THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0265

State of New Hampshire

v.

Benjamin M. MacKenzie

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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1. Whether the court erred by admitting Bourne's testimony that B.F. habitually bought drugs from MacKenzie.

Issue preserved by State's motion, defense objection, the hearings on the matter, and the court's ruling. AD 58-61; H 18-24; T1 5-13; T2 225-31; A3-A6.*

2. Whether the court erred by admitting text messages exchanged between the 3908 phone and drug-purchasers other than B.F.

Issue preserved by State's motion, defense objection, the hearing on the matter, and the court's ruling. AD 62; T2 255-57, 260-61, 302; A7-A29.

* Citations to the record are as follows:
"AD" refers to the attached addendum containing the decisions from which MacKenzie appeals;
"A" refers to the separately-bound appendix;
"H" refers to the transcript of the hearing held on January 18, 2019;
"T1" through "T4" refer to the designated volume of the consecutively-paginated transcript of the four-day trial, held in January 2019.

STATEMENT OF THE CASE

A Strafford County grand jury indicted Benjamin MacKenzie for the distribution of drugs, with death resulting. T1 17-18; A43. He stood trial over four days in January 2019 and was convicted as charged. T4 516. The court (Houran, J.) sentenced MacKenzie to a stand-committed term of twelve to twenty-four years, with two years of the minimum potentially suspended upon assessment of the need for, and admission into, substance-use-disorder treatment. A44-A47.

STATEMENT OF THE FACTS

In December 2016, nineteen-year-old B.F. lived with her parents in Rochester. T1 60-61, 74. On December 12, she returned home from work and decorated a Christmas tree with her mother. T1 61-63, 74. Around 10:00 p.m., B.F. told her parents she was going out for a while. T1 64-65, 75. She returned around 11:00 p.m., went into her bedroom, and locked the door. T1 67, 75-76; T2 283. In the room, she injected fentanyl, which caused her death. T1 121, 134; T2 163-68, 200, 207-09; T3 347. The following morning, her parents discovered her body and called 911. T1 81-82.

The prosecution contended that, while out that night, B.F. bought from Ben MacKenzie, a young man about her age, the fentanyl she used upon her return home. In support, the State introduced a text exchange B.F. had with the holder of a cellphone associated with the number 833-3908 (the "3908 phone"). T3 391-95. That exchange began with B.F. sending a text at 9:50 p.m. saying, "need a 30." T2 278. The 3908 phone responded at 10:07 p.m.: "Hey. Getting it ready." T2 278-79. Subsequent texts between B.F. and the 3908 phone discussed their locations and arranged a place and time to meet. T2 279-82. The communication between the phones closed with two short calls, the last of which happened at 10:56 p.m. T2 282-83.

From a police expert witness, the State elicited testimony that users do not tend to hoard fentanyl, but rather consume it before acquiring more. T3 392. The police did not find, among the drug paraphernalia in B.F.'s room, any unused quantity of an opiate. T3 361-62, 364-65, 423.

When questioned by the police after his arrest in late December 2016, MacKenzie denied that he ever had a cell phone.[1] T2 290-92, 295-96, 300. To link MacKenzie to the 3908 phone, the State obtained Verizon records documenting texts and other communications from that phone. T2 300-03.

For example, the State introduced evidence of communications between the 3908 phone and a number associated with MacKenzie's mother. T2 181, 183, 219, 309; T3 400-01. In one message, the holder of the 3908 phone addressed as "mom" the holder of MacKenzie's mother's phone. T2 311. Also, MacKenzie's mother texted a message reminding the holder of the 3908 phone of an appointment with a probation officer. T2 311.[2] Other evidence linked MacKenzie's brother, Zach, with another phone number, and in communication with that phone the 3908 phone's holder spoke about "mom." T3 335, 340.

[1] Indeed, when arrested on December 26, 2016, MacKenzie did not have a cellphone on him. T3 354-56.

[2] The State supported the phone's link to MacKenzie by eliciting evidence that he had a probation appointment on December 14, 2016. T2 182-83, 312.

The State further sought to associate the phone with MacKenzie by eliciting from his former employer that MacKenzie listed that number on his job application. T2 219-21. In addition, Tyler Bergeron, at one time a friend of MacKenzie's, testified that the 3908 number was MacKenzie's. T2 235-36.[3] However, MacKenzie listed a different phone number on probation forms – 866-3435 – a number otherwise associated with his mother. T2 181, 183, 219.

The State also elicited testimony from Taylor Bourne, a friend of B.F. T2 248-49, 253. Bourne never met MacKenzie, but B.F. showed her pictures of him. T2 249-50. Bourne testified that B.F. told her that she had bought opiates from MacKenzie on prior occasions. T2 249-50.

In addition to Bourne's testimony, the State elicited other evidence tending to show that MacKenzie, as the alleged user of the 3908 phone, regularly sold drugs. Verizon text-message records associated with the 3908 phone documented conversations in which the phone's user seemed to be selling, or trying to sell, drugs to other people around the time of the transaction with B.F. See T2 313-14; T3 402 (text exchange with phone with number beginning with 573, consistent with discussion of drug sale); T2 314; T3 402-03 (same, with number 973-6879); T2 314; T3 403 (same, with number 973-

[3] Bergeron agreed, though, that MacKenzie's brother Zach possibly also used the phone. T2 238-39, 242. However, Bergeron had no positive knowledge that the MacKenize brothers shared a phone. T2 243.

5441); T2 314-16; T3 403-04 (same, with number beginning with 389); T2 316-21; T3 333-35, 405-10 (same, with phones associated with sisters Shawnda Drouin and Renee Meagher); T3 335-42, 410-14 (communications with phone associated with Zach MacKenzie, wherein Zach seemed to facilitate drug sale). At points in some conversations, the holder of the other phone addressed the holder of the 3908 phone as "Benny" or "Ben." T2 313, 317; T3 402-03, 406-07. The Drouin/Meagher communications stood out from the others as both sisters, in words communicating the urgency of an addict in the throes of withdrawal, begged the 3908 phone's holder to supply drugs. T2 316-21; T3 333-35.

Also, the State introduced a text communication between the 3908 phone and an unknown person using a number ending in 3645. T2 304-09. Those messages tended to suggest that the user of the 3645 phone advanced to the holder of the 3908 phone the drugs that the 3908 phone-user subsequently sold. T2 307-09; T3 395-400, 424.

The defense denied that MacKenzie sold B.F. the drugs. The defense emphasized evidence suggesting that Zach MacKenzie could have had access to the 3908 phone and sold drugs. E.g., T3 353-57; T4 463, 465.

SUMMARY OF THE ARGUMENT

1. The court erred in admitting Bourne's testimony about B.F.'s past purchases of drugs from MacKenzie. That evidence did not constitute "habit" within the meaning of Rule 406. Moreover, its admission was not justified by the residual hearsay exception of Rule 807. Finally, any probative value the evidence had was substantially outweighed by the risk of unfair prejudice.

2. The court erred in admitting text messages relating to drug sales by the holder of the 3908 phone to customers other than B.F. Evidence of sales to other customers was not intrinsic to the charged offense. It was also largely inadmissible under Rule 404(b), because not relevant to prove either plan or intent. Finally, any probative value associated with the evidence was substantially outweighed by the risk of unfair prejudice.

I. THE COURT ERRED IN ADMITTING BOURNE'S TESTIMONY THAT B.F. HABITUALLY BOUGHT DRUGS FROM MACKENZIE.

Shortly before trial, the State filed a motion *in limine* to introduce certain evidence through Bergeron. A3-A6. At the pre-trial hearing convened on that motion, the State enlarged its request to cover also certain proffered testimony of Taylor Bourne. H 18-24. Specifically, the State sought to elicit Bourne's testimony that "it was [B.F.'s] habit and routine to obtain heroin or fentanyl from" MacKenzie. H 19. Bourne would further testify that MacKenzie was B.F.'s first choice as a source of the drug and that B.F. "sort of liked Ben. . . . [B.F.] would talk to [Bourne] about Ben." H 19-20, 22.

The State contended that the proffered evidence was relevant to prove MacKenzie's identity as the source of the fatal dose. H 22. The State further argued that the evidence was admissible under Rule 406, governing testimony describing routine or habit. A4-A5; H 20-22. Because the State had just filed the motion, defense counsel deferred the presentation of its objection until after jury selection. H 23.

The discussion resumed on the morning of the first day of trial. T1 5-13. Defense counsel objected to the proffered testimony, arguing that the potential for unfair prejudice substantially outweighed any probative value. T1 6. Counsel also suggested that the evidence could be sanitized. Id. The

State repeated its arguments in support of the admission of the testimony. T1 6-10.

The court ruled in a written order. AD 58-61. With respect to Bourne's testimony, subject to the hearsay rules, the court allowed the State to introduce, as evidence of habit, that B.F. "was in the habit of procuring her drugs from" MacKenzie. AD 60-61.

During trial, when the State was about to call Bourne, the defense lodged a hearsay objection to her proffered testimony. T2 225. In response, the State relied on the exceptions covering present sense impressions and then-existing mental, emotional, or physical conditions. T2 226. Alternatively, the State relied on Rule 807's residual hearsay exception. T2 226-28. The State also repeated its Rule 406 habit argument. T2 226, 228. Defense counsel called attention to information provided by Bourne indicating that B.F. named other people also as suppliers of her drugs. T2 228.

The court admitted the evidence. T2 229-31. The court confirmed its prior conclusion with respect to the Rule 403 balance of probative value and unfair prejudice. T2 229. With respect to hearsay, the court rejected the State's argument under Rule 803(3). T2 229-30. However, the court found applicable the Rule 807 residual exception. T2 230-31.

As relevant to this appeal, on direct examination, Bourne testified that she and B.F. met about six or seven months before B.F.'s death and became "really close" friends. T2 248-49. Bourne knew of MacKenzie from B.F. but never actually met him, though she could identify him at trial because B.F. showed her pictures of him on Facebook. T2 249-50. Bourne testified that B.F. told her "that [B.F.] had gotten [opiates] off of" MacKenzie. T2 249.

To be admissible, Bourne's testimony had to pass through three evidentiary-rule filters. First, merely to be relevant to prove that MacKenzie supplied the fatal dose, testimony that B.F. previously got opiates from MacKenzie had to qualify as habit under Rule 406. Second, because that habit evidence came in the form of an out-of-court statement offered to prove the truth of the matter asserted, the State further required an applicable hearsay exception. Third, even if the evidence passed those two hurdles, it nevertheless had to be excluded under Rule 403 if its risk of unfair prejudice substantially outweighed its probative value. In separate sub-sections below, this brief contends that, at each hurdle, the State fell.

If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. See State v. Munroe, 173 N.H. 469, 472 (2020) (noting that Court reviews *de novo*

interpretations of court rules, but deferentially the application of a properly-interpreted court rule). Applying deferential review, this Court assesses whether the ruling is clearly untenable or unreasonable to the prejudice of the appellant's case. Id. This Court does not, though, defer to the trial court's interpretation of the rules of evidence. State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary"); see also Koon v. United States, 518 U.S. 81, 100 (1996) (abuse-of-discretion "label" "does not mean a mistake of law is beyond appellate correction," because "[a] district court by definition abuses its discretion when it makes an error of law").

A. The proffered testimony was not evidence of habit within the meaning of Rule 406.

Rule 406 provides:

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

"The rule does not define habit." Lapierre v. Sawyer, 131 N.H. 609, 611 (1989). In Lapierre, the Court noted that

"[g]enerally, however, habit is a 'regular response to a repeated specific situation,' … a response which may become semi-automatic." Id. (quoting Reporter's Notes to N.H. R. Ev. 406 and citing treatise); see also Webster's Third New International Dictionary 1017 (unabridged ed. 2002) ("an acquired or developed mode of behavior or function that has become nearly or completely involuntary"). "The admissibility of habit evidence depends on the facts of each case." Lapierre, 131 N.H. at 611.

Commentators agree. See, e.g., Marshall, Garcia, & Prager, The Habit Evidence Rule and Its Misguided Judicial Legacy: A Statistical and Psychological Primer, 36 Law & Psychol. Rev. 1 (2012) (proposing definition restricting "habit" to a history of virtually identical, uncontemplated reflexive acts that make repetition almost certain). "Analytically, habit or routine practice, for the purposes of Rule 406, is said to consist of three elements: (1) regularity; (2) specificity, and (3) an involuntary or semiautomatic response." Annotation, Habit or routine practice evidence under uniform evidence Rule 406, 64 A.L.R. 4th 567 at §2[a] (1988) (hereinafter, Habit or routine practice).

Regularity, in turn, "has two sub-elements: frequency and consistency." Id. Thus, "[c]onduct is not a habit or routine practice unless it is frequently engaged in. Moreover, conduct is not a habit unless it is a person's invariable or at

least frequent response to a particular situation – a standard not met, for example, by the person's engaging in the 'habitual' conduct only about half the time." Id.

The second element is specificity. "Specificity provides the key. If specific conduct usually results from specific stimuli, courts will call this conduct a habit and admit it on the grounds that the witness more likely than not acted in conformity with this virtually autonomic behavior. This sounds rather Pavlovian, but it provides the clearest distinction." Wharton's Criminal Evidence §4:43 (online edition). By way of example, the treatise continues:

> Therefore, if we say that a dog likes canned food, this is a statement of the dog's character. But if we say the dog *always* eats all the food in his bowl, this is a statement of the dog's habit based on a response to a specific situation. Even voluntary acts may rise to the level of habit or routine practice if repeated on a consistent basis.

Id.

"The third element is that the conduct be an involuntary or semi-automatic response to a specific situation." Habit or routine practice, 64 A.L.R.4th 567 at §2[a]. Moreover, "[c]ourts have excluded 'habit' evidence if the habit is one for committing a crime." Wharton's Criminal Evidence §4:43.

Consistent with that understanding, this Court has disapproved of the admission, as habit, of evidence that

describes an insufficiently automatic response to a given situation. For example, in Underhill v. Baker, 115 N.H. 469, 471 (1975), the Court observed that it would be improper to allow the jury "to consider evidence of the plaintiff's drinking habits as direct evidence of his condition on the night of the accident." Similarly, in Lapierre, the Court affirmed the exclusion of proffered habit evidence in the form of testimony that "the defendant's specific response to the repeated situation of falling behind or losing important racquetball points was to strike balls no longer in play, or otherwise play outside the rules so as to endanger his opponents." Lapierre, 131 N.H. at 611. The Court reasoned that the proponent failed to demonstrate a sufficiently regular response to a specific situation.

Here, the proffered evidence falls outside the boundaries of Rule 406. When it sought the admission of Bergeron's testimony, the State proffered that he bought drugs daily from MacKenzie. A4. However, when the State expanded the motion to encompass Bourne's testimony about B.F.'s practices, the State did not assert any such frequency. H 19. Indeed, at the first hearing, while the State asserted that phone records corroborated some plural number of prior purchases by B.F. from MacKenzie, the prosecutor gave a date only for one. H 21-22. Similarly, while the State proffered generically that Bourne had knowledge of some unspecified

but multiple number of such purchases, the prosecutor gave detail only for one. H 19. At the second hearing, in support of the claim of admissibility under Rule 406, the prosecutor mentioned just one prior instance of which Bourne was aware, and one prior occasion corroborated by text records. T1 8. Just before the evidence was admitted, the prosecutor seemed to suggest that those two items – Bourne's statement and the text message records – referred to the same single incident. T2 227-28. That proffer, resting on such a small number of instances, fails to satisfy the frequency component of the regularity element.

Second, the record fails to support the consistency requirement. Prior to the admission of the evidence, defense counsel called the court's attention to the fact that information in discovery suggested that B.F. sometimes sought to obtain drugs from other persons besides MacKenzie. T2 228. A past course of conduct does not fall within Rule 406's concept of "habit" if the actor only occasionally engages in that course of conduct.

Third, the act of buying opiates from a particular seller also fails the third element, requiring that the action alleged to be a habit have an involuntary or semi-automatic character. A drug sale requires a renewed negotiation on each occasion and its consummation depends on the vicissitudes of supply and timing, as subsequently shown at trial by B.F.'s

unsuccessful attempt to buy from another seller. T3 343-46, 415-20. In short, an illicit negotiation involves voluntary and non-automatic actions on the parts of both buyer and seller. Counsel has found no case in which any court has admitted such evidence as habit under Rule 406. For these reasons, the court erred in admitting the proffered evidence on that theory.

B. The residual hearsay exception of Rule 807 did not apply.

Rule 807 establishes a residual exception to the bar on hearsay, applicable in certain circumstances when the statement is "not specifically covered" by any of the exceptions provided in Rule 803 or 804. N.H. R. Ev. 807(a). The rule lists four necessary conditions:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

Rule 807(a).

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement … and is

generally inadmissible unless it falls within one of the many exceptions which provide for its admissibility." State v. Marcotte, 124 N.H. 61, 64 (1983). By its plain terms, Rule 807 applies only when none of the other hearsay exceptions covers the circumstance. Lest this residual or "catch-all" exception swallow the general rule excluding hearsay, courts construe it narrowly. See State v. Johnson, 145 N.H. 647, 650 (2000) (rejecting expansive interpretation that "threatens to swallow the entirety of the hearsay rule"); see also United States v. Sinclair, 74 F.3d 753, 759 (7th Cir. 1996) (conditions on use of exception must be construed narrowly so that exception does not "dramatically revis[e] the hearsay rule"). The residual exception should be used only in "extraordinary circumstances." United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993).

Consistent with the limited scope of the exception, this Court has relatively infrequently decided appeals involving it. In the cases that have arisen, this Court has often affirmed rulings excluding evidence proffered under the residual exception, or reversed rulings admitting such evidence. See, e.g., In re Estate of King, 149 N.H. 226, 233-34 (2003) (reversing admission); State v. Francoeur, 146 N.H. 83, 86-87 (2001) (reversing admission); State v. Johnson, 145 N.H. 647 (2000) (reversing admission); Keating v. United Instruments, Inc., 144 N.H. 393, 396-97 (1999) (affirming exclusion);

Chinburg v. Chinburg, 139 N.H. 616, 618-20 (1995) (affirming exclusion); Simpkins v. Snow, 139 N.H. 735, 739 (1995) (affirming exclusion); State v. Marcotte, 124 N.H. 61, 65 (1983) (reversing admission); State v. King, 2017 WL 4770441 (N.H., Sept. 19, 2017) (unpublished) (affirming exclusion); State v. Lacasse, 2005 WL 8142428 (N.H., Oct. 11, 2005) (unpublished) (reversing admission). Much rarer are opinions approving of the use of the exception. See, e.g., State v. Knowles, 132 N.H. 130 (1989) (affirming admission); Caledonia, Inc. v. Trainor, 123 N.H. 116 (1983) (affirming admission).

In arguing for admission under the residual exception, the prosecutor asserted the reliability of B.F.'s statements to Bourne about the identity of her supplier. T2 227. By way of explanation, citing information that B.F. had "almost felt like there was a flirtation going on between" herself and MacKenzie, the prosecutor said that he could imagine no reason for B.F. to accuse MacKenzie falsely when speaking to her friend Bourne. T2 227.

Second, the State called the court's attention to the record of a text exchange between B.F. and the holder of the 3908 phone, about a week before the charged drug sale. T2 227-28. In that exchange, it appeared that B.F. sought to buy drugs from the phone's holder. The messages on that prior occasion indicated that B.F. texted from the Riviera Motel, at

which Bourne was then residing. T2 227-28. It further appeared that, on that prior occasion, MacKenzie was at the Riviera Motel. T2 228. The State acknowledged, though, that the subsequent investigation found no evidence that MacKenzie had registered as a guest at the motel. T2 229.

In its oral ruling, the court relied on those considerations. T2 230. The court reasoned:

> under 807, this is – if you'll permit me to say so – almost classically admissible under 807. The offer has someone who is quite familiar with the person to whom the statements are attributed. The context – use of illegal controlled drugs as the State asserts – heightens the circumstantial guarantees of trustworthiness. But here there's – the offer includes corroborating evidence – actually multiple incidents of corroborating evidence. So observation of photographs on the phone, not hearsay, that's a direct observation.
>
> And the – [B.F.'s] text message referencing the Riviera Motel ties directly into the State's offer as to what this witness would testify to if she were testifying in front of the jury in full to all of the circumstances. … [U]nder Rule 807, the hearsay objection is overruled.

T2 230. For the reasons given below, the court erred in applying the residual exception of Rule 807.

First, the perceived flirtation added a degree of intensity to the relations between B.F. and MacKenzie that could as easily motivate as deter a false claim. The emergence, in B.F., of a romantic interest in MacKenzie could prompt her to envision herself as more deeply involved with him than was yet the case, and to relate those imaginings to a good friend. Alternatively, if B.F. perceived that her emerging romantic interest was not reciprocated, that disappointment could motivate false accusations. In short, the presence of that dimension to B.F.'s feelings does not necessarily increase the reliability of her statements about MacKenzie. A statement by a possibly infatuated B.F. to a close friend is "not equivalent to giving a statement under penalty of perjury … and [does] not contain the same guarantees of trustworthiness." Johnson, 145 N.H. at 649.

Second, the fact that the State had evidence tending to prove one particular prior sale by MacKenzie to B.F., witnessed to some extent by Bourne at the motel, did not lend sufficient circumstantial guarantees of trustworthiness to the broader proffered statement – that B.F. habitually bought drugs from MacKenzie. Indeed, as noted by defense counsel, T2 228, Bourne named other people also from whom she thought B.F. had bought drugs.

The Evidence Rules recognize numerous and varied exceptions to the general bar on the admission of hearsay.

None applied here. Nothing about the circumstances here – a statement by one friend to another about the identity of the former's source of illegal drugs – suggests the basis of a narrow, well-defined, and broadly justifiable additional hearsay exception. Rather, the State claims just that this declarant, making these statements in this setting, probably told the truth. If it prevails, such reasoning creates a residual hearsay exception that would swallow the general rule excluding hearsay.

C. The court should have excluded the evidence as unfairly prejudicial under Rule 403.

Finally, even if the evidence could evade the bars rooted in Rules 406 and 807, the court erred in failing to exclude it under Rule 403. That rule provides that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury…." "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Willis, 165 N.H. 206, 216 (2013).

At the last hearing on the matter, the court in certain respects acknowledged the diminished probative value of the evidence. T2 229. In its written order, though, the court ruled, without substantial explanation, that the risk of unfair prejudice did not outweigh the probative value. AD 60-61. In so ruling, the court erred.

The rule requires first an assessment of the probative value of the challenged evidence. As already noted, evidence of B.F.'s supposed habitual recourse to MacKenzie for illegal drugs was offered to prove that she bought the fatal dose from him. That claim rested on an inference of propensity or habit. For the reasons stated above in connection with Rule 406, incorporated herein by reference, the State lacked a strong basis supporting that inference. Briefly summarized, the flaw lay in the fact that B.F.'s recourse to MacKenzie was insufficiently frequent or consistent to lend substantial support to an inference from her past practice to the conclusion that she bought the fatal dose from him.

Set against that minimal probative value was a substantial risk of unfair prejudice. "[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. Tabaldi, 165 N.H. 306, 322 (2013). "Among the factors [courts] consider in weighing the 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." Id. at 322-23.

"Unfair prejudice is inherent in evidence of other similar crimes or wrongs because, notwithstanding the permissible reasons for which such evidence might be admitted, there is a risk that the jury will find the defendant had a propensity to commit the charged crime merely because the defendant committed a similar crime or wrong in the past." State v. Belonga, 163 N.H. 343, 360 (2012). "Such a risk runs counter to the principle that a defendant may only be convicted if the jury finds that the accused committed the specific act that is the subject of the trial, and not some similar act at some other time." Id. "The risk of unfair prejudice, moreover, increases as the degree of similarity between the prior act and the charged crime increases." Id.

That risk existed here. The proffered evidence described prior acts – selling opiates to B.F. – identical to the charged acts, save only for the unintended fatal result. Evidence of a defendant's commission of an unrelated crime can inflame the passions of a jury. This Court has often noted that an "incurable prejudice may result when the testimony of a witness conveys to a jury the fact of a defendant's prior

criminal offense." State v. Willey, 163 N.H. 532, 538 (2012) (quoting State v. Woodbury, 124 N.H. 218, 221 (1983)). It has reversed convictions when "the fact that the alleged prior acts were criminal in nature was unambiguously revealed to the jury." Willey, 163 N.H. at 538 (quoting State v. Carbo, 151 N.H. 550, 554 (2004)).

Because the minimal probative value of the evidence did not outweigh its substantial risk of unfair prejudice, the court erred in admitting the evidence. That error prejudiced the defense by permitting the jury to hear evidence of MacKenzie's commission of other similar crimes. This Court must reverse his conviction.

II. THE COURT ERRED IN ADMITTING TEXT MESSAGES SHOWING DRUG SALES TO OTHER CUSTOMERS.

Before trial, the State filed a motion to admit phone messages exchanged between the 3908 phone and several other phones. A7-A27. One part of the motion sought permission to introduce messages exchanged with a phone associated with MacKenzie's mother. A11. A second part involved messages exchanged with the phone thought to belong to MacKenzie's source for drugs. A12-A15. A third involved messages exchanged with other drug-purchasing customers. A15-A22. A fourth involved messages exchanged with a phone thought to be associated with Zach MacKenzie. A22-A25. The defense objected. A28-A29.

On appeal, MacKenzie challenges the admission of messages in the third set, involving customers other than B.F. As to that third set, the State argued first that the messages were "intrinsic" to the charged crime of selling opiates to B.F. Alternatively, the State argued that, even if not "intrinsic" in that sense, the evidence was admissible under Rule 404(b). A20-A22.

In an initial short written order issued in August 2018, the court granted the State's motion. AD 62. In that order, the court first declared the messages to be "intrinsic," and thus admissible without regard to Rule 404(b). Id. In the alternative, the court ruled that the evidence would also be

admissible under Rule 404(b). Id.; see also T2 256 (reaffirming ruling).

During trial, the court re-affirmed its rulings on the text messages, and the defense renewed its objections. T2 255-57, 260-61, 302. The court modified its pre-trial ruling by requiring the partial redaction of one of the messages exchanged between the 3908 phone and MacKenzie's mother. T2 256-57.

As relevant to the appellate issue, at trial the State elicited the following evidence of texts between the 3908 phone and other phones thought to belong to people seeking to buy drugs. First, referring to a phone having a number beginning with 573, the State elicited the following text exchange, beginning on the afternoon of December 12:

> 573: Hey
>
> 3908: Yo
>
> 573: You good?
>
> 3908: U need
>
> 573: Ya 20.
>
> 573: I only got till 4 tho
>
> 573: Can I meet you now
>
> 3908: Yeah. Go to brickstones going there now
>
> 573: Ok.
>
> 573: Where are you Benny

A15-A16; T2 313; T3 402.

Second, referring to a phone having a number beginning with 973, the State elicited two texts sent by the 3908 phone:

> 3908: Hey hit me back I got something u might want
>
> 3908: My B [bad] I thought I just missed a call from u

A16; T2 314; T3 402-03.

Third, referring to a phone having a number ending in 5441, the State elicited the following message, sent from the 3908 phone shortly after 11:15 p.m. on December 12:

> 3908: fire fire hmu [hit me up] good price

A16; T2 314; T3 403.

Fourth, referring to a phone having a number beginning with 389, the State elicited the following exchange, beginning at 6:21 a.m. on December 13:

> 389: Can we grab a 40?
>
> 3908: In a lil bit couple hours I can leave the house im at or ill get kicked out everyone's sleeping and this lady is fucking nuts
>
> 389: k
>
> 389: please don't forget me cause I won't be able to see you tonight thanks
>
> 3908: I won't
>
> 3908: where r u
>
> 3908: ??

389: Can I grab another 40 please[4]

A16-A17, A19; T2 315; T3 403-04.

Fifth, referring to a phone associated with Renee Meagher ("RM"), the State elicited the following text exchange, beginning just after 7:00 a.m. on December 13:

RM: You awake this morning

RM: Please oh please

3908: Whos this

RM: Renee

3908: Whats up

RM: I am omw [on my way] to work and really need stuff for me and my sister please

RM: Can u help me please

RM: I am getting ready to leave soon

3908: Depends how much im staying at this crazy ladys house

RM: I need a half

RM: Please

3908: Shes sleeping and she will kick me out if she wakes up

RM: Please i. beg I ben

3908: What does your sis need

RM: It's her 30 and my 20 put together

RM: A half total please Ben I beg u

[4] This final message was sent at 5:48 p.m. on December 13, hours after the earlier messages. A19.

RM: please please

RM: I am so fucking sick nothing will happen I can head right now to u

3908: Chill im not getting kicked out and being homeless again where do u have to work at

RM: Greenland

RM: New Hampshire

RM: Nvm Shawnda wants a 60 plus my 20

RM: it will be a 80 bag total please hun

3908: Last 2 times u said needed 2 halfs it wasn't right

RM: I swear to God on my son's life I need a 60 + 20

RM: 60 for my sister and a 20 for me please hunni

3908: And it better be 80 cuz I set something up in Dover

3908: I would need u to bring me and my brother to dover

RM: Like get dropped off in Dover

RM: I have to go to work so I can drop u off omw there it's my sister who wants 60 and I need 20 a total of 80

RM: I sware [sic] its 80

3908: Come now im in east roch

RM: I need 80

3908: And u can bring us back it's the second exit after the toll 8w

3908: It takes 10 mins there

RM: You will have it omw now dropping Dylan off at his bus then to u

RM: Where in East side

RM: 20/25 mins the latest

RM: So I can be there is there any way I can meet me at aromas

RM: Dropping Dylan y [sic] son at his bus stop now

RM: Can you weigh my 20 separate from Shawnda 60

RM: I am almost to my sister at Aroma in East Rochester

RM: I am here

RM: where are u

RM: How much longer till u get here I have to go to work love

RM: ?

RM: You there hun I am nervous I promise your coming I don't wanna be late for work

RM: You want me to move next to u

RM: Heyy hunni can I come see you[5]

RM: Do you have product to help me I actually need two 40's

[5] The final three text messages were sent about twelve hours later, around 8:30 p.m. on December 13. A20.

RM: How long till I get here? Aromas in east side, right?

A17-A18, A20; T2 316-21; T3 405-09.

Sixth, for a phone number associated with Meagher's sister Shawnda Drouin ("SD"), at the same time on the morning of December 13 that the 3908 phone was communicating with Meagher, the State elicited the following text exchange:

SD: O Hey Homie NI [and I] know you're talking to my sister alreadt [sic] but I was hoping that you could please please meet with us NI need a 60 and idk [I don't know] what she needs but I

SD: O m [am] begging you please

3908: It better be 80 I need a ride to Dover

SD: Ok

SD: Hey Renee was on the phone with Dylan's school\n That's why I called\n Trying to figure out where you're at homie

A18-A19; T2 321-22; T3 333-25, 409-10.

Here, in admitting the evidence, the court relied on two distinct evidentiary principles. Section A below contends that the court erred in finding the above-quoted texts to be "intrinsic to," and "inextricably linked with," the charged crime involving B.F. Section B contends that the court erred in its alternative rationale, according to which the evidence

was admissible under Rule 404(b). Section C advances the argument that the balancing test used in the analysis of both Rule 403 and 404(b) required the exclusion of the evidence.

A. The evidence of sales to other customers was not intrinsic to the charged crime.

This Court has "distinguished between 'extrinsic' evidence of other crimes, wrongs, or acts, which is governed by Rule 404(b), and 'intrinsic' evidence, which is not." State v. Thomas, 168 N.H. 589, 598 (2016). Evidence of other acts "is 'intrinsic,' and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." Id.; see also State v. Papillon, 173 N.H. 13, 24-25 (2020) (articulating same analysis); State v. Wells, 166 N.H. 73, 77-78 (2014) (same); State v. Dion, 164 N.H. 544, 551 (2013) (same). "'Intrinsic' or 'inextricably intertwined' evidence will have a causal, temporal, or spatial connection with the charged crime." Wells, 166 N.H. at 77.

By way of further explanation, this Court has observed that, "[t]ypically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an

integral part of a witness's testimony, or completes the story of the charged offense." Wells, 166 N.H. at 77-78. The Court has also said that such evidence "is admissible under the rationale that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence." Id. at 78 (quotation marks and citation omitted).

An application of those principles yields the conclusion that the texts are not intrinsic to, or inextricably intertwined with, the charged act of selling drugs to B.F. The messages were not part of the same criminal episode because they involved unrelated transactions with other customers at different times and places from the sale to B.F. For the same reason, the texts with other customers lacked the requisite "causal, temporal, or spatial connection with the charged crime." Wells, 166 N.H. at 77. The sale to B.F. did not depend in any way on the success or failure of those other sales. There is no reason to think that B.F. had any knowledge of those texts or the other sales.

The caselaw confirms that conclusion. In every case in which this Court has found other-act evidence intrinsic to the charged crime, there existed a much closer connection between the other act and the charged crime. In Wells, for example, the charge alleged aggravated felonious sexual

assault in the form of intercourse, and the other-act evidence held to be intrinsic consisted of testimony that, during a single criminal episode, shortly before engaging in intercourse, the defendant digitally penetrated the victim. Wells, 166 N.H. at 76-78; see also Dion, 164 N.H. at 551 (in negligent homicide prosecution arising out of incident in which defendant's car struck and killed pedestrian, describing as "intrinsic" evidence of defendant's cell phone usage during that same journey); State v. Hall, 148 N.H. 671, 675 (2002) (affirming admission of evidence of uncharged act where act was "part and parcel of the same episode").

By contrast, separate sales to different people at distinct times and places do not constitute parts of a single criminal episode. In Papillon, for example, the State prosecuted the defendant for arranging for the murder of a person thought to be a police informant. At Papillon's trial, the State sought to elicit that, near the time of the victim's murder, Papillon offered to kill another, unrelated informant. Papillon, 173 N.H. at 22-23. On appeal, this Court held that the trial court erred in regarding that evidence as "intrinsic" to the charged offense. Id. at 24-28. This Court reasoned that, although the defendant's offer happened close in time to the charged offense, it was "not necessary to complete the story of the conspiracy to murder" the victim but was "merely coincidental to the charged offenses." Id. at 25. This Court concluded that

Papillon's "apparent willingness to facilitate the murder of another, unrelated, suspected 'snitch' was not part of the same criminal episode or at all part of a sequence of events leading to the charged conspiracy to murder" the victim. Id. at 26.

That holding reflects a proper understanding of the meaning of the word "episode." The word has its origin as a term for a literary or dramatic unit and signifies: "a usu[ally] brief unit of action in a dramatic or literary work: as … b: a developed situation that is integral to but separable from a continuous narrative." See Webster's Third New International Dictionary 765 (unabridged ed. 2002). The non-literary definition follows accordingly: "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series." Id. This Court must therefore reject the State's argument, made below, that separate sales occurring over a forty-eight hour period constitute a single criminal episode. A20. The State cited no authority for so broad a definition of the concept, and counsel is aware of none. Cf. State v. Brown, 159 N.H. 544, 549-54 (2009) (joinder proper for charges of four sales to same informant over two-week period on ground that, despite that each sale constituted separate criminal episode, charges were logically

and factually connected in manner that does not solely demonstrate propensity).

State v. Nightingale, 160 N.H. 569 (2010), confirms that understanding. In that case, the charge alleged sale of oxycontin pills. Id. at 571. Intrinsic to the proof of that charge was evidence that, during the same interaction in which the defendant sold the oxycontin pills, she discussed with the buyer a planned sale of cocaine to him the following day. Id. at 572-74. Because the cocaine conversation occurred during the oxycontin sale, both formed a part of a single criminal episode. Here, by contrast, the challenged evidence involves conversations with other customers, of which B.F. had no knowledge.

This case likewise differs from cases such as State v. Martin, 138 N.H. 508 (1994). In that sexual assault case, evidence that the defendant threatened or inflicted harm on the victim's pets was intrinsic to the charge, because it explained the victim's delay in reporting the assaults. Id. at 518-19; see also State v. Kulikowski, 132 N.H. 281, 287 (1989) (same). Here, by contrast, there is no evidence that B.F. knew of any other sales, or of the communications with other buyers. Even if she did know, the State advanced no argument as to how such knowledge might have influenced B.F.'s actions.

For all these reasons, this Court must conclude that the texts with other customers were not intrinsic to the charged sale to B.F. The trial court thus erred in admitting it on that basis.

Finally, even if the challenged texts were intrinsic to the charged offense, that label does not, standing alone, establish their admissibility. Rather, such evidence must also pass the Rule 403 test balancing probative value against the risk of unfair prejudice. Wells, 166 N.H. at 79. This brief incorporates herein by reference the argument presented in Section C below, demonstrating that the risk of unfair prejudice substantially outweighed any probative value.

B. Most of the texts were not admissible for any purpose listed in Rule 404(b).

Rule 404(b)(1) provides that evidence of other crimes, wrongs or acts is not admissible to prove character to show that the person "acted in conformity therewith." However, such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The State claimed that the challenged evidence was relevant to prove plan, intent, and identity. A21. It contended, as to plan, that "these messages show that [MacKenzie] repeatedly engaged in arranging meetings with customers as

he did with [B.F.].” A21. As to intent, the State asserted: “[MacKenzie] arranged these meetings with the intent to dispense his product in exchange for money.” A22. Finally, as to identity, the State argued that the messages prove MacKenzie’s identity as the user of the 3908 phone, in that some of the customers addressed him by name. A22.

On appeal, MacKenzie concedes the admissibility, on the issue of identity, of the few text messages in this category that address the holder of the phone by a name. Given the ease with which the messages can be redacted, though, that concession grants the admissibility of only a few messages, and of those, only the part that uses the name. To the extent that the court ruled the rest of the messages admissible to prove “plan” or “intent,” the court erred.

Rule 404(b) is “grounded in long-established notions of fair play and due process, which forbid judging a person on the basis of innuendos arising from conduct which is irrelevant to the charges for which he or she is presently standing trial.” State v. Addison, 165 N.H. 381, 463 (2013). Its purpose “is to ensure that an accused is tried on the merits of the crime charged and to prevent a conviction that is based upon propensity and character inferences drawn from evidence of other crimes or wrongs.” Id.

To introduce evidence of other alleged acts committed by the defendant, “the State must demonstrate that: (1) such

evidence is relevant for a purpose other than proving the defendant's character or disposition; (2) clear proof establishes that the defendant committed the other bad acts; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant." Id.

"[I]n order to be relevant, other bad acts evidence must have some direct bearing on an issue actually in dispute and have a clear connection to the evidentiary purpose for which it is offered." Id. at 464. "[T]he State must identify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of bad character or criminal propensity." Id. "The trial court . . . must articulate for the record the theory upon which the evidence is admitted, without invoking propensity, and explain precisely how the evidence relates to the disputed issue." Id.

i. The evidence was irrelevant to prove a plan.

"The distinguishing characteristic of a plan is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution." State v. Glodgett, 148 N.H. 577, 579-80 (2002). Thus, the "other bad acts must be constituent parts of

some overall scheme." State v. Kirsch, 139 N.H. 647, 655 (1995). In other words, the "bad acts must be intertwined with the charged offenses rather than a series of independent acts that, only in retrospect, resemble a design." Id. at 580. The charged conduct and the uncharged conduct therefore must be "mutually dependent." State v. Melcher, 140 N.H. 823, 828-29 (1996). Accordingly, in Melcher, the Court assessed whether the success of the charged conduct "hinge[d]" on the uncharged conduct.

Here, the sale to B.F. in no way depended on the success of the effort to sell to any other customer. The mere fact that the holder of the 3908 phone sought to earn money by selling to multiple customers does not make each sale to each customer part of an overarching plan. Kirsch offers an analogy. In that AFSA case, this Court held that the State could not introduce, on a "plan" theory, evidence of sexual assaults against other child victims, in a prosecution charging the defendant with sexual assault against one child victim. Kirsch, 139 N.H. at 655; see also State v. Whittaker, 138 N.H. 524, 527-28 (1994) (same). In the absence of any indication that the charged assault was aided by the uncharged assaults, the State could not elicit the uncharged assaults on a "plan" theory. See also Petition of State (State v. San Giovanni), 154 N.H. 671, 676-78 (2007) (affirming

severance of charges of theft involving different victims, despite defendant's use of similar course of conduct).

ii. The evidence was irrelevant to prove intent.

Neither was the evidence relevant to prove "intent." When "intent is … an element of the crime to be proven by the State, it is sufficiently at issue to require evidence at trial." State v. Cassavaugh, 161 N.H. 90, 97 (2010) (in murder prosecution, defendant's prior threat to kill victim relevant, under Rule 404(b), to show that he acted "purposely," i.e., with the "specific intent to kill" the victim).

Here, however, MacKenzie's "intent" was not "actually in dispute." "Intent" is synonymous with "purpose." State v. Pond, 132 N.H. 472, 475 (1989). Thus, as a general matter, other-acts evidence is relevant to prove a defendant's "intent" only if the defendant is charged with acting with a specific purpose. See Lapierre, 131 N.H. at 612 (in suit alleging negligence, evidence that defendant "lost his temper" and committed similar act on other occasions inadmissible under Rule 404(b) because "intent is not an issue"); State v. Hickey, 129 N.H. 53, 60 (1986) ("[W]hen there is a need to prove that a defendant acted purposely … the court may find, in the proper exercise of discretion, a stronger justification for admitting evidence of prior crimes to prove intent than if the burden is to prove mere recklessness").

This Court's cases addressing the admissibility of other-act evidence to show a defendant's "intent" confirms this view. The cases demonstrate that the predominant consideration is whether the State must prove that the defendant acted with a particular purpose.

Where the State has the burden of proving a particular purpose, this Court has generally affirmed the admission of other acts apparently committed with the same purpose. Cassavaugh, 161 N.H. at 97; State v. Pepin, 156 N.H. 269, 276-78 (2007); State v. Sawtell, 152 N.H. 177, 181-82 (2005); State v. Brewster, 147 N.H. 645, 648-50 (2002); State v. Richardson, 138 N.H. 162, 165-66 (1993); State v. Simonds, 135 N.H. 203, 205-07 (1991); Hickey, 129 N.H. at 60-61 (1986); State v. Allen, 128 N.H. 390, 397 (1986); State v. Shackford, 127 N.H. 695, 699-700 (1986); State v. Parker, 127 N.H. 525, 532 (1985). Conversely, where the State need only prove that the defendant acted knowingly, this Court has generally held that the admission of other acts evidence to prove "intent" is erroneous. Kirsch, 139 N.H. at 654-55; State v. Bassett, 139 N.H. 493, 499-502 (1995); State v. Hastings, 137 N.H. 601, 604-06 (1993); State v. Blackey, 137 N.H. 91, 93-95 (1993).

This Court has admitted other-act evidence to prove intent in cases alleging a knowing mental state only in the context of charges positing an intention or motivation that

jurors may struggle to understand and therefore to believe. For example, this Court affirmed the admission of evidence in a case charging an assault on a child by a caregiver. See, e.g., State v. Fandozzi, 159 N.H. 773, 780-781 (2010) (affirming admission of defendant's mistreatment of infant within seven to ten days prior to discovery of broken ribs). It has also done so in sexual assault cases, where the proffered evidence tends to prove the defendant's sexual interest in the victim, often a child. E.g. State v. Colbath, 171 N.H. 626, 633-37 (2019). In such cases, proof of the defendant's sexual interest in a victim tends to overcome the defense that defendant did not commit the acts because he had no such interest. However, a jury faces no difficult-to-understand intention where the *actus reus* alleges that the defendant sold a product for money. Unlike sexual attraction to, or violent physical assault on, children, the profit motive posits no counter-intuitive impulse.

Here, the State was not required to prove that MacKenzie acted purposely. With respect to the element of B.F.'s death, the State was not required to prove any culpable mental state. T4 506. As to the act of dispensing a drug, the State had only to prove that MacKenzie acted knowingly. Id. At trial, there was no suggestion that the holder of the 3908 phone accidentally distributed drugs to B.F. or distributed a substance in ignorance of its nature. The principal dispute

centered on whether MacKenzie was the holder of the 3908 phone when B.F. bought drugs. In this circumstance, evidence of efforts by the holder of the 3908 phone to sell drugs to other people had no probative value. See Glodgett, 144 N.H. at 691 (recognizing diminished probative value of other-act evidence offered to prove intent, when intent not disputed).

On the strength of these arguments, this Court must conclude that the challenged texts were irrelevant. The court therefore erred in admitting them. Alternatively, if the evidence had some slight relevance to prove plan or intent, the court still should have excluded it because the risk of unfair prejudice substantially outweighed that probative value. Section C develops that argument.

C. Any relevance was substantially outweighed by the risk of unfair prejudice.

The analysis for weighing the risk of unfair prejudice, under Rule 404(b), is the same as under Rule 403. State v. Marti, 140 N.H. 692, 694 (1996). This brief incorporates herein by reference the points and authorities in Section I(C) describing that weighing test. For the reasons stated in Section II(B) above, outside of the few messages admissible to prove identity, the challenged evidence had little probative

value. It did, though, create a substantial risk of unfair prejudice.

First, the evidence tended to suggest that the holder of the 3908 phone habitually earned money by dealing drugs. This Court has recognized the substantial prejudicial potential of such information. State v. Pelkey, 145 N.H. 133, 136-37 (2000).

Second, some of the texts, particularly those with Meagher and Drouin, invited a strongly negative emotional reaction. Those texts showed Meagher straining to balance the demands of motherhood and work, while oppressed by a serious drug addiction and its painful withdrawal symptoms. In words bespeaking desperation, she begged the holder of the 3908 phone to sell to her as soon as possible. The seller responded not with compassion but with annoyance, as he told her to "chill." That exchange, irrelevant to any disputed issue in the case, risked inflaming the jury's emotions against MacKenzie. Because that risk of unfair and irrelevant prejudice outweighed whatever modest probative value the text messages otherwise have, this Court must reverse the conviction.

CONCLUSION

WHEREFORE, Mr. MacKenzie respectfully requests that this Court reverse his conviction.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decisions are in part in writing and are to that extent appended to the brief.

This brief complies with the applicable word limitation and contains approximately 9290 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: May 5, 2021

ADDENDUM

ADDENDUM – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

State of New Hampshire

v.

Benjamin M. Mackenzie

Docket No. 219-2017-CR-00816

ORDER

The defendant, Benjamin M. Mackenzie, is charged with one count of Distribution Of A Controlled Drug With Death Resulting. The State has filed a motion in limine seeking to admit certain testimony of Tyler Bergeron ("Mr. Bergeron"). (Court index #43.) The defendant objects. The court held a hearing on this matter on January 18, 2019 and January 23, 2019. Based on the parties' arguments and the applicable law, the court finds and rules as follows.

At the hearing, the State represented that it intends to elicit the following testimony from Mr. Bergeron: (1) that Mr. Bergeron knew the defendant and was friends with him; (2) that the defendant was Mr. Bergeron's regular drug dealer starting in 2016; (3) that he knew from memory that the defendant's cell phone number was (603) 833-3908; (4) that the defendant used only one cell phone; (5) that "needing a 30" indicates that a person is seeking to purchase drugs; and (6) that the decedent, Bryanna Frechette ("Ms. Frechette"), was in the habit of obtaining drugs from the defendant. At the hearing, the State also indicated that is seeks to elicit testimony from Taylor Bourne ("Ms. Bourne"): (1) that she was friends with Ms. Frechette; and (2) Ms. Frechette was in the habit of obtaining drugs from the defendant, including during the week before her death.

The State argues that this testimony is admissible under New Hampshire Rules of Evidence 401, 402, and 406. (See State's Mot. Admit Testimony ¶¶ 8, 10.) Specifically, the State contends that testimony relating to the defendant's cell phone number and his use of the cell phone is relevant under Rule 401 because it helps to establish the defendant's identity. (See id. ¶ 8.) Additionally, the State argues that Mr. Bergeron's testimony and Ms. Bourne's testimony that Ms. Frechette was in the habit of purchasing drugs from the defendant is admissible under Rule 406 because it establishes Ms. Frechette's habit of obtaining drugs from

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the defendant. (See id. ¶¶ 10–11.)

The defendant objects, arguing that the court should exclude this evidence pursuant to Rule 403 because its probative value is substantially outweighed by the risk of unfair prejudice or the risk of needlessly presenting cumulative evidence, or both. Additionally, the defendant argues that some of the offered testimony, particularly that concerning the defendant being Mr. Bergeron's drug dealer, is evidence of other bad acts, and is therefore governed by Rule 404(b).

Relevant evidence is generally admissible. N.H. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H. R. Evid. 401. Nevertheless, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . or needlessly presenting cumulative evidence." N.H. R. Evid. 403.

First, the court holds that the following testimony is relevant: (1) that Mr. Bergeron knew the defendant and was friends with him; (2) that Mr. Bergeron knew from memory that the defendant's cell phone number was (603) 833-3908; and (3) that Mr. Bergeron knew that the defendant used only one cell phone. At trial, the State bears the burden of proving the defendant's identity beyond a reasonable doubt. See State v. Addison, 160 N.H. 792, 797–98 (2010) (approving jury instruction on State's burden to prove identity). In this case, the State alleges that Ms. Frechette purchased a fatal dose of drugs from the person in possession of the cell phone associated with number (603) 833-3908. Therefore, the State must prove that the defendant was in control of the cell phone associated with that phone number in order to identify him as the person who sold the fatal dose of drugs to Ms. Frechette. As such, Mr. Bergeron's testimony that this cell phone belonged to the defendant and that the defendant used only one cell phone is highly probative of the issue of identity. Additionally, Mr. Bergeron's testimony that he knew and was friends with the defendant is probative of Mr. Bergeron's basis of knowledge. The court finds that any danger of unfair prejudice or needlessly presenting cumulative evidence does not substantially outweigh the highly probative value of this evidence.

Second, the court holds that Mr. Bergeron's testimony regarding his ongoing relationship with the defendant as his dealer, and his testimony about the meaning of "needing a 30," is inadmissible. At the hearing, the State explained that, prior to her death, Ms. Frechette sent a text message to cell phone number (603) 833-3908, stating that she needed "a 30." The State

explained that it is not immediately apparent from Ms. Frechette's message that she was requesting to purchase drugs. Mr. Bergeron's testimony about his drug use as the basis of his knowledge for the meaning of "needing a 30" would be relevant, and testimony about the meaning of that phrase would be relevant. See N.H. R. Evid. 401. As a basis for Mr. Bergeron's knowledge, the State seeks to elicit testimony that, starting in 2016, the defendant was Mr. Bergeron's regular drug dealer. The defendant argues that this evidence of other acts is governed by Rule 404(b), and the court agrees. Under Rule 404(b), "[e]vidence 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." This evidence is not intrinsic to the charged crime, and the State has not offered a permissible reason for this evidence to be admitted under Rule 404(b). Further, the testimony about the meaning of "needing a 30" would be cumulative of the testimony of the State's expert on the same topic, and the testimony of Mr. Bergeron concerning his ongoing use of drugs obtained from the defendant is highly prejudicial. Given the cumulative nature of Mr. Bergeron's "needing a 30" evidence and the substantial prejudicial effect of the jury hearing from Mr. Bergeron that the defendant is the person who regularly supplied him with drugs, that evidence is excluded under Rule 403.[1]

Third, the court holds that Mr. Bergeron's testimony and Ms. Bourne's testimony to the effect that Ms. Frechette was in the habit of procuring her drugs from the defendant is – if otherwise admissible under, e.g., Rules 801-807 – admissible habit evidence under New Hampshire Rule of Evidence 406. Rule 406 provides that "[e]vidence of a person's habit . . . may be admitted to prove that on a particular occasion the person . . . acted in accordance with the habit . . . . The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness." In this case, the State seeks to prove that it was Ms. Frechette's habit to purchase drugs primarily from the defendant. Mr. Bergeron's testimony and Ms. Bourne's testimony would help to establish that it was Ms. Frechette's habit to purchase her drugs from the defendant, and that she therefore had a relationship with the defendant consistent with purchasing drugs from him the night of her death. To the extent that Mr. Bergeron's testimony and Ms. Bourne's testimony is otherwise admissible – Rule 406 does

[1] The court by this order is granting the State's motion as to Mr. Bergeron's friendship with the defendant as the basis for his knowledge of the defendant's phone, but denying the motion as to Mr. Bergeron's use of the defendant as his drug supplier as the basis of that knowledge. These holdings will necessarily require the State to be particularly vigilant in its examination of Mr. Bergeron, and warrants in limine permission to lead him through this portion of his testimony.

not, for example, provide an exception to the exclusion of hearsay under Rule 802 – the court finds that this evidence is probative of Ms. Frechette's habit. The court further determines that the danger of unfair prejudice, while present, does not substantially outweigh the probative value of this evidence.

For the foregoing reasons, the State's motion in limine is GRANTED in part and DENIED in part, as set out above.

So Ordered.

January 23, 2019

Steven M. Houran
Presiding Justice

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

The State of New Hampshire

v.

Ben MacKenzie

Docket No. 219-2017-CR-816

ORDER ON MOTION TO ADMIT

On August 3, 2018, the State filed a Motion To Admit Phone Messages (court index 37).

Upon review this date of the motion, the other pleadings of record, and the applicable law, the motion is GRANTED.

The evidence the State seeks to admit is "intrinsic," and thus admissible without reference to Rule 404(b). *See e.g. State v. Wells*, 166 N.H. 73, 77 (2014) and *State v. Thomas*, 168 N.H. 589, 598 (2016).

The court notes as well that even if this evidence were not "intrinsic" it would, upon a three-part analysis pursuant to, *e.g., State v. Beltran*, 153 N.H. 643, 647 (2006), be admissible under Rule 404(b).

So Ordered.

August 14, 2018

Steven M. Houran
Presiding Justice

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

State of New Hampshire

v.

Benjamin M. Mackenzie

Docket No. 219-2017-CR-00816

ORDER ON PENDING MOTIONS

The defendant, Benjamin M. Mackenzie, has been charged with one count of Distribution Of A Controlled Drug With Death Resulting. The State has filed two motions, one seeking to admit evidence of the defendant's probation status, (court index #44), and one seeking to admit evidence of certain cell phone records, (court index #49).[1] The defendant objects to both motions. The court held a hearing on these matters on January 18, 2019.

I. State's Motion to Admit Evidence of the Defendant's Probation Status

First, the State has filed a motion in limine to admit evidence of the defendant's probation status. Specifically, the State seeks to admit a Probationer/Parolee Report form dated December 14, 2016 (the "report") (State's Ex. 1)[2] and other evidence of the defendant's probation status. The State intends to submit portions of the report as evidence that the defendant attended a probation meeting on December 14, 2016, and that at the probation meeting, he indicated that his phone number was (603) 566-3435. The State also intends to adduce evidence at trial that the telephone associated with (603) 566-3435 sent a text message referring to the defendant's obligation to check in with probation on December 14 to cell phone number (603) 833-3908, which the State contends was exclusively controlled by the defendant. The State argues this evidence is relevant and highly probative of the defendant's identity. The State also intends to submit evidence of the defendant's probation status in order to show that he lied about his employment to his probation officer, and that he therefore must have been supplementing his

[1] The State also filed a motion in limine seeking to admit certain testimony, however, the court resolved to address that motion at a later date, prior to opening statements, in order to provide the defense an opportunity to respond.
[2] At the hearing, the court admitted the December 14, 2016 Probationer/Parolee Report as State's Exhibit 1 for the purpose of deciding the State's motion in limine only.

income by selling drugs. The defendant objects, arguing that the court should exclude evidence of his probation status because its probative value is substantially outweighed by a danger of unfair prejudice.

Relevant evidence is generally admissible. N.H. R. Evid. 402. Irrelevant evidence is not. Id. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H. R. Evid. 401. Nevertheless, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." N.H. R. Evid. 403.

In this case, the court finds that the probative value of evidence of the defendant's probation status is not significantly outweighed by a danger of unfair prejudice. At trial, the State bears the burden of proving the defendant's identity beyond a reasonable doubt. See State v. Addison, 160 N.H. 792, 797–98 (2010) (approving jury instruction on State's burden to prove identity). Here, the state intends to prove the defendant's identity as the person who supplied the drugs leading to the decedent's death in part by showing the link between the phone number provided by the defendant to his probation officer to a text from his mother at that number reminding him to report to probation on December 14 sent to the phone number that the State alleges was used to communicate with the decedent concerning supplying the drugs that allegedly killed her, and thus linking the defendant to the decedent and those drugs. Accordingly, the court finds that evidence of the defendant's probation status is highly probative of the issue of identity. Further, the court finds that the danger of unfair prejudice, while present, does not substantially outweigh the high probative value of this evidence. Accordingly, the court holds that evidence of the defendant's probation status is admissible as providing a strong circumstantial inference of the defendant's identity as the person responsible for the alleged criminal act.

Because the court has determined for the reasons set out above that the defendant's probation status is admissible, the State's alternative theory of admissibility concerning the defendant's report to his probation officer of his employment is moot.

II. State's Supplemental Motion to Admit Phone Messages

Next, the State has filed a supplemental motion to admit cell phone records that were supplied to the State by the provider under a valid search warrant but which exceeded the scope

of that warrant. On January 9, 2017, Detective Joseph Rousseau of the Rochester Police Department obtained a search warrant for records associated with the phone number (603) 833-3908. The warrant authorized Detective Rousseau to obtain from Verizon Wireless all account holder information, inbound and outbound call logs, and inbound and outbound text messages associated with that phone number. The warrant was limited by its terms to records of activity that occurred between 3:00 p.m. on December 11, 2016, and 1:00 a.m. on December 13, 2016. On February 21, 2017, Detective Rousseau obtained these records from Verizon Wireless. Thereafter, the State filed a motion to admit phone messages, (court index #37), which the court granted, (court index #38). Recently, the State determined that a number of the text messages it sought to admit in its previous motion that had been provided to it by Verizon Wireless pursuant to the search warrant had been sent outside the timeframe specified in the search warrant.

Accordingly, the State has now filed a supplemental motion seeking an evidentiary ruling that the text messages obtained outside the scope of the timeframe in the warrant are admissible at trial. The State does not dispute that these text messages were outside the scope of the search warrant, but asserts that they are nonetheless admissible. In support of its motion, the State argues that the text messages are admissible because they were not obtained as the result of State action, or alternatively, that the text messages are not subject to the exclusionary rule. (See State's Suppl. Mot. Admit Phone Messages ¶¶ 13, 23.) The defendant objects, arguing that discovery of the text messages was precipitated by State action, that the messages are outside the scope of the warrant, and that the messages are therefore inadmissible.

Under Part I, Article 19, of the New Hampshire Constitution, every citizen has "a right to be secure from all unreasonable searches and seizures of his person . . . and all his possessions." N.H. CONST. pt. I, art. 19. If evidence discovered during a search is obtained in violation of Part I, Article 19, that evidence "may be subject to exclusion from evidence in a criminal trial." State v. Davis, 161 N.H. 292, 295 (2010) (citation omitted). Warrantless searches are unreasonable *per se* unless "conducted within the narrow confines of a judicially crafted exception." State v. Murray, 135 N.H. 369, 374 (1992) (citation omitted). "In the absence of a warrant the burden is on the State to show that the conduct of the search falls within the claimed exception." Murray, 135 N.H. at 374 (citation omitted).

"The protection [of the State Constitution] against unreasonable searches and seizures is

aimed at preventing unlawful State action." State v. Nemser, 148 N.H. 453, 455 (2002) (quoting State v. Patch, 142 N.H. 453, 456 (1997)). "Thus, evidence obtained by a private party may be admissible even if secured through 'the most outrageous behavior by [the] private party.'" Id. (quoting State v. Carroll, 138 N.H. 687, 691 (1994)). However, "[t]he acquisition of evidence by an individual acting as an agent of the police must be reviewed by the same constitutional standards that govern law enforcement officials." State v. Heirtzler, 147 N.H. 344, 348 (2001). "This 'agency rule' prevents the police from having a private individual conduct a search or seizure that would be unlawful if performed by the police themselves." Id. at 349. "A conclusion that an agency relationship existed between the government and a private individual requires proof of an affirmative act by a state official prior to the search or seizure that can reasonably be seen to have induced the search or seizure by the private party." State v. Wall, 154 N.H. 237, 240 (2006). "The totality of the circumstances must be considered when determining whether the operative facts create an agency relationship." Id.

In the instant case, there is no evidence of an affirmative act by Detective Rousseau prior to the search and seizure of the text messages that can be viewed as having induced Verizon Wireless to provide records outside the scope of the warrant. In fact, as the State argues, all evidence is to the contrary. Prior to obtaining these records, Detective Rousseau complied with the provisions of the State Constitution by applying for and obtaining a search warrant. There is nothing suggesting that Detective Rousseau requested or instructed Verizon Wireless to provide records that were outside the scope of the warrant. The defendant contends that the court should find that an agency relationship existed because it was the State's warrant and Detective Rousseau's request for the records that precipitated the actions of Verizon Wireless, which ultimately led to the State's receipt of evidence outside the scope of the warrant. However, in the absence of any evidence of any affirmative act by Detective Rousseau creating such a relationship or inducing the private party to exceed the warrant, the court finds that there was no agency relationship.

In a case the court finds instructive, the Court of Appeals of Washington, Division 1, considered a very similar case in State v. Canady, 161 Wash.App. 1009, 2011 WL 1459733 (Wash. Ct. App. 2011) (unpublished opinion) rev. denied 172 Wash.2d 1026 (Wash. 2011). In Canady, a police detective applied for and was granted a search warrant to obtain the defendant's

text message records from Verizon Wireless. 2011 WL 1459733 at *1. The search warrant was limited to text messages sent between 6:00 a.m. and 12:00 p.m. on June 26. Id. Thereafter, the detective received text message records from Verizon Wireless, which he immediately viewed and determined to be incriminating. Id. However, upon closer examination, the detective discovered that many of the text messages provided by Verizon Wireless had been sent earlier than 6:00 a.m. on June 26. Id. at *2. Based on those text messages, police arrested the defendant and applied for a second search warrant for records of text messages sent between June 20 and July 3. Id. The defendant moved to suppress all evidence discovered based on the probable cause developed as a result of the detective's initial reading of those text messages. Id. The trial court denied the defendant's motion to suppress, and a jury found him guilty as charged. Id. at *2–3.

The Canady appellate court first found that "in the absence of state action, [the state and federal constitutions] have no application regardless of the scope of protection which would otherwise be afforded under either provision." Id. at *3 (quotation omitted). Thus, "the exclusionary rule does not apply to the acts of private individuals." Id. (quotations and brackets omitted). The court then applied an agency test, similar to the test in New Hampshire. Id. ("In order to prove that a private individual was acting as a government agent, it must be shown that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person.") (quotations and brackets omitted). The court found that the detective explicitly notified Verizon Wireless regarding the limitations of the search warrant. Id. at *4. Therefore, "[e]ven were [Verizon Wireless] acting at police direction when [it] complied with the search warrant by providing those records specified in the search warrant, [it] was certainly not acting at police direction when [it] sent additional records outside the scope of the search warrant." Id. at *4. Accordingly, the court found that the trial court did not err by denying the defendant's motion to suppress the text message evidence. Id.

Similarly here, there is no evidence that Detective Rousseau instigated, encouraged, or directed Verizon Wireless to provide records that were outside the scope of the search warrant. Even though Verizon Wireless was acting at the direction of the police when it provided records that were within the scope of the warrant, as the defendant argues, it was not acting under police direction when it provided records that were not identified by the warrant. Accordingly, the

court finds that there was no agency relationship between the State and Verizon Wireless, and that Verizon Wireless was acting as a private party when it provided records outside the scope of the search warrant. The court concludes that there was no State action, and that the disputed text messages are not subject to the protections of Part I, Article 19 of the State Constitution. The State's supplemental motion to admit phone messages is therefore granted.

So Ordered.

January 18, 2019

Steven M. Houran
Presiding Justice