THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0608

State of New Hampshire

v.

Stephen Girard

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(10 minutes, 3JX)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

1. Whether the trial court sustainably exercised its discretion in joining indecent exposure charges to computer offense and witness tampering charges, where the computer and witness tampering charges resulted from the charges of indecent exposure.

2. Whether the trial court sustainably exercised its discretion when it disclosed family counseling records following an *in camera* review.

STATEMENT OF THE CASE

A Rockingham County grand jury indicted the defendant, Stephen Girard, on two counts of indecent exposure, two counts of witness tampering, and two counts of computer related offenses: misuse of computer or computer network information. Tr.:4[1]; RSA 645:1 (2016); RSA 641:5 (2016); RSA 638:17 (2016).

The first two indictments both alleged indecent exposure towards S.N. when she was a minor under the age of 16. The first alleged that the defendant purposely masturbated himself in the presence of S.N. DOth.: A5; Tr.: 4. The second alleged that the defendant purposely transmitted an image of his exposed genitals to S.N. DOth.: A6; Tr.: 4.

The first witness tampering indictment alleged that the defendant purposely used a computer in retaliation for S.G. acting as a witness or informant. DOth.: A7. The second alleged that defendant attempted to cause S.G. to withhold testimony, documents, or information by instructing a third party to tell S.G. to keep her mouth shut or he would sue her for slander. DOth.: A8; Tr.: 5–6.

The computer related offense indictments alleged that the defendant knowingly altered computer or computer network data without

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[1] "Tr.:_" refers to the trial transcript;
"MCTr.:_" refers to the transcript of the Motion to Consolidate hearing held on December 11, 2017;
"DBr.:_" refers to the defendant's brief;
"DApp.:_" refers to the defendant's appendix containing the appealed decisions
"DOth.:_" refers to the defendant's appendix containing documents other than appealed decisions; and
"SApp.:_" refers to the State's appendix as attached to this brief.

authorization by changing S.G.'s Facebook and email passwords without her permission or authorization. DOth.: A3–A4; Tr.: 5.

After a one-day bench trial, the trial court (*Delker*, J.) found the defendant not guilty on the witness tampering charges but guilty on the indecent exposure and computer-related charges. DOth.: A3–A8; *see* Tr. 1, 77. On the guilty charges, the trial court sentenced the defendant to seven to fourteen years in the New Hampshire State Prison with a chance for three-and-a-half years to be suspended. DOth.: A40, A42. It also imposed a three-and-a-half to seven-year suspended sentence. DOth.: A40, A42.

STATEMENT OF FACTS

1. The Investigation

On September 11, 2016, S.G. reported to the Chester Police Department ("CPD") that the defendant had sexually assaulted her daughter, A.N. DOth.: A28. Later that day, S.G. reported to CPD that the defendant had sent her other daughter, S.N., a photo of his erect penis. DOth.: A28.

On September 12, 2016, S.G. met with Lieutenant Kennedy Richard. DOth.: A28. Lieutenant Richard then set up interviews with A.N. and S.N. at the Child Advocacy Center for September 16, 2016. Tr.: 28. On September 16, 2016, Lieutenant Richard interviewed the victims and scheduled a later meeting with the defendant. Tr.: 28. On September 22, 2016, Lieutenant Richard interviewed the defendant, who confessed to both counts of indecent exposure. Tr.: 28.

2. Conduct

The defendant's predatory conduct towards S.N. began in S.N.'s first year of high school, after S.G. told the defendant to "stop being cuddly with A.N." DOth.: A12. First, the defendant told S.N. "it was fine" when her towel kept slipping down after a shower. DOth.: A12. Between then and September 11, 2016, he handed S.N. and A.N. a phone with photographs of his penis on it, streamed pornography to a television in front of S.N., and showed S.N. "fetish videos." DOth.: A10–A12; SApp.: 32.

He singled out S.N. over this period. DOth.: A12. At one point, he isolated her at the side of a pond to discuss fetishes and sex. DOth.: A12 On

another occasion, he privately messaged her, "that he had friends who used their step-daughters for sex," but that he did not want to do so. DOth.: A10. S.N. had "previously informed" her mother about these acts. DOth.: A17.

The defendant used his control over S.N.'s technology to engage in sexual conversations and to expose himself to S.N. SApp.: 35; *see also* Tr.: 9. He controlled "time blocks" in which she could access the internet. Tr.: 9. When S.N.'s phone was "taken away," the defendant allowed her to use his phone to access the internet, but insisted that the phone "had to stay with him." Tr.: 11. He then played pornography in the room and began to masturbate in front of S.N. Tr.: 11–12. On another occasion, "he asked [her] if [she] could hear when [her] Mother and him had sex" while messaging S.N. about extending her internet access. Tr.: 15, 30. After S.N.'s response, the defendant replied, "that was good," and privately messaged S.N. a photo link containing his penis. Tr.: 15, 30.

This photograph matched one in a series of photographs provided to S.N. when the defendant gave both her and her sister a cell phone containing several photographs of his penis. DOth.: A10. During his police interview, the defendant only admitted to sending S.N. the photograph when Lieutenant Richard informed him that Richard had seen the link and the defendant's instruction to S.N. to open the image. Tr.: 29–30. Despite providing the image to S.N. twice, the defendant told Lieutenant Richard that, when he handed the phone to his stepdaughters, he believed the photographs had already been "wiped" off the phone. DOth.: A10–A11.

CPD interviewed the defendant about masturbating in front of S.N. Tr.: 28–31. In this interview, the defendant admitted to watching a pornographic video while S.N. was in the same room. Tr.: 31. S.N. asserted

that as she sat in the room, the defendant put on an "animated like porn video where the girl was highly moaning, and the boy was penetrating her." Tr.: 12. The defendant "play[ed] with his penis while moving it up and down with his hand." Tr.: 13. The defendant was "moaning." Tr.: 13. He then stood up, stated that he was going to ejaculate, moaned, and then sat back down. DOth.: A10–A11. After this event, the defendant messaged S.N. that he thought about "keeping [his penis] out, because she was the oldest" and asked "her to confirm that she would have been okay if he kept masturbating himself while she was there." Tr.: 31.

S.G. provided Lieutenant Richard with a flash drive containing texts and the penis photograph the defendant had sent to S.N. Tr.: 25–26. She also received a text message that the defendant had sent his son, C.G., directing C.G. to apologize to S.G. for the defendant's actions. DOth.: A9–A10. The message stated, "[T]ell her [S.G.] that I am sorry for everything that I have done, the lies that were said, and for the issues that occurred with the girls. I love them all and I deeply regret hurting everyone in our family and for destroying our marriage." DOth.: A9–A10.

3. Facebook Threats and Unauthorized Access

On September 29, 2016, the defendant used Facebook to message K.C., a friend and recent cohabitant of S.G.'s. Tr.: 52. He threatened S.G. through K.C., messaging, "You better tell [S.G.] to knock it off. [S.N.]'s stuff is a lie. . . Tell [S.G.] to keep her mouth shut. . . . If [S.G.] doesn't knock it off I'll sue her for slander and it won't be good for her or your entire family." Tr.: 52. S.G. then received a "frantic" call from K.C.

because the defendant's threat violated S.G.'s protective order against the defendant. Tr.: 35, 53–54; DApp.: AD5.

During her subsequent phone call with CPD about the threat, S.G. received cell phone messages that she "had been logged out of Facebook." Tr.: 36. After the call, S.G. could not access her Facebook account or primary email account, but she successfully accessed her secondary email account. Tr.: 36–38. This account's emails alerted her that she had been logged out of her primary email, that her primary email password had been changed, that her backup email and phone number had been taken off her primary email account, and that somebody around Salisbury, Massachusetts had logged into her Facebook account. Tr.: 38. The defendant was living in Salisbury, Massachusetts, and had access to S.G.'s email and Facebook passwords. Tr.: 39. When S.G. logged back into her Facebook account, she noticed that someone had deleted her private messages. Tr.: 61.

4. Motion to Consolidate and Motion in Limine

On October 25, 2017, the State filed a motion to consolidate the above charges with the defendant's pending sexual assault case against A.N., his other stepdaughter. SApp. 31. The trial court denied this motion on December 11, 2017.[2]

On February 22, 2018, the State moved to admit the defendant's prior conduct towards S.N., the defendant's admission of fault to his son, and both stepdaughters' prior disclosures of sexual abuse. *See* DOth.: A9.

[2] The charges related to A.N.'s allegations are subject to a separate appeal currently pending before this Court. *See State v. Girard*, No. 2018-0586.

The Court held a hearing on April 11, 2018. *See* MCTr.: 1. On May 15, 2018, the trial court excluded evidence of the defendant's acts toward A.N. and his prior conduct towards S.N. DOth. A9, A18–A19. It ruled that, absent argument that the acts towards S.N. were "a gradual escalation" or "interdependent," the evidence merely showed propensity of his sexual interest towards S.N. DOth.: A17.

The trial court also ruled that evidence of S.N.'s prior disclosures of recurring sexual abuse were admissible only if the defendant alleged that S.N. fabricated her disclosure or otherwise promoted an "incomplete picture of unwarranted bias." DOth.: A19. It excluded the defendant's apology text message. DOth: A20. Although the court was persuaded that the message showed consciousness of guilt, it concluded that introducing the message would let the jury know about A.N.'s sexual assault. DOth.: A20.

The defendant filed a subsequent motion to sever the S.N.-related charges into three trials on May 25, 2018. DOth.: A25–A26. The trial court analyze the relevant factors and denied the defendant's motion. DApp.: AD12. The trial court reasoned that "significant overlap" of mutually admissible facts would cause "evidentiary chaos" if it severed the charges. DApp.: AD12.

With respect to prejudice, it found that "the facts are straightforward and the alleged acts are discrete enough that the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense." DApp.: AD12 (citation omitted). The court also declared that "the purpose of joinder outweighs the marginal prejudice to the defendant in this instance." DApp.: A13.

SUMMARY OF THE ARGUMENT

1. The trial court sustainably exercised its discretion when it joined six related charges for trial. It sustainably applied the *State v. Brown*, 159 N.H. 544 (2009), factors when it determined that a logical and factual connection existed between the charges. The defendant did not suffer undue prejudice because the factfinder could intelligently apply the law to each offense. Even if the trial court unsustainably exercised its discretion when it joined the charges, such joinder was harmless error because admissible evidence for each charge would ensure the same result.

2. Because the State does not know the contents of the materials submitted for in camera review, it does not object to this Court's review of said materials to determine whether the trial court sustainably exercised its discretion.

ARGUMENT

1. A SUFFICIENT LOGICAL AND FACTUAL CONNECTION EXISTED BETWEEN THE CHARGED OFFENSES SUCH THAT THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT JOINED THEM.

New Hampshire Rule of Criminal Procedure 20 governs the joinder of criminal offenses and distinguishes between charges that are related and unrelated. Two or more offenses are related if they "[a]re alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct." *N.H. R. Crim. P.* 20(a)(1); *see also State v. Brown*, 159 N.H. 544, 548–49 (2009).

The joinder doctrine recognizes that the government should not need to prove "essentially the same set of facts" more than once and that defendants should not need to defend "connected" charges more than once. *Brown*, 159 N.H. at 552.

Joinder helps avoid the negative effects of multiple trials and promotes efficiency and economy for both the defendant and the government. *See id*. at 552–54. It reduces the time to dispose of offenses, benefiting both parties. *Id*. at 522. Joinder also streamlines otherwise duplicative evidence in multiple trials, which reduces the burdens placed upon victims and witnesses. *Id*. at 552. It reduces extended harassment, trauma, expense, and publicity from multiple trials and decreases prison time by increasing the possibility of concurrent sentences and preventing enhanced sentencing statutes. *Id*. at 552.

For sexual crime victims, joinder particularly ameliorates the "trauma inherent in subjecting a victim of multiple sexual assaults to multiple trials." *State v. Abram*, 153 N.H. 619, 627 (2006). In this case, joinder therefore helps S.N., a minor victim of multiple indecent exposures.

Five factors "serve as guidelines that must be sensibly applied in accord with the purposes of joinder" to determine whether cases should be joined. *Brown*, 159 N.H. at 552. To join cases, a trial court must consider:

> (1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant's mode of operation; (4) the duplication of law regarding the crimes charges; (5) the duplication of witnesses, testimony and other evidence related to the offenses.

Id. at 551–52. "No single factor is dispositive on the question of relatedness." *Id*. at 554. When a party moves to join related charges, if the trial court concludes that they are logically and factually related, then the trial court must join the charges unless it determines that "joinder is not in the best interests of justice." *N.H. R. Crim. P.* 20(a)(2).

"[T]he decision to join multiple charges [is] a discretionary matter left to the trial court." *Brown*, 159 N.H. at 550. This court "will uphold the trial court's ruling unless it concludes that the trial court's decision constitutes an unstainable exercise of discretion." *Id*. "To show the trial court's decision is unsustainable, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of [the defendant's] case." *Id*.

A. The trial court sustainably exercised its discretion when it applied the *Brown* factors to each charge and decided that a logical and factual connection existed between the charged offenses.

Temporal relationship is a component of the first *Brown* factor relevant to logical and factual connection. *Id*. at 551. This Court has routinely held that conduct occurring over multiple years can retain a sufficient temporal connection to support joining the offenses into a single trial. *See State v. Allen*, 128 N.H. 390, 397 (1986) (finding sufficient temporal connection between two acts occurring three-and-a-half years apart); *see State v. Dukette*, 145 N.H. 226, 230–231 (2000) (discussing sufficient logical connection and temporal relevancy between acts committed one and two years prior to the charged offense); *see also State v. Magoon*, No. 2018-0280, 2019 WL 2184829, at *4 (N.H. May 21, 2019) (unpublished) (holding joinder sustainable where charges span four years, five of six charges occurred over two years and offenses occurred at the same location and a similar time of day).

The defendant's indictments charged acts occurring within, at most, nine months, and, at minimum, eighteen days. DOth.: A3–A8. The defendant's predatory actions towards S.N. occurred within roughly one year, from during S.N.'s first year of high school through September 11 of her second year. DOth.: A9, A12. Less than one week after the defendant's confessions to Lieutenant Richard and less than two weeks after S.G. first contacted Lieutenant Richard, the defendant messaged his threat about the pending investigation to K.C., S.G.'s close friend and cousin. Tr.: 51. The defendant's intrusion into S.G.'s accounts occurred the same day K.C.

received this threat. Tr.: 35–36. S.N.'s indecent exposure allegations substantiate the witness tampering allegations and provide motive for the computer related offenses. *See* DApp.: AD8–AD10; *see* DOth.: A23.

The first *Brown* factor also includes spatial relationship. *Brown*, 159 N.H. at 551. As to this spatial relationship, all charges in the indictments affected the same household and all crimes involved acts committed online.

"Commonality of the victim(s) and/or participant(s)" is the second relevant factor to determine logical connection. *Brown*, 159 N.H. at 551. As to this commonality, one participant engaged in all criminal activity over the same span. No accomplices participated or influenced the defendant's actions. S.G. suffered from all counts, being the target of threats in the witness tampering charges, the subject of unauthorized access in the computer related offenses: misuse of computer or computer network information charges, and the victim of destroyed relationships due to her husband's sexual predation of her daughter. The defendant's threats and computer offenses, communicated to S.G., targeted the pending investigation into his indecent exposures towards S.N.

As for the defendant's mode of operation, the third *Brown* factor, all crimes involved the defendant's control over the family's technology, including internet accounts and smartphones. *See Brown*, 159 N.H. at 552; *see* SApp.: 33. The defendant used his superior control over the family's technology to isolate S.N., entice S.N. to engage in sexual conversations, log into S.G.'s online accounts, and retaliate against S.G. *See* SApp.: 33.

Differentiation in laws, the fourth *Brown* factor, is not dispositive. *See Brown*, 159 N.H. at 552. Additionally, even if charged laws differ, the court can sustainably join charges when overlapping evidence and

witnesses would cause duplicative litigation in consecutive trials. *See State v. Bruno*, No. 2017-0414, 2018 WL 7080488, at *2 (N.H. Dec. 26, 2018) (unpublished). In this case, there were six charges, but only three different statutes were involved. Additionally, overlapping allegations and admissible evidence would require duplicative litigation. *See* DApp.: AD7–AD10 (detailing overlap of factual allegations).

As for duplication of witnesses, testimony, and other evidence, the last *Brown* factor, testimony of the witness tampering and computer charges overlapped. As family members close to all counts, each affected victim would be able to offer overlapping testimony concerning the crimes charged.[3] S.G. testified to the witness tampering and computer related offenses and provided admitted evidence of the defendant's sexual conversations with her daughter on a flash drive. *See* Tr.: 34–49.

The same police officer, Lieutenant Kennedy Richard, questioned S.G., S.N., and the defendant. Tr.: 24–28. Lieutenant Richard provided both testimony about hearing S.G.'s allegations, admissible for the defendant's witness tampering charges, and testimony of S.N. and the defendant's interviews, containing the indecent exposure confession. *See* Tr.: 24–35. He testified to S.N.'s interview as well as information he received from S.G., including the photograph of the defendant's penis and messages between S.N. and the defendant. *See* Tr.: 25–34; *see Brown*, 159 N.H. at 558 (reasoning that "the same police officers" can be grounds for joinder).

If two charges are causally related, a trial court may more justifiably join them. *See State v. Roberts*, 465 S.W.3d 899 (Mo. 2015) (justifying

[3] A familial relationship between mutual witnesses with overlapping evidence does not preclude their testimony in the same trial.

joinder by causal relations between charges); *see also Bruno*, 2018 WL 7080488, at *2–3 (unpublished) (holding joinder between crimes and charges of "conceal[ing] involvement in" the crimes sustainable). In this case, the computer fraud and witness tampering charges "flow from the charges concerning S.N." DOth.: A23. The defendant's threats to S.G. would be admissible in an indecent exposure trial due, in part, to this but-for connection. DApp.: AD9. Therefore, causal connection weighs in favor of joinder in this case.

"[C]lose relationship" is "largely determined" "with respect to both the underlying charged conduct *and* the evidence to be used to prove the charges." *See Brown*, 159 N.H. at 551 (emphasis added). Though mutual admissibility in hypothetical separate trials is not a threshold requirement for joinder, admissibility supports consolidation. *Brown*, 159 N.H. at 558; *State v. Bergmann*, 135 N.H. 97, 102–03 (1991); DOth.: A23. To the extent that the defendant implies that three interconnected victims with overlapping evidence merely "appear in [a generated] list," these people's lives and observations are deeply connected. *Compare* DBr.: 16 (suggesting that the trial court "simply . . . generate[d] a list" of K.C., S.N., and S.G.), *with* DApp.: AD8 (describing "significant overlap" of the three individuals' potential testimony), *and Brown*, 159 N.H. at 554 (referencing "common witnesses" and "primarily the same police officers" as justification for joining four counts). Therefore, the trial court sustainably found connection between the charges, and this Court must affirm.

B. The trial court sustainably found that joinder was in the best interests of justice because the evidence would neither emotionally charge a factfinder nor cause undue speculation.

The trial court's conclusion that the charges were logically and factually connected required it to consider the prejudice joinder would have on the defendant's case. *See Brown*, 159 N.H. at 550; DApp.: AD10. Upon motion by either party, the trial court must join related offenses for trial unless it determines that "joinder is not in the best interests of justice." *Brown*, 159 N.H. at 555; *N.H. R. Crim. P*. 20(a)(2). Joinder is not "in the best interests of justice" if the "trier of fact" cannot "distinguish the evidence and apply the law intelligently to each offense." *Brown*, 159 N.H. at 555 (quoting *State v. Ramos*, 149 N.H. 118, 128 (2003)). The focus of the court's inquiry is upon whether joinder jeopardized the defendant's right to a fair trial. *See State v. Winders*, 127 N.H. 471, 473 (1985).

On appeal, demonstrating unfair prejudice presents a high bar. "The trial court is in the best position to gauge the prejudicial impact of particular testimony, and what steps, if any, are necessary to remedy that prejudice." *See, e.g.*, *State v. Sonthikoummane*, 145 N.H. 316, 324 (2000) (quotation and brackets omitted); *see also State v. Addison*, 160 N.H. 493, 501–02 (2010) (citing *Sonthikoummane*, 145 N.H. at 324) (explaining that the trial court has "broad latitude" when "ruling on the admissibility of potentially unfairly prejudicial evidence"). Courts therefore "accord considerable deference to the trial court's determination in balancing prejudice and probative worth of evidence under Rule 404(b)." *State v. Pepin*, 156 N.H. 269, 278 (2007) (quotation omitted). To succeed on

appeal, the defendant must demonstrate that the trial court's ruling was "clearly untenable or unreasonable to the prejudice of his case." *Brown*, 159 N.H. at 555 (quoting *Ramos*, 149 N.H. at 120) (describing joinder prejudice's unsustainable exercise of discretion standard).

"Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." *See, e.g.*, *State v. Cassavaugh*, 161 N.H. 90, 98 (2010). "[T]he prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged." *State v. Kuchman*, 168 N.H. 779, 790 (2016). Among the factors to weigh evidence are: "(1) whether the evidence would have a great emotional impact upon a jury; (2) its potential for appealing to a juror's sense of resentment or outrage; and (3) the extent to which the issue upon which it is offered is established by other evidence, stipulation or inference." *Addison*, 160 N.H. at 501–02 (quoting *State v. Howe*, 159 N.H. 366, 378 (2009)).

Acquittals support an inference that the factfinder weighed each charge's evidence separately. *See Ramos*, 149 N.H. at 121 ("[T]he jury demonstrated that it considered each charge separately by acquitting the defendant on two of the charges."); *see also United States v. Stackpole*, 811 F.2d 689, 694 (1st Cir. 1987) (assertion that the factfinder was confused by joinder was "contradicted by the verdict," which included acquittals on two counts). Had the factfinder been emotionally charged or outraged, the factfinder would likely not have spent significant time analyzing each

charge nor entering "not guilty" findings on two of the six charges. *See* Tr.: 69–76.

A trial court may justifiably admit evidence proving an element of the offense or a genuine question of fact. "Unfair prejudice is not, of course, a mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial." *See, e.g.*, *State v. Colbath*, 171 N.H. 626, 636 (2019) (quotation omitted). The court may sustainably admit this evidence through joinder. *See Bruno*, 2018 WL 7080488, at *3 (unpublished) ("Joining the charges was in the best interests of justice because much of the evidence from any one trial would be necessary and admissible in the remaining trials to prove such things as motive and identity.").

Here, the State required joinder to meet its burden of proving a "knowing" mental state for the computer related offenses and a "purposeful" mental state for the indecent exposures and the witness tampering. DOth.: A3–A8. The trial court also determined that the facts of this case are strong enough that a jury would not convict based on weight of accusations or accumulated effect of evidence. DApp.: AD11. [4] This court must therefore affirm.

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[4] To the extent that the defendant claims that *People v. Massie*, 428 P.2d 869, 872 (Cal. 1967) is "analogous," *Massie*'s decision relies on an irrelevant legal rule. *See* DBr.: 20 (claiming *Massie* is "analogous"); *compare Massie*, 428 P.2d, at 872 (relying on a rule, propounded in *People v. Aranda*, 407 P.2d 265 (Cal. 1965), narrowly barring defendants' extrajudicial testimony against joint codefendants), *with* DOth.: A3–A8 (indicting one individual with six charges). The defendant's signed waiver acknowledges that he "fully discussed [his] rights to a jury trial with [his] legal counsel," that he knows the court has a "substantial amount of information that would not be heard by a jury," and that he "feel[s] it is best [to] proceed with a jury waived trial." DOth.: A35.

C. Even if the trial court unsustainably exercised its discretion, joinder was harmless error because overwhelming evidence proved each count.

The State introduced overwhelming evidence on each convicted count to support the defendant's convictions beyond a reasonable doubt. "Misjoinder of criminal offenses is subject to harmless-error analysis." *State v. Mason*, 150 N.H. 53, 62 (2003). "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id*. (citing *State v. Smith*, 141 N.H. 271, 278 (1996)).

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *State v. Dupont*, 149 N.H. 70, 74 (2003) (quotation omitted). The doctrine "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id*. (quotation omitted). "[A]n error involving misjoinder affects substantial rights and requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." *Mason*, 150 N.H. at 60 (describing, prior to adopting, *United States v. Lane*, 474 U.S. 438, 449 (1986)).

The court heard detailed testimony from S.N. about both counts charging indecent exposure. Tr.: 7–15. It saw texts between S.N. and the defendant in which the defendant sent S.N. a photograph of his penis,

talked about masturbating in front of S.N., and told S.N. to delete all of the messages detailing the events. Tr.: 15–17. Lieutenant Richard testified that the defendant admitted that he sent S.N. a photograph of his penis and watched pornography while S.N. was in the room. Tr.: 30–31. In addition to S.G. and K.C.'s testimony, the defendant threatened to prevent investigation into his acts via text message. *See* Tr.: 34–46; *see* Tr.: 51–54. The evidence for the indecent exposure charges was overwhelming. DOth.: A5–A6.

With respect to the charges that alleged that the defendant misused a computer device or network, the evidence was similarly overwhelming. In addition to indecent exposure facts, which gave the defendant motive to tamper S.G.'s accounts, the defendant lived in Salisbury, Massachusetts, and evidence showed that someone in Salisbury logged into her account. *See* Tr.: 34–54. After the unauthorized access, the defendant, who had been blocked, was unblocked and re-friended. Tr.: 41. This evidence overwhelmingly proves that the defendant logged into S.G.'s accounts and changed her data.

Joining the charges did not affect the verdict, as the admissible evidence for each charge would ensure convictions on each convicted charge at the trial court. *Compare* DOth.: A23 ("[T]hese charges would certainly be admissible in some form in the other's trial."), *with Mason*, 150 N.H. at 62 (finding error where a defendant offered inconsistent testimony and where the jury considered inadmissible evidence).

2. THIS COURT MAY REVIEW THE DOCUMENTS REVIEWED BY THE TRIAL COURT.

Prior to trial, the defendant moved the trial court to order the production of confidential materials for *in camera* review. DApp.: AD14–AD22. The trial court granted the motions, reviewed the confidential materials, and ordered that some of the materials must be disclosed. DApp.: AD14–AD22. The defendant is concerned that the trial court may have erred by not disclosing more material, and requests that this Court conduct a second *in camera* review to determine whether the trial court improperly withheld any documents. DBr: 22–25.

This Court has held that "the trial court must permit defendants to use privileged material if such material is essential and reasonably necessary to permit counsel to adequately [prepare his defense]." *State v. Gagne*, 136 N.H. 101, 104 (1992). "[This Court] review[s] a trial court's decisions on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard." *State v. Guay*, 162 N.H. 375, 385 (2011). "To meet this standard, a defendant must demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of his case." *Id*. Because the State does not know the substance of the information contained in the undisclosed materials, it assents to the defendant's request that this Court conduct an independent *in camera* review.

Yet, this Court may reverse if and only if it discovers information that should have been disclosed to the defendant *and* if it concludes that the failure to disclose was unreasonable or untenable to the prejudice of the defendant's case. *See Guay*, 162 N.H. at 385. It is not enough, as the

defendant asserts, that the evidence be "essential and reasonably necessary" alone. DBr: 22. The trial court sustainably exercises its discretion when it refuses to release information that would address facts that are not in dispute or that contain information the defendant can gather from sources to which the defendant has access, for example. *See, e.g.*, *Gagne*, 136 N.H. at 104–05 (observing that where facts are not in dispute, the element that the confidential information was essential to prove those facts cannot be met).

CONCLUSION

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

The State requests a ten-minute oral argument before a 3JX panel.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

July 30, 2019

/s/ *Sean R. Locke*
Sean R. Locke
N.H. Bar ID No. 265290
Assistant Attorney General
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33 Capitol Street
Concord, NH 03301-6397
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CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,280 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

July 30, 2019 /s/*Sean R. Locke*
Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

July 30, 2019 /s/*Sean R. Locke*
Sean R. Locke

APPENDIX TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT
218-2017-CR-00117

STATE OF NEW HAMPSHIRE

v.

STEPHEN GIRARD

STATE'S MOTION TO CONSOLIDATE

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, and states as follows:

1. The Defendant is charged with two counts of Misuse of a Computer or Computer Network, two counts of Indecent Exposure, and two counts of Witness Tampering. On docket 218-2017-CR-00149 he is charged with two counts of Aggravated Felonious Sexual Assault. Trial on docket 17-CR-00149 was scheduled for the week of October 30, 2017 but was continued at the State's request. Trial in this matter is currently scheduled for the week of January 21, 2018.

FACTS[1]

2. The charges in both cases involve the Defendant's step-children, A.N. and S.N. Both cases originated on September 11, 2016 when the children's mother, Shaina Girard, contacted the Chester Police Department to report that A.N. disclosed that the Defendant had sexually assaulted her. Later that same day, Ms. Girard contacted Chester Police again and reported that S.N. informed her that the Defendant had sent her a photo of his erect penis.

3. Lieutenant Kennedy Richard met with Ms. Girard the following day, and saw the picture that the Defendant had sent to S.N., as well as a text message that he had sent his son directing him to apologize for his actions. The message stated "tell her that I am sorry for everything that I have done, the lies that were said, and for the issues that occurred with the girls. I love them all and I deeply regret hurting everyone in our family and for destroying our marriage."[2]

4. Lieutenant Richard determined through his investigation that the sexual assault reported by A.N. had occurred in Hampstead, and not Chester. Lieutenant Richard set up interviews for A.N. and S.N. at the Child Advocacy Center on September 16, 2016, and Detective Mark Conway from the Hampstead Police Department also attended those interviews.

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[1] All factual assertions contained herein are derived from the reports and investigation conducted by the Chester Police Department and Hampstead Police Department, previously provided to the Defendant through counsel as discovery.

[2] Discovery p. 14.

5. A.N. disclosed during her interview that the Defendant had touched her vaginal area when she was in fourth grade, that he had done so numerous times, and that the touching stopped when he married her mother. She disclosed that one incident occurred when they were in the Defendant's bedroom because she wanted to watch Netflix, and that she remembered that he touched her while the computer was loading. She stated that she did not know that she could tell him to stop. She explained that he would touch her with two fingers and make small circles with his fingers, and she demonstrated this motion. She stated that he told her that he thought she was enjoying it and that if she did not like it she could tell him to stop. She stated that she did not tell him to stop because she thought it was a normal thing to do. A.N. further disclosed that he had sent her a picture of his penis when she was in fifth grade, but had told her not to look at it because he had meant to send it to her mother. She stated that while she was in fifth grade, he was playing a game on his computer wearing boxer shorts and his "thing" slipped out. A.N. stated that the Defendant asked her whether she had seen his penis about a week later, and when she stated that she had, he stated that she was not supposed to be seeing that at her age. She also stated that after she told her mother about the sexual assaults, the Defendant stated that he might have done it, but that he did not remember doing it.

6. S.N. disclosed during her interview that the Defendant began to communicate with her through an app called "Hangouts". She stated that he had been texting and calling her more frequently, and had sent her some pictures of his penis. She stated that she knew the picture was of the Defendant because she recognized the shoes that he was wearing in the photo, as well as the bathroom floor, which matched the floor in his former apartment. She further stated that the Defendant told her not to show the picture to anyone else. When asked to clarify about having said that she received multiple pictures, she stated that she and A.N. were given the Defendant's old cellular phones to use to watch Netflix, and on one occasion, they were looking through pictures on a phone when they came across numerous pictures of his penis. S.N. stated that A.N. had also seen these pictures, and that the Defendant had apologized and said that he had meant to delete the images before they used his phone. S.N. stated that these same pictures were later sent to her while she was communicating with her boyfriend on Skype shortly after the family had moved from Hampstead to Chester.

7. S.N. further disclosed that the Defendant had manipulated her. She stated that he once sent her a text message stating that he had friends who used their step-daughters for sex, but that he did not want to do that. She also stated that the Defendant had masturbated in front of her after giving her his phone so she could communicate with a friend. She stated that the phone was being charged in the computer room, and that the Defendant began watching a Hentai video on his computer, pulled out his penis, and began masturbating, telling her that she could stay and watch if she wanted to. She stated that she sat in a folding chair and was using the phone, and he continued to masturbate, telling her that he was going to come and then standing up and moaning. She stated that she did not see him ejaculate, but that after he stood up and moaned, he put his penis back in his pants, sat down, and continued to play a computer game. She also discussed an incident where the Defendant had put a pornographic video on the television in the living room while she was watching television there.

8. On September 22, 2016 Lieutenant Richard interviewed the Defendant at the Chester Police Station. He admitted to sending S.N. pictures of his penis, but denied wanting a sexual relationship with her. He also admitted to giving A.N. and S.N. his phone to use while it

contained pictures of his penis. He told Lieutenant Richard that he had thought he had wiped the phone before giving it to the girls to use, and believed that they had seen three images on the phone. He also admitted to putting a pornographic video on television while S.N. was watching the television, but stated that he did not realize that the video he was watching upstairs on the computer would also be on the living room television. Lieutenant Richard confronted him with a text message conversation he had had with S.N. about the video, where he corrected her on the video depicting a man and a woman rather than two women engaging in sexual conduct. The Defendant then admitted that he had purposely shown S.N. the video because he was stupid and felt that she might be sexually curious. Lieutenant Richard confronted the Defendant about S.N.'s allegation that he had masturbated in front of her, and he stated that there was one time when he was masturbating, and S.N. walked in but immediately walked out in disgust. When confronted with a text message conversation he had had with S.N. about the incident, the Defendant told Lieutenant Richard that he could understand why Lieutenant Richard would believe he had continued to masturbate in front of S.N., but that he had not continued to masturbate in front of S.N.

9. Lieutenant Richard then spoke with the Defendant about A.N., and the Defendant admitted that on one occasion he had rubbed her belly when she had a stomach ache, and that his hand may have ventured lower, but that he had not touched her sexually. Lieutenant Richard told the Defendant that A.N. had disclosed that he would put his hand under her shorts and would rub her vaginal area in small circles. The Defendant responded by stating that if this had happened, he was totally oblivious to it, and did not remember putting his hand down A.N.'s pants at any time.

10. On September 23, 2016 Lieutenant Richard spoke with T.N., who had told her mother that she had witnessed the Defendant put his hand on A.N.'s crotch numerous times while they were living in Hampstead. She stated that A.N. would have temper tantrums and the Defendant would follow her up to her room and calm her down. T.N. told Lieutenant Richard that she was concerned about her sister, so she would make up excuses to go to her room to check on her, and saw the Defendant's hand on A.N.'s crotch. She stated that she did not see his hand under her clothing on any of these occasions.

11. On September 30, 2016, the children's mother, Shaina Girard, reported to the Chester Police Department that she believed that the Defendant had accessed her e-mail and Facebook accounts and changed her passwords. She stated that the previous day she had received a frantic phone call from her cousin, Katie Crowley, who told her that the Defendant had messaged her on Facebook. According to Ms. Crowley, the Defendant told her to tell Ms. Girard that she needed to keep her mouth shut or else he would sue Ms. Girard for slander. Ms. Girard reported that shortly after she had received the phone call from her cousin, she received a message from Facebook that she was logged out, and when she attempted to log back in, she received an error message that her password was incorrect. She then received a message from her e-mail service that her passwords had been changed, and that someone had logged into her Facebook account from Salisbury, Massachusetts. She explained to the officer that the Defendant had been staying with family in Salisbury since the incidents with her children were reported to the police.

12. On May 3, 2017, the Defendant was convicted of Violation of a Protective Order for sending the message to Ms. Crowley directing her to tell Ms. Girard to keep her mouth shut.

ARGUMENT

13. All of the charges in this matter should be consolidated with docket 218-2017-CR-00149 for trial because they are related as defined by applicable law. The Defendant's conduct towards both his step-daughters is probative on the issue of intent, particularly his sending or exposing them to pictures of his penis. The Defendant's statement to S.N. that some of his friends engaged in sexual relationships with their step-daughters is probative on the issue of whether he touched A.N. for purposes of sexual gratification. His questioning A.N. about whether she saw his penis and his discussions with S.N. about the pornographic video he showed her and her reaction to seeing him masturbate further prove that his conduct was not accidental in either case. Finally, his telling Shaina Girard to keep her mouth shut through her cousin is probative on the witness tampering charges, and demonstrates that this comment was made in retaliation for Ms. Girard reporting the incidents to police.

14. According to New Hampshire Rule of Criminal Procedure 20,

> two or more offenses are related if they:
>
> (A) Are alleged to have occurred during a single criminal episode; or
>
> (B) Constitute parts of a common scheme or plan; or
>
> (C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.
>
> N.H. R. Crim. Pro. 20(a)(1) (2017).

15. The facts and circumstances of both cases are related under section C of Rule 20. Although the crimes charged occurred at different times, the charges are logically and factually connected in ways other than showing that the Defendant has a propensity to commit crimes.

16. First, the victims have relevant testimony in each other's cases. The Defendant did not deny touching A.N., but rather stated that if he had touched A.N., he had done so unintentionally and was oblivious to his conduct. The fact that he sent A.N. a picture of his penis, questioned her about seeing his penis on a separate occasion, and allowed her and S.N. to have access to a cell phone containing images of his penis are all relevant to the issue of intent as it relates to the Aggravated Felonious Sexual Assault charges. The fact that he questioned S.N. in a similar manner regarding her seeing him masturbate, sent S.N. a picture of his penis, made a comment about having friends who are in sexual relationships with their step-daughters, and intentionally exposed her to pornography demonstrates that he was touching A.N. for the purpose of sexual arousal or gratification, rather than to calm her down or soothe her upset stomach.

17. With respect to the charges involving S.N., the fact that the Defendant sent A.N. a picture of his penis, exposed himself to her, and allowed her and S.N. to have access to a phone containing nude pictures of himself suggests that he intentionally sent nude images to S.N. He claimed to have accidentally put a pornographic video on the television while S.N. was watching it, but his behavior towards A.N. suggests that this conduct was not accidental. He told S.N. that

he had friends who were in sexual relationships with their step-daughters, but denied that he wanted that type of relationship with her, knowing that he had engaged in sexual contact with her sister. He also claimed to have accidentally masturbated in front of S.N. and stopped when she entered the room, but his behavior towards A.N. contradicts his version of events and supports S.N.'s disclosure that he continued to masturbate in front of her.

18. Another common thread in both children's disclosures is the Defendant's granting them use of technological devices while committing the crimes charged. A.N. stated that he touched her while allowing her to watch Netflix. S.N. stated that he put pornography on the television, had a pornographic video playing on his computer while she was in the room using his phone, and allowed both children to use a phone that had pictures of his penis on it because they used the phone to watch Netflix. He essentially used access to technology to entice them to engage in sexual conduct.

19. In State v. Brown, the New Hampshire Supreme Court affirmed the trial court's joinder of four drug sales, finding that although the transactions occurred on different dates, they were factually and logically related in a manner other than showing the defendant's propensity to engage in criminal conduct. State v. Brown, 159 N.H. 544, 549 (2009). The trial court relied on the fact that all four transactions involved the same controlled drug, the same amount of the drug, and were organized by the same police officers. Id. The trial court also noted that while joining the transactions did demonstrate propensity, joinder was not unduly prejudicial because the fact that the defendant had engaged in selling the same quantity of drugs four times within a short timeframe was highly probative of intent. Id.

20. The Brown Court identified five factors that ought to be considered when determining whether joinder is appropriate:

> (1) the temporal and spatial relationship among the underlying charged acts;
> (2) the commonality of the victim(s) and/or participant(s) for the charged offenses;
> (3) the similarity in the defendant's mode of operation;
> (4) the duplication of law regarding the crimes charged; and
> (5) the duplication of witnesses, testimony and other evidence related to the offenses.

Brown, 159 N.H. at 551 – 552, (citing United States v. Edgar, 82 F. 3d 499, 503 (1st Cir. 1996); State v. Lewis, 488 N.W.2d 518, 525 (1992); State v. Hall, 307 N.W.2d 289, 295 (1981)).

21. The charges in this matter span from January 1, 2016 through September 29, 2016, and the charges in 218-2017-CR-00149 occurred between February 1, 2013 and April 30, 2014. Although there is no temporal proximity between the charged offenses, that is merely one factor for the Court to consider in determining whether the cases should be consolidated. The fact that he engaged in similar conduct in terms of exposing himself and sending both victims pictures of his penis suggests that he engaged in this conduct over a prolonged period.

22. The second factor, commonality of the victims and participants for the offenses, is present in this case. As noted above, both victims have information that is relevant to each other's cases. The Defendant's conduct with A.N. is probative on the question of intent and absence of mistake or accident with respect to S.N., and vice versa. The girls' mother has relevant information to offer in both cases, and the Defendant's apology he sent through text message for his son to deliver to Ms. Girard relates to all of the charged conduct. The Defendant's tampering with Ms. Girard's e-mail and social media accounts and conviction for violating the protective order put in place by contacting her are relevant to determining guilt in both cases.

23. Similarity in the Defendant's mode of operation is also present throughout these cases. He claimed that any touching of A.N.'s genitals was the product of mistake or accident, similar to his masturbation in front of S.N. and exposing her to pornography. The fact that he told A.N. that he thought she enjoyed the assaults is echoed in his statements to S.N. about whether she was fine with him masturbating. He claimed that he exposed himself to both girls on two separate occasions, and exposed them to naked pictures of his penis on multiple occasions, was a result of a mistake or accident. The Defendant repeatedly claimed in his interview with Lieutenant Richard that his conduct was accidental at best, and stupid at worst. Claiming that he accidentally assaulted and exposed both victims to sexual conduct was the Defendant's mode of operation throughout all of the crimes charged.

24. Finally, there would be substantial duplication of witnesses, testimony, and other evidence if these matters remained severed. Lieutenant Kennedy Richard, Shaina Girard, A.N., and S.N. would all be witnesses called by the State at both trials. The Defendant's interview with Lieutenant Richard, the text message to his son directing him to apologize to Ms. Girard for his conduct with the girls, his exposing himself to both girls, his sending both girls pictures of his penis, and the threat he made to sue Ms. Girard for slander would be evidence in both trials. Because there is substantial overlap of witnesses, testimony, and other evidence, it is proper for the Court to consolidate these cases for trial.

WHEREFORE, the State respectfully requests that this Honorable Court:

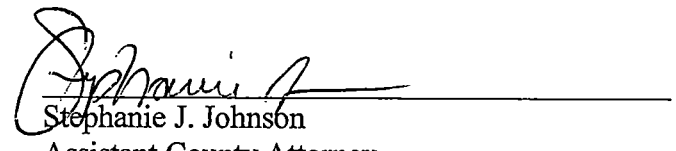
A. Grant the State's Motion and consolidate these matters for trial;

B. Schedule a hearing on the matter, if necessary, and

C. Grant such further and other relief as justice may demand.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

10/25/2017



Stephanie J. Johnson
Assistant County Attorney
New Hampshire Bar # 18645

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to defense counsel Alexander G. Nossiff, attorney for defendant, at 24 Chestnut Street, Dover, NH 03820 and Howard Clayman, attorney for the defendant, at New Hampshire Public Defender, P.O. Box 679, Stratham, NH 03885.

Stephanie J. Johnson
Assistant County Attorney

THE STATE OF NEW HAMPSHIRE

Judicial Branch

ROCKINGHAM, SS

SUPERIOR COURT
218-2017-CR-00117

STATE OF NEW HAMPSHIRE

V.

STEPHEN GIRARD

DEFENDANT'S OBJECTION TO
STATE'S MOTION TO CONSOLIDATE

Now comes the Defendant, Stephen Girard, by and through counsel, Nossiff & Giampa, PC, and respectfully moves this Honorable Court deny State's Motion to Consolidate, and in support thereof states as follows:

1. As admitted by the State, there is no temporal proximity between the charged offenses.

2. Significant prejudice to the Defendant would be suffered if these offenses are consolidated. The State's Motion to Consolidate essentially establishes that a conviction on all Counts is more likely if the matter is consolidated.

3. The State's Motion is essentially a blueprint as to how the various charges can be conflated to support the State's theory of liability. That is, how one charge supports a conviction on another.

4. Accordingly, the State's Motion to Consolidate arguably proves prejudice to the Defendant from consolidation.

5. Futhermore, the State had previously indicated to the Court at a prior hearing that the matters would be tried separately with Docket No. 218-2017-CR-00117 being tried after Docket No. 218-2017-CR-00149.

Wherefore, the Defendant prays this Honorable Court:

a. Deny the State's Motion to Consolidate;

b. For such other and further relief as this Court deems just.

Respectfully submitted,
Stephen Girard
By and through attorneys,

NOSSIFF & GIAMPA, PC

By: _____

Alexander G. Nossiff, NH Bar 1889
661 Central Avenue
Dover, NH 03820
603-742-1260
anossiff@nossiffandgiampa.com

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was this day sent to,

Stephanie J. Johnson, Assistant County Attorney.

_____

Alexander G. Nossiff, Esquire

C: Stephen Girard
Stephanie J. Johnson, Esquire

11-1-17

KW

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November 1, 2017

Maureen F. O'Neil, Clerk
Rockingham Superior Court
PO Box 1258
Kingston NH 03848-1258

Re: State v. Stephen Girard
218-2017-CR-00117

Dear Clerk O'Neil:

With regard to the above matter, please find Defendant's Objection to State's Motion to Consolidate.

Thank you.

Very truly yours,

Alexander G. Nossiff

AGN:p
Enclosure
C: Stephen Girard
[redacted]

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

218-2017-CR-00149

STATE OF NEW HAMPSHIRE

v.

STEPHEN GIRARD

DEFENSE RESPONSE TO STATE'S MOTION TO CONSOLIDATE

NOW COMES Stephen Girard, defendant, by and through counsel, Emily Jessep and Howard Clayman, New Hampshire Public Defender, and hereby requests that this Court deny the State's Motion to Consolidate.

In support of this motion, the following is stated:

FACTS

1. On docket 218-2017-CR-00149, the State accuses Stephen Girard of two counts of Aggravated Felonious Sexual Assault ("AFSA"). On docket 218-2017-CR-00117, he is accused of two counts of Indecent Exposure, two counts Misuse of a Computer or Computer Network, and two counts of Witness Tampering.
2. In this case, Mr. Girard is accused of two counts of AFSA against A.N. The State alleges that between February 1, 2013 and April 30, 2014 Mr. Girard touched A.N.'s genitalia for the purpose of sexual arousal or gratification.
3. In his other case, Mr. Girard is accused of two counts of Indecent Exposure against S.N. The State alleges that between January 1, 2016 and September 29, 2016 Mr. Girard masturbated in front of S.N. and that during that same time period, he sent her a link

which led S.N. to an image of an erect penis. Mr. Girard is also accused of two counts of Misuse of a Computer or Computer against S.N. The State alleges that between January 1, 2016 and September 29, 2016 Mr. Girard allowed S.N. to watch an animated pornographic video with him on his laptop computer. The State also alleges that in the same time period, he allowed S.N. to watch an adult pornographic video that he had streaming from his laptop to the television downstairs that S.N. was watching.

LEGAL ANALYSIS

I. The deadline for filing motions for joinder or severance in this case has passed.

4. If either party seeks to change the status of charges after their initiation, that party must file a motion for joinder or severance within 60 days of the entry of a plea of not guilty or 15 days after the dispositional conference, whichever is later. R. Crim. Proc. 15(b)(1). Such a motion may only be filed after the deadline if a party shows the Court "good cause" for the delay. See Super. Ct. Crim. R. 98(G) (repealed eff. Mar. 1, 2016).

5. Mr. Girard pled not guilty to the AFSA charges in Superior Court on June 2, 2017. The dispositional conference was held on July 26, 2017. The deadline for filing motions for joinder or severance of charges in this case has passed. Further, the State has not shown good cause for the delay that would allow this Court to overlook the deadline.

II. Even if the Court finds good cause for the delay that would allow the Court to overlook the deadline, the Court should not join Mr. Girard's charges.

A. Mr. Girard's charges are not related.

6. The joinder of criminal charges for trial is governed by Rule of Criminal Procedure 20. The rule provides that if a defendant is charged with two or more "related" offenses, either party may move to join such charges. R. Crim. Proc. 20(a)(2). The trial judge

shall join the charges unless the trial judge determines that joinder is not in the best interests of justice. Id. Offenses are "related" if they: (A) are alleged to have occurred during a single criminal episode; or (B) constitute parts of a common scheme or plan; or (C) are alleged to have occurred during separate criminal episodes, but nonetheless are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct. Id. § 20(a)(1). If a defendant is charged with two or more "unrelated" offenses, only the defendant can move for a joinder. Id. § 20(a)(3). "Unrelated" charges are those that are "not related," although they can be of the same or similar conduct. State v. Ramos, 149 N.H. 118, 125 (2003). For example, a defendant, charged with multiple acts of sexual assault, involving the same victim, would have an absolute right to sever each charge for trial if those charges did not arise from the same transaction, constitute the same act, or form part of a common plan. State v. Abram, 153 N.H. 619, 627 (2006).

7. The State concedes that Mr. Girard's charges do not fit into section (A) or (B). Rather, it argues that the AFSA charges are logically and factually connected to the Indecent Exposure, Misuse of a Computer Network, and Witness Tampering charges in a manner that does not solely demonstrate that Mr. Girard has a propensity to engage in criminal conduct.

8. In order to join "related" charges, there must be a close relationship among the offenses with respect to both the conduct and the evidence. Five factors for the court to consider when determining whether joinder is appropriate are: (1) temporal and spatial relationship; (2) commonality of victims or participants; (3) similarity in the defendant's

mode of operation; (4) duplication of the law; and (5) duplication of witnesses, testimony, and evidence. State v. Brown, 159 N.H. 544, 551-52 (2010).

9. In Brown, the Court held that four drug transaction charges were logically and factually connected in a manner that did not solely demonstrate that the defendant had a propensity to engage in criminal conduct. Id. at 554-55. The charges for the case comprised a series of controlled buys, that occurred within a mile of each other within about three weeks. Id. at 554. Each transaction involved the defendant and the cooperating individual. Id. Each transaction occurred inside the same car, in the same manner and with the same drug exchanged for money. Id. Each offense charged is the same crime, so there was duplication of the law. Id. Finally, each charge involves the same witnesses whose testimony for each charge would be substantially similar if not exactly the same. Id.

10. In Ramos, the Court held that the defendant's AFSA and felonious sexual assault ("FSA") charges against victim L.B. charges and the defendant's AFSA charges against victim A.O. were "unrelated." State v. Ramos, 149 N.H. 118, 128 (2003). The charges arose out of incidents that occurred less than a year apart. Id. at 119. They involved two separate victims who were cousins. Id. The defendant's conduct during each assault was different. Id. During the first assault, while the defendant was staying with A.O.'s family he threatened to hurt A.O. and his family and then performed fellatio on A.O. at A.O.'s house. Id. During the subsequent assault, while the defendant was staying with L.B.'s family, he rubbed L.B.'s buttocks and put his hand down L.B.'s pants and fondled L.B.'s penis while at L.B.'s house. Id. The Court's reasoning was that the charges did not arise from the same transaction, they were not part of the same act, and they were not part of a common plan. Id. The Court rejected the State's justification for joining the

offenses: that L.B.'s immediate reporting explained why A.O. suddenly reported the assaults against him after so many months had gone by. Id.

11. In State v. Mason, the State conceded that the charges against the defendant were unrelated. 150 N.H. 53, 60 (2003). The defendant was charged with two counts of AFSA, one count of second-degree assault, and one count of witness tampering. Id. It is unclear when the conduct occurred, but the conduct involved the same victim. Id. at 55-59. The charges did not arise from the same transaction or act. Id. Because the charges were different, there was little duplication of the law. See id. at 60. Finally, there was only a little overlap between witnesses for each charge. See id. at 57-59 (the victim had to testify for multiple charges, a child protection worker had to testify with respect to the second-degree assault charge, a doctor had to testify with respect to the second-degree assault charge).

12. In State v. Cossette, the State conceded that the charges against the defendant were unrelated. 151 N.H. 355, 357 (2004). The defendant was charged with six counts of AFSA and one count of FSA against the same victim. Id. The conduct that made up the charges happened between June and October 2000. Id. at 358. The assaults all involved the defendant and the same victim. Id. Each offense charged was a sexual assault where the law is substantially similar if not the same. See id. at 357. It is not clear from the opinion whether the defendant's mode of operation was the same during each assault and whether there would have been a duplication of witnesses, testimony, and evidence. See id. at 357-59.

13. Here, the charges in Mr. Girard's two cases are unrelated. First, there is no temporal or spatial relationship among the underlying charges. See State's Mot. Consol ¶ 21. In

Brown, where the Court held that the charges were logically and factually connected, the four drug transactions occurred over a period of about three weeks within a mile of each other. Brown, 159 N.H. at 554-55. In Ramos, where the Court held the charges were unrelated, the conduct underlying the AFSA and FSA charges with two separate victims occurred less than a year apart in different houses. Ramos, 149 N.H. at 119, 128. Here, the conduct underlying the charges with respect to A.N. occurred more than a year and a half before the conduct underlying the charges with respect to S.N. and occurred in different locations.

14. Second, there is little commonality of victims or participants. In Brown, the Court found a commonality of victims or participants because each drug transaction involved the defendant and the cooperating individual. Brown, 159 N.H. at 554. In Ramos, the Court held that the charges were unrelated even though there was a common defendant and two victims who were related. Ramos, 149 N.H. at 119. Here, similar to Ramos, the charges involve a common defendant, Mr. Girard, and two sisters, A.N., and S.N.

15. Third, there is no similarity in Mr. Girard's alleged mode of operation. In Brown, the Court found similarity in the defendant's mode of operation because all four drug transactions occurred inside the same car, in the same manner and with the same drug exchanged for money. Brown, 159 N.H. at 554. In Ramos, the Court held that AFSA and FSA charges were unrelated where the defendant's conduct that made up each offense was different. Ramos, 149 N.H. at 119 (performing fellatio on A.O. and fondling L.B.). The instant case is more like Ramos. The conduct that makes up each charge is different. In its motion, the State conflates what they call Mr. Girard's mode of operation with his defense. See State's Mot. Consol. ¶ 23. This is not "mode of operation" as the

Brown Court envisioned it. Mode of operation refers to the conduct that makes up the offense. See Brown, 159 N.H. at 554. The conduct that comprises touching the genitals of a A.N. is different than the conduct that comprises masturbating in front of S.N., showing S.N. pornographic videos, or sending S.N. a picture of a penis.

16. Fourth, there is no duplication of the law here. The offenses that Mr. Girard is charged with in A.N.'s case are different than the charges that Mr. Girard is charged with in S.N.'s case.

17. Fifth, it is not a foregone conclusion that there will be duplication of witnesses, testimony, and evidence if the charges are not joined. The State intends to introduce a text message to Mr. Girard's son, testimony that Mr. Girard exposed himself to A.N. and S.N., that he sent A.N. and S.N. pictures of his penis, and a threat he made to sue Ms. Girard for slander. See State's Mot. Consol. ¶ 24. It is not clear that all of that evidence will be admissible in a trial where the only issue is whether between February 1, 2013 and April 30, 2014 Mr. Girard touched A.N.'s genitalia for the purpose of sexual arousal or gratification. The defense argues this evidence is irrelevant to the issue and would be unfairly prejudicial against Mr. Girard if introduced.

18. Because none of the Brown factors point to the AFSA charges being related to the Indecent Exposure, Misuse of a Computer Network, and Witness Tampering charges, joinder is not appropriate.

B. Even if the charges are related, joinder is not appropriate here because it is not in the best interests of justice.

19. Under Rule 20(a)(I)(A)-(C), joinder that is otherwise appropriate cannot occur if it "is not in the best interests of justice." R. Crim. Proc. 20(b). In other words, even if the case

meets the relatedness standard, joinder may not be appropriate for many reasons. These reasons include concerns of undue prejudice, 403 concerns, 404(b) concerns, inconsistent defenses among the charges, unusual complexity occasioned by joinder, unusual tendency to inflame occasioned by joinder, or the State using joinder strategically to bootstrap a weaker case on some charges. Brown, 159 N.H. at 555. Ultimately, in determining the best interests of justice, the purposes underlying joinder, efficiency and economy, must give way when conducting a single trial would jeopardize a defendant's right to a fair trial. Id. at 556 (citing State v. Mason, 150 N.H. 53, 61 (2003)).

20. Here, joining the AFSA charges with Indecent Exposure, Misuse of a Computer, and Witness Tampering charges would create 404(b) concerns. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. R. Ev. 404(b). In Kirsch, the Court noted that to argue that a defendant's other similar sexual assaults bore directly on a defendant's intent to commit charged offenses was an attempt "to show propensity pure and simple." State v. Kirsch, 139 N.H. 647, 655 (1995). In its motion, the State argues that Mr. Girard's alleged conduct with A.N. is probative on the question of intent and absence of mistake with respect to S.N, and vice versa. See State's Mot. Consol. ¶ 22. As the Court pointed out before, this is propensity evidence. And further, any probative value that evidence would have is outweighed by the unfair prejudice to Mr. Girard.

21. Consolidating the charges would lead to undue prejudice against Mr. Girard and could inflame the jury. Evidence of other wrongs is inherently prejudicial and increases

likelihood that jury will decide the case on improper bias. State v. McGlew, 139 N.H. 505, 509 (1995). It is beyond dispute that there is a high potential for prejudice in permitting a jury to hear evidence of sexual assaults against a child when that evidence is otherwise not relevant to other charges. Mason, 150 N.H. at 62. In Marti, the Court held that under the balancing test used with 404(b), the probative value of the evidence of numerous prior sexual assaults against the same victim, was substantially outweighed by prejudice to the defendant who was charged with three counts of AFSA. State v. Marti, 140 N.H. 692, 695 (1996). If these charges are joined, the factfinder would hear evidence of sexual conduct involving another child that it would not hear if the charges remained severed. That evidence of sexual conduct involving another child that is not relevant to the charges involving A.N. would unfairly prejudice the factfinder against Mr. Girard.

22. Joinder is not in the best interests of justice in this case because if the charges were joined there would be concerns of undue prejudice, 404(b) concerns, and unusual tendency to inflame occasioned by joinder. The New Hampshire Supreme Court has reversed AFSA cases because the Court held that the trial court's consolidation of charges erroneous. See e.g., Ramos, 149 N.H. at 128 (AFSA and FSA with AFSA charges involving two victims were unrelated and trial court's denial of defendant's motion to sever was erroneous); State v. Tierney, 150 N.H. 339, 342, 345 (2003) (AFSA with FSA charges involving the defendant's fiancé's sons were unrelated and the trial court's denial of defendant's motion to sever "jeopardized the defendant's right to a fair trial"); Mason, 150 N.H. at 62 (erroneous joinder of AFSA charges with second degree assault and witness tampering charges was not harmless).

WHEREFORE, Stephen Girard respectfully requests this Court:

(a) Deny the State's Motion to Consolidate the AFSA charges with the Indecent Exposure, Misuse of a Computer, and Witness Tampering; or

(b) Schedule a hearing on these matters for the parties to be heard; and

(c) Grant any further relief justice may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing notice has been forwarded to Stephanie J. Johnson, Esq., Assistant County Attorney, this 13th day of November, 2017.

Emily Jessep