Folds cites multiple New Hampshire cases dealing with ambiguous language in similar statutes. In State v. McKeown, 159 N.H. 434, 436 (2009), the court considered the provision of RSA 651–B:6, III that imposes sex offender registration "as a result of a violation of more than one offense." The defendant argued his two convictions arose from a single criminal episode. Id. The court interpreted the statute as being consistent with the provisions of the federal Jacob Wetterling Act, and concluded the phrase "more than one offense" was "not intended to apply to two misdemeanor sexual assault convictions arising from a single criminal episode." Id. at 437; cf. State v. Gordon, 148 N.H. 710, 714–15 (2002) (holding that the phrase "previously convicted of 2 or more offenses" wasn't applicable to a defendant who sexually assaulted two victims in one concurrent criminal episode). The court also found the State's interpretation that any two convictions "could lead to unjust results, giving prosecutors nearly unfettered discretion to impose the lifetime registration requirements by charging a defendant with multiple offenses for multiple touches of the same victim in a single criminal episode." McKeown, 159 N.H. at 437. "It has long been settled here that our court will not interpret a statute so as to produce an unjust .

[6] There is very little case law dealing with the phrase "any combination of" in similar statutes in other jurisdictions. See United States v. Campbell, 427 F.2d 892, 893 (5th Cir. 1970) (finding the appellants argument that 'any combination of parts designed and intended for use in converting a weapon into a machine gun' is unconstitutionally vague unconvincing); Griswold Ready Mix Concrete, Inc. v. Reddick, 134 So. 3d 985, 986–87 (Fla. Dist. Ct. App. 2012) (reading the phrase "or any combination thereof" to mean that if any combination of the parties named within statute (e.g., a general contractor, a subcontractor, and a materialman) contracts for indemnification, the provision must contain a monetary limit of liability); State v. Stevens, 11 N.E.3d 252, 264–65 (finding that only one case in Ohio had found the provisions of R.C. 2923.31(1), including the use of the word "combination" ambiguous); Diefenderfer v. Pierce, 396 S.E.2d 227, 227–28 (1990) (finding the language "any combination thereof" in a job description was plain and unambiguous and logically applies only to the work experience component—it cannot mean that any combination of experience can substitute for the education requirement).

. . result." Id. at 437 (quoting State v. Roger M., 121 N.H. 19, 21–22 (1981) (quotation omitted)); see State v. Gubitosi, 157 N.H. 720, 724 (2008) (noting that the court construes all parts of a statute together to achieve its purpose and to prevent an unjust result); RSA 625:3 (Criminal Code taken as promoting justice).

In State v. Gordon, 148 N.H. 710, 714 (2002), the court considered whether the statutory language "previously convicted of 2 or more offenses" should be construed to mean any two convictions, irrespective of the fact they were committed "simultaneously during a single spasm of criminal activity," or whether the language refers to the number of prior occasions where the defendant has engaged in and been convicted of aggravated felonious sexual assault. See United States v. Towne, 870 F.2d 880, 889 (2d Cir.), *cert. denied,* 490 U.S. 1101 (1989). In a case of first impression, the court noted a "split of authority on this issue, the resolution of which often depends on the language of the particular statute under consideration and the court's opinion of what purpose such a statute is intended to serve." Id. (quoting Annotation, Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty Under Habitual Offender Statutes, 7 A.L.R. 5th 263, 263 (2001)). The court read the legislative history as showing the legislature intended for the statute to be directed at repeat offenders, not those who obtain three convictions as a result of a single criminal incident. Id. at 715; see United States v. Montgomery, 819 F.2d 847, 850 (8th Cir. 1987) (holding convictions for the concurrent rape of two victims as part of a continuous course of conduct represents a single conviction for purposes of sentence enhancement).

In State v. Coppola, Rockingham Cty. Superior Ct., No. 218-2013-CR-0401 (Dec. 13, 2013) (Order, Delker, J.), the defendant argued that because her two prior convictions arose from a "single spasm of activity," they could not support the elevated charge under RSA 637:11, II(b).

The court applied the holding in Gordon, and found the language of the statute ambiguous. Id. at 2. The court ultimately concluded that because the two convictions "stem from the same criminal episode, they should not be treated as two or more convictions for the purposes of RSA 637:11, II(b)," and the defendant's motion to dismiss the indictment was granted. Id. at 4. Similarly, in State v. Brito, Rockingham Cty. Superior Ct., No. 218-2014-CV-00260 (July 14, 2014) (Order, Delker, J.), the defendant moved to dismiss the indictment against her using the same argument. The court again cited Gordon as holding that crimes committed in a "single spasm" of criminal activity cannot support elevated penalties. Id. at 2. In determining there was ambiguity in the language and using the legislative history as a guide, the court found that the intent of the statute was to deter and punish habitual offenders of theft. Id. at 4. The court held that the defendant committed the thefts sequentially and her actions, therefore, signified a "continuous 'spasm' of criminal activity," meaning they should not be treated as two or more convictions for the purposes of RSA 637:11, II(b). Id. at 5.

Folds also cites federal law as being supportive of his position. In United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987), the Solicitor General stated that the court erred in applying the enhanced sentencing portion of the Armed Career Criminal Act of 1984 (18 U.S.C.App. § 1202(a)(1)), to Petty for possession of a firearm by a convicted felon, as he did not have "three previous convictions for robbery or burglary," a requirement under the statute. Petty was convicted of six counts of armed robbery based on a simultaneous robbery of six people at a restaurant, and the Solicitor General stated that characterizing this incident as more than one conviction for purposes of the enhanced sentencing statute was error. Id. The Solicitor General remarked that the "legislative history strongly supports the conclusion that the statute was intended to reach multiple criminal episodes that were distinct in time, not multiple felony

convictions arising out of a single criminal episode." Id. The court held that the enhanced sentence for possession of a firearm by a convicted felon should be vacated, and the case was remanded. Id.

In United States v. Towne, 870 F.2d 880, 888–89 (2d Cir. 1989), a section of title 18 states that someone who violates 18 U.S.C. § 922(g) and has "three previous convictions . . . for a violent felony . . . shall be . . . imprisoned not less than fifteen years. . ." The question presented to the court by the appellant was:

> whether the statutory reference to 'three previous convictions' in § 924(e)(1) should be construed literally to mean *any* three felony convictions, regardless of whether the three predicate felonies were committed simultaneously during a single spasm of criminal activity; or whether it should be construed as a reference to the number of prior *occasions* on which a defendant has engaged in, and been convicted of, violent criminal conduct.

Id. at 889.

This question was one of first impression in the Circuit, but the court noted it was well established in other jurisdictions that the reference in § 924(e)(1) to "convictions" meant single "episodes" of "felonious criminal activity that are distinct in time, rather than literal convictions."[7] Id. The court held that the district court erred in enhancing the defendant's sentence based on the four convictions arising out of his two prior attacks on women. Id. at 890. The court relied on the statute's legislative history showing that literal adherence to the terms of § 924(e)(1) would frustrate the legislative goals behind the Armed Career Criminal Act. Id. It also relied on "recent indications that the Supreme Court and the United States Solicitor General

[7] The court cites the following cases in support of this proposition: See United States v. Gillies, 851 F.2d 492, 497 (1st Cir.), *cert. denied,* 488 U.S. 857 (1988); United States v. Harden, 846 F.2d 1229, 1232 (9th Cir.), *cert. denied,* 488 U.S. 910 (1988); United States v. Rush, 840 F.2d 580, 581 (8th Cir. 1988); United States v. Wicks, 833 F.2d 192, 194 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988); United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987), *cert. denied,* 486 U.S. 1057 (1988); United States v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986); see also Brief of United States Solicitor General filed in Opposition to Defendant's Petition for Certiorari at 5, in United States v. Wicks, No. 87–6807 (U.S. 1988) (noting that every federal court of appeals that has considered the issue has adopted the multiple episodes approach, and that these courts have "simply required that the criminal episodes be distinct in time"). Towne, 870 F.2d at 889–90.

have come to similar conclusions about the proper interpretation of § 924(e)(1)" and cited Petty.[8] Id. The court adopted the "multiple criminal episodes" approach, as the Armed Career Criminal Act was "aimed at career criminals, rather than 'those who merely commit three punishable acts.'" Id. at 890–91 (quoting United States v. Wicks, 833 F.2d 192, 194 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988) (Pregerson, J., dissenting) (Judge Pregerson observed that the title of the Act itself "indicates that it was aimed at punishing 'career' criminals, 'individuals who are resistant to society's efforts at rehabilitation'"). Finally, the court notes that this section of the Act was meant to target recidivists—"those who have engaged in criminal activity on at least three separate occasions, and not individuals who happen to acquire three convictions as a result of a single criminal episode." Id. at 891.

The State argues the language of RSA 159:3-a is unambiguous, and cites State v. Balch, 167 N.H. 329, 331 (2015) as being instructive on how the New Hampshire State legislature intended to measure the unit of prosecution under the statute. The defendant in Balch was given six consecutive sentences based on six convictions arising from a single incident in which he had six firearms. Id. at 331–32. He argued that the legislature intended for the unit of prosecution to be each occurrence of possession rather than each individual firearm. Id. at 332. The court, in interpreting the statute, focused its analysis on the language "shall own or have in his possession or under his control, a pistol, revolver, rifle, shotgun, or any other firearm." Id. at 333. The court held that the plain language of RSA 159:3-a shows that the legislature "intended to adopt each individual firearm possessed as the unit of prosecution under RSA 159:3-a." Id. at 334 (noting the court in State v. Stratton, 132 N.H. 451, 455 (1989) in analyzing similar language in RSA 159:3 defined the unit of prosecution as each individual firearm possessed by a qualifying

[8] The Eighth Circuit has since reaffirmed this position, stating in United States v. Rush, 840 F.2d 580, 581 (8th Cir. 1988) that the "criminal episodes underlying the [defendant's prior] convictions . . . must be distinct to trigger the provisions of the [statute]." Id.

felon); see State v. Beckert, 144 N.H. 315, 317 (1999) (analyzing RSA 159:3 and finding the purpose of the statute is "to protect the public from felons who would possess or have under their control instruments capable of causing serious injury or death"). While Balch deals with the same statute at issue in this case, the court focused its statutory interpretation on different language in the statute specifically pertaining to qualifying the number of firearms needed to define a unit of prosecution. The number of firearms and the subsequent charges based on that number are not at issue here, it is whether the three drug convictions stemming from a single criminal occurrence constitute one offense or two, for purposes of meeting the threshold of RSA 159:3-a. Therefore, Balch is not applicable.

The State offers multiple Michigan Supreme Court cases to show how that court has dealt with its habitual offender statute. The court in People v. Gardner, 753 N.W.2d 78, 83 (2008) analyzed a provision in MCL 769.11, "[I]f a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows. . ." The court in Gardner rejected a prior holding and found that the language of the statute was clear and unambiguous, and that "Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately. The text of those laws does not include a same-incident test." Id. at 95 ("the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted"). Id. at 85. Recently, in People v. Wilson, 500 Mich. 521 (2017), the court looked at the felony firearm statute and determined that just as in the habitual offender statutes, it "clearly contemplated the number of times a person has been 'convicted' of felony-firearm." Id. at 521 (quoting Gardner, 753 N.W.2d 78). The court held

that "nothing in the text of MCL 750.227b(1) requires that a repeat felony-firearm offender's prior felony-firearm convictions arise from separate criminal incidents." Id.

Because the provisions of RSA 159:3-a are not identical to the provisions of the state and federal statues previously considered, the court finds the statute ambiguous and turns to the legislative history for guidance.

RSA 159:3-a, was proposed as an addition to RSA 159 in the 1989 House Bill 699-FN ("HB699").The bill is described as "prohibiting the possession of firearms by career criminals and imposing a minimum mandatory sentence."[9] N.H.H.R. Jour. 543 (1989) (emphasis added). Under "Amended Analysis," it states "[T]his bill imposes a minimum mandatory prison sentence of 10 years and a fine of up to $25,000 for any person who has been convicted 3 or more times of certain felonies and uses or possesses or has under his control certain firearms." Id. at 544 (emphasis added). On February 21, 1989, the House Committee on the Judiciary held a public hearing where members of the public had the opportunity to speak on behalf of the bill. In the record of the testimony from the hearing, Al Rubega, who spoke in favor of the bill, stated that "[T]his bill was modeled after a federal law. Most violent crimes are committed by repeat offenders." *Prohibiting the Possession of Firearms by Career Criminals and Imposing a Minimum Mandatory Sentence: Hearing on HB699-FN Before the H. Comm. on the Judiciary*, 1989 Leg., 151st Gen. Ct. (Nh. 1989) (statement of Al Rubega, Gun Owners of New Hampshire).[10] William Quigley, Jr. also spoke in favor of the bill and said "this is to get the read (sic) bad person off the street." Id. (statement of William Quigley, Jr., Gun Owners of New

[9] Under the term "career criminal," it says "See Recidivist." The definition of recidivist is "1. Someone who has been convicted of multiple criminal offenses, usu. similar in nature; a repeat offender. 2. A criminal who, having been punished for illegal activities, resumes those activities after the punishment has been completed . Also termed *habitual offender; repeater; career criminal; prior and persistent offender*." *Recidivist*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] Folds provided a transcript of the hearing as an attachment to his motion to dismiss.

Hampshire). Andy Anderson spoke in favor of the bill and stated, "[T]his is not taking people who had a bad day off the street, the people it would lock up are the violent people." Id. (statement of Andy Anderson, New Hampshire Sheriffs' Association).

While the court in Michigan has held that the statutory language in both the habitual offender statute and the felony firearm statute are clear and unambiguous, and have rejected the same incident test in relation to the words "any combination," this court has determined here that the language of RSA 159:3-a is ambiguous. Therefore, this court declines to follow the Michigan courts interpretation of "any combination."

Although the state and federal case law provided is not directly on point, the court finds persuasive the New Hampshire courts reading of statutes of similar intent, as well as other jurisdictions interpretations of similar language, and the legislative intent of HB699. The court agrees with the cautions of the McKeown court— that a prosecutor could easily seek three or more felonies from a single episode and thus meet the threshold for an armed career criminal charge—a result that is both absurd, unjust, and not in keeping with the overarching goals of the justice system. In considering the legislative history and intent as an aid to our analysis, the language of the statute and the testimony corroborating the intent behind it leads us to believe RSA 159:3-a was intended to punish career criminals, or recidivists, who have been convicted three or more times of committing a felony. That is to say they have committed three distinct criminal episodes. The purpose is not to punish the individuals who are convicted of multiple offenses resulting from a single criminal transaction.

After review of the statutory language, case law and legislative history, the court determines that "any combination of 3 or more felonies" requires three separate criminal episodes. The defendant, therefore, had two qualifying felonies (2015 burglary and 2012

possession convictions from a single criminal episode). Indictments 1326578C and 1326579C do not meet the statutory requirements of RSA 159:3-a of three prior felony convictions and accordingly, must be dismissed.

II. Motion to Suppress

Folds moves to suppress the evidence obtained in violation of his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and Part I, Article 19 of the New Hampshire State Constitution, specifically a firearm obtained as a result of a search of his residence. (Def.'s Mot. Suppress at 1.) Folds argues that the search warrant did not provide probable cause for a search for firearms, and thus the warrant did not authorize its search and seizure. (Def.'s Mot. Suppress at I.) The State agrees that the warrant did not set forth probable cause for firearms, but the seizure falls within the plain view exception to the warrant requirement and, therefore, is admissible. (State's Obj. Mot. Suppress at I.)

As the New Hampshire Constitution provides at least as much protection as the Federal Constitution in this context, the court analyzes the constitutionality of the search under the State Constitution and cites federal opinions for guidance only when necessary. State v. Ball, 124 N.H. 226, 231–32 (1983). "Part I, Article 19 of the New Hampshire Constitution protects against unreasonable searches and seizures." State v. Saunders, 164 N.H. 342, 353 (2012). The State Constitution safeguards "all people, their papers, their possessions and their homes from unreasonable searches and seizures" because of the heightened expectation of privacy in one's dwelling. State v. Orde, 161 N.H. 260, 264 (2010) (quoting State v. Goss, 150 N.H. 46, 48 (2003)) (quotation omitted).

Under Part I, Article 19, a search warrant must be supported by probable cause. Orde, 161 N.H at 269; see State v. Zwicker, 151 N.H. 179, 185 (2004). "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." Letoile, 166 N.H. at 273 (quoting State v. Ward, 163 N.H. 156, 159 (2012)). To establish probable cause, the affidavit "need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched." Ward, 163 N.H. at 159 (quoting Orde, 161 N.H. at 269).

When reviewing the sufficiency of an affidavit submitted with a warrant application, the reviewing court asks: "[G]iven all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, was there a fair probability that contraband or evidence of a crime would be found in the particular place described in the warrant?" Ward, 163 N.H. at 159–160 (quoting State v. Silvestri, 136 N.H. 522, 525 (1992)). "'While an affidavit may establish probable cause without the observance of contraband at the location to be searched,' in order to meet constitutional muster, 'affidavits must establish a sufficient nexus between the illicit objects and the place to be searched.'" Letoile, 166 N.H. at 273 (quoting Ward, 163 N.H. at 160); see also State v. Dalling, 159 N.H. 183, 186 (2009). The reviewing court should, however, "assign great deference to the magistrate's determination of probable cause, and [should] not invalidate a warrant by interpreting the evidence submitted in a hypertechnical sense." State v. Zwicker, 151 N.H. 179, 185–86 (2004). Instead, the court "interpret[s] affidavits in support of search warrants realistically and with common sense." Id.

Warrantless seizures are *per se* unreasonable under Part I, Article 19 of the State Constitution "unless they fall within the narrow confines of a judicially crafted exception" and, if so, the State has the burden of proving that seizure falls under a recognized exception. State v. Brunelle, 145 N.H. 656, 659 (2000) (quotation omitted); State v. Davis, 149 N.H. 698, 700 (2003). The courts have recognized a plain view exception to the State Constitution's warrant requirement. See State v. Smith, 141 N.H. 271, 275 (1996); Davis, 149 N.H. at 700. For a seizure to be considered lawful under this exception, the State must prove by the preponderance of the evidence that: "(1) The initial intrusion which afforded the view must have been lawful; (2) the discovery of the evidence must have been inadvertent[11]; and (3) the incriminating nature of the evidence must have been immediately apparent." State v. Hammell, 147 N.H. 313, 317 (2001) (quotation omitted); Davis, 149 N.H. at 700–01. "The 'immediately apparent' requirement is met if, at the time of the seizure, the officer has probable cause to believe that the object seized is incriminating evidence." Davis, 149 N.H. at 701 (quoting State v. Murray, 134 N.H. 613, 615, 598 A.2d 206 (1991) (quotation omitted). "The probable cause required under the plain view exception is at least as great as that required to support a warrant, but need not be greater." State v. Bell, 164 N.H. 452, 455–56 (2012) (quotation omitted). Furthermore, the officer's "expertise and experience. . . are relevant to the probable cause determination. Officers are entitled to draw reasonable inferences from the facts available to them in light of their knowledge and prior experience." Id. (quotation omitted).

There is no question that a warrant to search Folds' residence, his person, and his vehicle for drugs was appropriate given the facts known to Scott at the time her affidavit was submitted

[11] The court in State v. Nieves, 160 N.H. 245, 250 (2010) held there is no longer an inadvertency requirement under the State Constitution for drugs, weapons, and other items "dangerous in themselves." The State, therefore, need not prove inadvertent discovery in this case.

with the application for a search warrant. However, in her recitation of the facts, and her request for items and places to be searched, she mentions nothing about a firearm, gun, or weapon. (Ex.1, Affidavit.) Both Scott and Blodgett testified they had no knowledge of Folds or Ferron owning or possessing a gun, and had received no information from the CI that he had ever seen or heard about a gun in his interactions with Folds. Additionally, Scott testified that the inclusion of the firearms in the search warrant was an oversight because they had no information leading up to that point about a firearm potentially being present in the residence. Therefore, there was no probable cause for firearms to be included in the search warrant, and the search and seizure of the firearm was not authorized by the warrant.

The State argues that, because the search of Folds' residence was lawful, the discovery of the firearm was inadvertent, and its incriminating nature was immediately apparent, Blodgett lawfully seized the firearm under the plain view exception to the warrant requirement. (State's Obj. Mot. Dismiss ¶ 18.) There is no dispute that the search of the residence for drugs was lawful. The inadvertency requirement does not apply here because a firearm is a weapon and, thus, the State need not prove this element. The State has not, however, met its burden on the "readily apparent" element. When Blodgett found the box in the closet and opened it, he noticed a tightly wrapped t-shirt. He stated in his testimony that he could not identify what was in the t-shirt at the time, and that nothing stood out to him as to indicate there was even something inside. The incriminating nature of the gun was not immediately apparent, and it was only after he manipulated the t-shirt and unfurled it that he was able to deduce there was a gun located inside. Further, no evidence of gun possession, including ammunition or gun packaging, had been located at any point throughout the search by Blodgett or other officers involved in the investigation, and there was no reason to think they would find a firearm. Therefore, the State

has not proven by the preponderance of the evidence that the required elements of the plain view exception have been met. Accordingly, the motion to suppress the firearm obtained as a result of an illegal search and seizure is granted.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is GRANTED. The defendant's motion to suppress is GRANTED.

So Ordered.

Date: November 7, 2017

Amy L. Ignatius
Presiding Justice

CONCLUSION .

For the foregoing reasons, the defendant's motion to dismiss is GRANTED. The defendant's motion to suppress is GRANTED.

So Ordered.

Date: November 7, 2017

Amy L. Ignatius
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **State v. Jonathan Folds**
Case Number: **212-2016-CR-00218**

Please be advised that on December 14, 2017 Judge Ignatius made the following order relative to:

State's Motion for Reconsideration (Suppress).

The Court finds no material issue of law or fact that the Court has misconstrued or overlooked. The State disagrees with the Court's interpretation of the law, in light of these facts but that is not a basis to reconsider the Nov 7, 2017 Order suppressing the firearm. Motion is DENIED.

December 15, 2017

Abigail Albee
Clerk of Court

(405)

C: John H. Harding, ESQ; Caroline L. Smith, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **State v. Jonathan Folds**
Case Number: **212-2016-CR-00218**

Please be advised that on December 10, 2017 Judge Ignatius made the following order relative to:

State's Motion for Reconsideration (Dismiss).

The Court finds no material issue of fact or law that the Court has construed or overlooked. The Motion to Reconsider the Order of Nov. 7, 2017 as to the provisions of RSA 159:3 is DENIED.

December 15, 2017

Abigail Albee
Clerk of Court

(405)

C: John H. Harding, ESQ; Caroline L. Smith, ESQ