THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0265

State of New Hampshire

v.

Benjamin M. MacKenzie

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument)

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I. Whether the trial court sustainably exercised its discretion when it admitted Taylor Bourne's testimony that the victim habitually purchased drugs from the defendant.

II. Whether the trial court sustainably exercised its discretion when it admitted text message conversations in which the defendant organized drug sales to other customers around the time of the charged sale to the victim.

III. Whether any error in admitting either piece of evidence was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

In September of 2017, a Strafford County Grand Jury indicted Benjamin MacKenzie ("the defendant") on one count of distribution of a controlled drug with death resulting, (RSA 318-B:2; RSA 318-B:26, IX), stemming from the fatal overdose of Bryanna Frechette ("the victim") on December 13, 2016. DA[1]43. Following a four-day trial in January 2019, a jury convicted the defendant. T516-17.

On April 8, 2019, the court (*Houran, J.*) sentenced the defendant to twelve to twenty-four years stand committed in the New Hampshire State Prison with 516 days of pretrial confinement credit. DD45. The court also ordered two years of the minimum sentence suspended upon successful completion of substance abuse disorder treatment. DD47. It also imposed a fine and statutory penalty of $620, suspended for five years. Finally, the court ordered the defendant to pay restitution to the victim's mother, Melinda Frechette. DD46.

[1]Citations to the record are as follows:
"DD __" refers to the addendum to the defendant's brief, and page number;
"DA__" refers to the separately bound appendix to the defendant's brief, and page number
"DB __" refers to the defendant's brief, and page number;
"MH__" refers to the transcript of the January 18, 2019, pre-trial motions hearing, and page number.

STATEMENT OF FACTS

A. The State's case at trial

The State's first witness was the victim's mother, Melinda Frechette. On December 12, 2016, Melinda left work around 7:15 p.m. T61. When she arrived home, her husband, John, and her daughter, the victim, were already home. T61. Melinda decided to spend the evening decorating the family's Christmas tree while her husband watched a football game on TV. T62. After some convincing, the victim joined her mother to help with the decorating. T63.

At approximately 10:00 p.m., the victim informed her parents that she was going out, but did not say where she was going. T64-65. Melinda finished decorating the tree and went to bed. T65. Melinda testified that she heard her daughter return home around 11:00 p.m. T67. She said good night and that she loved her and the victim replied that she loved her, too. T67. The victim went into her bedroom and closed the door. T67.

John Frechette confirmed the details of Melinda's testimony and added that the light was still on in the victim's room when he went to bed around 1:00 a.m. T78. He testified that he knocked on the door to tell her to turn off her light, but the victim did not respond. T79. Thinking she had fallen asleep with the light on, John attempted to open her door and turn off the light. T79. The door was locked, so he went to bed. T79.

The next morning, Melinda woke up to an alarm going off in the victim's bedroom. T68. She shouted for the victim to shut off the alarm, but received no answer. T68. After that, she called the victim's cell phone, but the victim did not answer. T68. Melinda got up and went to the victim's

bedroom, but the door was still locked. T69. Melinda woke John, who went to get a screwdriver with which to open the victim's door. T69. Meanwhile, assuming that the victim was sleeping soundly, Melinda went downstairs to make coffee. T69.

John testified that he used a screwdriver to open the victim's bedroom door. T80-81. When he entered the bedroom, he saw her lying on the middle of her bed with her legs hanging off the edge. T81. He noticed a plastic tube with a white plastic plunger clenched between her teeth. He went downstairs and told his wife that the victim was dead. T69, 82. Melinda ran upstairs, saw the victim's body on the bed, and called 911. T69-70, 82.

Wellington Bartels, an assistant deputy medical examiner for the State of New Hampshire, testified that he responded to the scene of a suspected overdose death at 54 Stillings Court in Rochester on December 13, 2016. T111. After consulting with the lead investigator, Mr. Bartels entered the house and pronounced the victim dead at approximately 8:40 a.m. T114. He then performed an initial examination of the body at the scene. T115-16. He testified that, based on his observations, she had been deceased approximately eight to twelve hours. T115.

Mr. Bartels noted only minor external injuries. The victim had bruising on her inner elbow, consistent with intravenous drug use. T117. He also noted what appeared to be a burn mark on the victim's right thumb and others on her left hand, consistent with heat transfer from 'cooking' drugs to draw into a needle. T120. Mr. Bartels also noted that The victim had "foaming of the mouth and/or nose. . . caused from foam built up in the

lungs." T121. Mr. Bartels testified that this was also consistent with an opiate overdose. T121.

Following this initial investigation, the victim's body was secured for several hours until Mr. Bartels was able to perform a full-body examination and collect blood and vitreous fluid for toxicology. T129. Following this examination, he sent the victim's body to the New Hampshire Medical Examiner's Office for an autopsy. T133. Finally, Mr. Bartels testified that he later received a copy of the cause of death form, which stated that the victim died from an accidental acute fentanyl overdose. T133-34.

Donna Papsun, an expert in forensic toxicology at NMS Laboratories, testified that her laboratory received two sets of samples related to the victim's death. T154, 160. The first set included two blood samples and a urine sample. T159. The samples tested positive for fentanyl and cannabis. T160-62. The second set of samples included two blood samples and a sample of vitreous fluid. T159. This set also tested positive for fentanyl and cannabis. T167. Ms. Papsun testified that the quantity of fentanyl was consistent with a fatal overdose. T167-68.

Dr. Thomas Andrews, retired Chief Medical Examiner for the State of New Hampshire and an expert in forensic pathology (T192) testified that he served as Chief Medical Examiner from 1997 to 2017 and performed approximately 5,800 autopsies in that time. T188, 192. He conducted an autopsy on the victim on December 16, 2016. T196. Dr. Andrews observed foaming around the victim's mouth and bluish discoloration in the crooks of the victim's arms, consistent with injecting drugs. T199. He also

observed the abrasion on the victim's right thumb that Mr. Bartels had identified as a burn consistent with heating drugs on a spoon. T199.

An internal examination revealed that the victim's lungs were heavy from a build-up of fluid. T201. Her brain was also slightly swollen, consistent with opiate intoxication. T201. Dr. Andrews testified that this swelling was not the cause of death. T201. He opined that the toxicology report showed "clearly lethal levels of fentanyl," and "ruled out any other competent competing cause of death." T205-07.

Officer Kyle Danie of the Rochester Police Department testified that he responded to a call of someone unconscious or not breathing at 54 Stillings Court in Rochester on December 13, 2016. T88. Upon arrival, Ofc. Danie secured the victim's bedroom as a potential crime scene and took photographs. T89-90. He observed and photographed items consistent with hypodermic needle use. T91. After the initial photographs, Ofc. Danie observed a container that held needles, aluminum foil, spoons, plastic baggies, and other paraphernalia associated with intravenous drug use. T92. Ofc. Danie testified that after this initial sweep, he interviewed the victim's parents. T98.

The state also called Rochester Police Department Detective Joseph Rousseau. In addition to reiterating the evidence discovered at the scene, Det. Rousseau testified that he obtained consent from the victim's parents to forensically download the contents of the victim's iPhone. T269-70. He testified that he performed a complete extraction on the phone. T274-75.

Det. Rousseau then testified to a series of text messages between the victim and a contact listed as "Ben Mackenzie." T278. He testified that the number associated with this contact was (603) 833-3908. T278. The victim

initiated a text exchange around 9:50 p.m. on December 12 with a text that said, "Need a 30." T278. The 3908 number replied at 10:07 p.m. "Hey. Getting it ready," followed by "where are you at?" T279. The victim replied, "I'm in Gonic. How long?" The 3908 contact answered, "I'm looking for my scale. I'm going to have you come to Brock Street." T279. The victim and the 3908 number exchanged a few more messages and arranged to meet at the "skate park on Brock Street." T280. At 10:31 p.m., the 3908 contact texted "Just call me when you turn on to Emerson." T281.

The victim's phone records showed that she called the 3908 number at 10:33 p.m. After that, the victim texted "Where are you?" T282. The 3908 contact responded "Almost there. You need to have patience." T282. The victim responded, "I know." T282-83. The records showed two phone calls between the victim and the 3908 number at 10:47 p.m. and 10:56 p.m. T283. Finally, the records showed that the victim's phone had connected to the Wi-Fi at her parents' house around 11:12 p.m. T82, 283.

Det. Rousseau also testified that, during an interview with the defendant's friend Tylor Bergeron, Mr. Bergeron had known the defendant's number from memory, without hesitating or looking at his own phone. T286. Det. Rousseau also testified to text exchanges between the 3908 number and another number in which the 3908 arranged a large purchase of opiates for redistribution. T308-09.

Det. Rousseau also testified that his investigation had linked another contact in the 3908 phone records to the defendant's mother. T309-11. In text exchanges with this number, the 3908 number referred to the other person as "Mom." T311. One message from "Mom," dated December 13, 2016, read, "Don't forget probation. Can't sleep through it." T311. Det.

Rousseau confirmed that the defendant was on probation at the time and attended a scheduled appointment with his probation officer on December 14, 2016. T182-83, 312. Det. Rousseau also testified to a number of text exchanges involving other drug transactions. T312-21, 334-35, 337-40. He further testified to text messages between the 3908 number and a number that investigators associated with the defendant's brother, Zach Mackenzie. T337-40.

Det. Rousseau also testified to a text exchange on the evening of December 12, 2016, between the victim and a contact identified as "Ben Rand." T344. Those messages suggested that the victim was attempting to buy opiates from Mr. Rand at the same time she was arranging to purchase them from the defendant. T345. Around 10:27 p.m., The victim texted Ben Rand: "[W]on't need any. Sorry." T345. According to the text records, she sent this at approximately the same time she met with the 3908 number.

During a brief cross-examination, Det. Rousseau acknowledged that the defendant's brother might have used the 3908 number. T357-58. The defendant also highlighted that investigators had not sent the empty baggies found near the victim's body to the lab for residue, fingerprint, or DNA analysis. T350-52, 360-62. Finally, Det. Rousseau agreed that it was possible that the fatal dose of fentanyl had come from multiple sources. T362. On redirect examination, Det. Rousseau reiterated that only a single baggie was found on the bed next to the victim's body. T364. The other baggies were located at the bottom of a "drug kit," covered with other drug paraphernalia. T365. This kit containing all but one of the baggies was found behind the victim's body. T364.

Christopher Mangum, a retired police detective with the Rochester Police Department's drug task force and an expert in narcotics investigations, who had responded to the scene of the victim's death, also testified. T382-83, 387-89. Det. Mangum testified about text message conversations between the 3908 number and other individuals. He concluded from clues in the text exchanges that the 3908 number belonged to the defendant. T415. In support, he pointed to several texts: (1) a text in which the defendant's mother referred to the phone's user as "Ben," (2) a text in which a number associated with the defendant's brother wrote, "Mom asked are you coming over," (3) a text exchange in which the defendant texted his mother: "Hey, mom. Are you up?" and a response in which the defendant's mother reminded him about a probation appointment the next day. T400-01. Det. Mangum confirmed earlier testimony that the defendant was on probation at that time and met with his probation officer on the day corresponding with the appointment in that text. T401.

Det. Mangum also concluded that many of the text exchanges involved drugs sales. T402. According to Det. Mangum's expertise in drug interdiction, the victim's "Need a 30" text referred to .30 grams of heroin or fentanyl, typically worth 30 dollars. Det. Mangum further testified that the text exchange meant that the defendant had weighed and packaged the drugs for sale to the victim. T393-94.

Det. Mangum also reviewed other text exchanges and concluded that the defendant had traveled to Lawrence, Massachusetts, to obtain 20 grams of fentanyl at a cost of $650. T397. According to other texts in that chain, the supplier had "fronted" the drugs, meaning the defendant would pay the supplier after he resold the drugs. T 399.

Det. Mangum next testified about a series of text exchanges between the defendant and several other phone numbers. T402-10. He testified that these exchanges represented various customers arranging to buy fentanyl from the defendant. T404-05. These conversations also included texts between the defendant and a number that investigators had associated with his brother, Zach MacKenzie. T410-414.

Finally, Det. Mangum testified that the victim had been in contact with someone who identified himself as Ben Rand on the night of her death. T416. Based on the text exchange between the victim and Mr. Rand, Det. Mangum testified that the victim had sought to purchase drugs from Mr. Rand. T417. According to Det. Mangum, however, the texts showed that they did not meet that evening. T420.

Charles Wolfert, the chief probation and parole officer for Strafford County, testified that the defendant was on probation at the time of the victim's death. T180. Ofc. Wolfert testified that the defendant reported to his office on November 9, 2016. T180. In addition to providing basic biographical information for this form, the defendant listed (603) 866-3435 as his home phone number. T181. He left the line for a cell phone number blank. T183. The defendant represented that he was living with his mother and stepfather and was employed at Gary's Sports Bar. T181. Ofc. Wolfert further testified that the defendant filled out the same form during a December 14, 2016 appointment and included the same biographical information. T183.

Gary Hillsgrove, the former owner of Gary's Restaurant and Sports Lounge, testified that he hired the defendant October 1, 2016 and the defendant worked as a dishwasher for approximately one month. T215-17.

Mr. Hillsgrove testified that the defendant had identified his cell phone number as (603) 833-3908 on two employment forms. T219-21.

The defendant's friend, Tyler Bergeron, testified that, to his knowledge, the defendant's cell phone number at the time of the victim's death was (603) 833-3908. T236. He further testified that he did not believe he had ever spoken to anyone else by calling that number. T237. Through a series of cross-examination, re-direct examination, and re-cross questions, the witness testified that he was unsure if the defendant had ever shared the 3908 number with his brother, but testified that he had previously told investigators, "Benjamin had his own phone." T238-45.

The victim's friend, Taylor Bourne, testified that the victim talked to her about the defendant in December of 2016. T247-48. According to Ms. Bourne's testimony, the victim had said that she purchased opiates from the defendant. T249-50. Ms. Bourne also testified that the victim had showed her pictures of the defendant on Facebook. T250. She additionally testified that she had unsuccessfully attempted to contact the victim around 1:00 a.m. on the night the victim died. T252. On cross-examination, Ms. Bourne testified that the victim had told her that she had previously purchased drugs from other individuals in addition to the defendant. T252-53.

B. Pre-trial motions and objections relevant to appeal

1. Taylor Bourne's proffered testimony

At a pre-trial motions' hearing, the State informed the court that it intended to offer testimony from Taylor Bourne that the victim habitually purchased drugs from the defendant, including during the week prior to her

death. MH19-23; DD58. The defendant objected, arguing that the risk of unfair prejudice would substantially outweigh the probative value, making the evidence inadmissible under *N.H. R. Ev.* 403. T6. After the first day of trial, the court ruled that Ms. Bourne's testimony was admissible as habit evidence under *N.H. R. Ev.* 406. DD58-61. The court noted that, "the danger of unfair prejudice, while present, [did] not substantially outweigh the probative value of this evidence." DD61.

Before the State called Ms. Bourne, defense counsel raised a hearsay objection. T225. The State argued that statements the victim made to Ms. Bourne before her death would fall into the Rule 803 exceptions for present sense impression or then-existing mental, emotional, or physical state. T226. Alternatively, the statements contained circumstantial guarantees of trustworthiness sufficient for admission under the Rule 807 residual exception. T226-27. The court rejected the State's Rule 803 argument, but ruled that the evidence admissible under the Rule 807 residual exception. T229-30.

During her testimony, Ms. Bourne testified briefly on this subject:

> Q Okay. Now, Taylor, I just want to ask, did you know somebody by the name of Ben Mackenzie during this same period of time?
>
> A Yes.
>
> Q Had you ever actually met him?
>
> A No.
>
> Q Okay. So how was it that you knew the name Ben Mackenzie?
>
> A From [the victim].

> Q Okay. And I want to be very clear about this December timeframe. Was that a name that [the victim] had told you about?
>
> A Yes.
>
> Q Okay. And what had she told she was doing in relation to Ben Mackenzie?
>
> A She had told me that she had gotten drugs off of him.
>
> Q And specifically, did she talk about what type of drug?
>
> A Opiates.

The admission of this testimony forms the basis of the defendant's first issue on appeal.

2. Text messages from other customers

On August 3, 2020, the State moved to admit a series of text exchanges between the 3908 number connected to the defendant and a number of individuals seeking to purchase drugs. DA7-27. On August 14, 2018, the defendant filed a cursory objection. DA28. That same day, the court granted the State's motion, finding that the messages were intrinsic to the charged offense and admissible without reference to Rule 404(b). DD62. The court further noted that even if the messages were not intrinsic, they would be admissible under Rule 404(b). DD62. The defendant filed no motion to reconsider

The court reaffirmed this ruling during trial. T256. It noted that the messages were "limited in time, limited in scope to the circumstances around the charged event[.]" While the court acknowledged that the messages were prejudicial, it concluded, "the probative value actually substantially outweigh[ed] the prejudicial effect, not the other way around."

T256. Referring to an off-the-record chambers conference with the parties, the court ordered the State to redact part of one message, in which the defendant's mother referred to a prescription medication the defendant was taking, because the court concluded that it was unfairly prejudicial. T256. When the court asked defense counsel if he wanted to be heard on "the Ben Rand issue," defense counsel responded "No." T260. The court then addressed the text messages, telling defense counsel that the defense had "the right to object at any point" if the State's foundation was insufficient. T 261. Later on, when the court asked if the defense wanted "to be heard further," on the admissibility of a subset of text messages, defense counsel responded that he had "already stated [his] position." T302. Two of the State's witnesses, Det. Joseph Rousseau and Det. Christopher Mangum, then testified about the remaining messages. T313-22, 334-35, 402-14. When the detectives recounted the substance of the texts, defense counsel raised no objection.

SUMMARY OF THE ARGUMENT

I. The trial court sustainably exercised its discretion when it admitted evidence that the victim habitually purchased opiates from the defendant. The evidence constituted proper habit evidence and the trial court correctly determined that it contained sufficient circumstantial guarantees of trustworthiness under *N.H. R. Ev*. 807 to overcome the defendant's hearsay objection. The probative value of this evidence substantially outweighed any risk of unfair prejudice.

II. The defendant failed to preserve this issue. However, if this Court finds that the issue was properly preserved, it should nevertheless find that the evidence was intrinsic to the charged crime and, even if it were not intrinsic, it would have been admissible under *N.H. R. Ev*. 404(b) to prove identity, plan, and intent. Finally, the probative value of this evidence substantially outweighed the risk of unfair prejudice and the defendant opened the door to this evidence.

III. If the evidence of the victim's habit or the text exchanges between the defendant and other customers were improperly admitted, the admissions were harmless beyond a reasonable doubt.

ARGUMENT

This case presents two issues related to the admissibility of evidence. "The admissibility of evidence is a matter left to the sound discretion of the trial court. Because the trial court is in the best position to gauge the prejudicial impact of particular testimony, [this Court] will not upset its ruling absent an unsustainable exercise of discretion. To sustain his burden, the defendant must show that the trial court's decision was unreasonable to the prejudice of his case." *State v. White*, 155 N.H. 119, 123 (2007) (internal citations omitted). "If the record establishes that a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it, the appellate court will uphold the trial court's decision." *State v. Barr*, 172 N.H. 681, 692 (2019).

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT THE VICTIM HABITUALLY PURCHASED DRUGS FROM THE DEFENDANT.

A. This issue is not preserved.

The State offered testimony from the victim's friend Taylor Bourne as evidence that the victim habitually purchased drugs from the defendant. MH 19; T 7-11, 228; DD59-61. The defendant first argues that Bourne's testimony was inadmissible under *N.H. R. Ev*. 406. As a threshold matter, the defendant has not objected to the relevance of this testimony to support an inference of habit prior to this appeal. T 6-11, 228. At trial, the defendant argued only that the trial court should exclude the evidence as unduly prejudicial under *N.H. R. Ev*. 403 (T 6) and as hearsay under N.H. R. Ev. 802 (T 225). Because the defendant never raised a specific and contemporaneous objection with the trial court, he has waived the issue. *State v. Ryan*, 135 N.H. 587, 588 (1992).

B. The State's proffered evidence was consistent with the meaning of "habit evidence" under *N.H. R. Ev.* 406.

If this Court finds that the defendant has preserved this issue, the trial court properly admitted this evidence to support an inference of habit. Rule 406 reads:

> Evidence 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.

"The rule does not define habit. Generally, however, habit is a regular response to a repeated specific situation[.]" *Lapierre v. Sawyer*, 131 N.H.

609, 611 (1989) (internal quotations omitted). "The admissibility of habit evidence depends on the facts of each case." *Id*.

This Court has previously upheld the admission of habit evidence under a range of circumstances. For example, in *Buxton v. Langan*, 90 N.H. 13, 14 (1939), evidence that employees of an automobile rental agency habitually tested brakes was considered relevant and admissible. In *State v. Cornwell*, 97 N.H. 446, 447 (1952), this Court upheld the admission of evidence a deputy customarily assisted the sheriff in taking possession of a motor vehicle, and that the procedure was followed in that case. In *Barton v. Plaisted*, 109 N.H. 428, 435 (1969), this Court upheld the admission of "testimony concerning the decedent's customary driving speed over a period of years, along the 'flat' leading southerly into the curve where the accident occurred[.]" More recently, this Court found no reversible error in the admission of testimony that a defendant habitually carried a knife. *State v. Martel*, No. 2012-0143, 2013 WL 11998266, at *2 (N.H. June 19, 2013) (unpublished).

Based on commentaries to Rule 406's federal counterpart, the defendant suggests a three-factor analysis admission of for habit evidence. DB21.This Court has never adopted this rule. To the contrary, as the commentaries to New Hampshire's rule observe, "New Hampshire recognizes the value of habit and routine practice evidence, and has a very liberal view on acceptance." *N.H. R. Ev. 406 Reporter's Notes*.

The defendant points to this Court's decision in *Lapierre v. Sawyer* to support his reading of Rule 406. In *Lapierre*, the plaintiff sought to admit evidence that the defendant habitually lost his temper when he was losing at racquetball and that the plaintiff's eye was injured following a violent

outburst. *Id*. at 610-11. This Court held that the plaintiff failed to distinguish habit evidence from character evidence. *Id*. at 611. The Court's analysis rested on whether the defendant had adequately demonstrated a regular response to a specific situation, not whether the defendant's actions could ever constitute habit. Unlike the plaintiff in *Lapierre*, who attempted to cast the defendant's temper as a habit, this case presents a specific, repetitive act –purchasing opiates from the defendant– in which the victim regularly engaged.

The defendant also points to *Underhill v. Baker*, 115 N.H. 469, 471 (1975) to support his narrow reading of permissible habit evidence. But the *Underhill* Court upheld the admission of evidence of a plaintiff's drinking habit. In *Underhill*, the plaintiff testified to consuming a moderate amount of alcohol in the hours before the car accident that was the subject of that case. The Court upheld the admission of testimony regarding the plaintiff's habit of excessive drinking. *Id.* Although it was not relevant to prove that the plaintiff was intoxicated on the night of the accident, evidence of the plaintiff's habit was relevant to his credibility about the number of beers he had consumed on the night of the accident. *Id*.

Similarly, the State proffered its habit evidence in this case to prove that the defendant sold the fentanyl with which the victim fatally overdosed. Evidence that the victim habitually purchased opiates from the defendant was, therefore, particularly probative of identity.

The testimony at issue amounted to only two questions on direct examination:

> Q Okay. And what had [the victim] told she was doing in relation to Ben MacKenzie?

A She had told me that she had gotten drugs off of him.

Q and specifically, did she talk about what type of drug?

A Opiates.

T249-50.

This evidence supported the inference that, because she was in the habit of contacting the defendant for drugs, she acted in accordance with that habit on this occasion. This, in turn, supported the State's contention that the 3908 number with which the victim communicated on the evening of her death, belonged to the defendant. Like the evidence in *Underhill*, this evidence was offered for a limited purpose - identifying the defendant as the person on the other end of the text chain with the victim - not as direct evidence that the defendant sold the lethal dose.

C. The trial court properly admitted the evidence under the residual hearsay exception in *N.H. R. Ev.* 807.

The defendant next argues that testimony regarding the victim's habit of buying opiates from the defendant constituted hearsay and did not meet the requirements for an exception. The trial court concluded that this evidence was admissible under *N.H. R. Ev.* 807. T 230-31. Rule 807 contains four requirements:

> (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.

N.H. R. Ev. 807(a).

The trial court called the evidence "almost classically admissible under 807." T230. The witness was "quite familiar" with the victim. T230. The fact that the statement involved illegal narcotics "heighten[ed] the circumstantial guarantees of trustworthiness." T 230. The court noted that the witness saw photographs on the victim's phone and these were not hearsay. T230. The text message that referenced the Riviera Motel was added corroboration. T230-31.

On appeal, the defendant challenges the statement's circumstantial guarantees of trustworthiness. DB29. As the record demonstrates, the court based its ruling on numerous indicia of trustworthiness. First, the evidence was offered by "someone quite familiar with the person to whom the statements are attributed." T230. Ms. Bourne testified that she and the victim were "really close" and saw each other almost daily around the time of the victim's death. T248-49. The victim's statements about illegal drugs were akin to a statement against interest admissible under Rule 804(b)(3). Under that exception, statements which would expose a declarant to criminal liability are considered inherently more reliable because individuals have a strong interest against incriminating themselves. *See, e.g*., *State v. Kiewert*, 135 N.H. 338 (1992).

Ms. Bourne's own observations corroborated the victim's statements. Ms. Bourne testified that the victim showed her pictures from the defendant's Facebook profile as she made the statements about buying drugs from him. The victim also said that there was flirtation between herself and the defendant. As the trial court recognized, it would be inconsistent for the victim to give a false name and then, in the same

conversation, show Ms. Bourne actual pictures of the defendant and discuss her romantic interest in him.

Finally, the trial court relied on certain texts between the victim and the defendant from December 6, 2019. In these texts, the victim said that she was at the Riviera Motel, where Ms. Bourne was staying. This corroborated the State's proffer that Ms. Bourne witnessed the victim leave her motel room at the Riviera Motel with the intent of purchasing drugs from the defendant, and then witnessed her return with drugs. T228.

Based on these indicia of trustworthiness, including independent corroboration for the circumstances of this conversation between Ms. Bourne and the victim, the trial court acted within its discretion when it admitted Ms. Bourne's testimony.

D. The probative value of the habit evidence was not substantially outweighed by the risk of unfair prejudice.

Ms. Bourne's testimony was admissible because it potential prejudice did not substantially outweigh its probative value. Under New Hampshire Rule Evidence 402, relevant evidence is generally admissible. Therefore, the burden rests on the defendant to show that its probative value is substantially outweighed by the danger of unfair prejudice. "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). "[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 [this Court] considers 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. "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. Thus, [this Court] give[s] the trial court broad latitude when ruling on the admissibility of potentially unfairly prejudicial evidence." *Id*. at 323.

The probative value of this evidence was substantial. The text message exchange between the victim and the 3908 number, as well as the other facts surrounding her death, proved that she bought the fatal dose of fentanyl from someone using the 3908 number. The central disputed fact in this case was the identity of that individual. Testimony that the victim habitually purchased drugs from the defendant was probative on the issue of identity.

Moreover, Ms. Bourne's testimony on this subject was narrowly tailored and limited further by the trial court's ruling. Indeed, the trial court was particularly mindful of the need to strike the necessary balance. It "urge[d] the State to cut back to the bare minimum with this witness" and noted that it would not hesitate to intervene if the prejudicial effect began to substantially outweigh the probative value. T230-31. The State ultimately limited this portion of Ms. Bourne's testimony to two questions on direct

examination. This brief testimony was corroborated by the text messages between the defendant and the victim. Since the text messages showed that the defendant and victim were in contact before her death, Bourne's brief testimony was simply corroboration of that fact.

The trial court acknowledged that Ms. Bourne also said that the victim purchased drugs from other individuals and that this might reduce the probative value of the evidence. But the court reasonably concluded that this fact did not mean that the testimony was substantially outweighed by the danger of unfair prejudice. T229. This careful balancing of the probative value and prejudicial effect of testimony falls squarely within the broad discretion afforded to trial courts. This Court should, therefore, conclude that the trial court's balance of probative value and prejudicial effect constituted a sustainable exercise of discretion.

II. THE TEXT EXCHANGES BETWEEN THE DEFENDANT AND OTHER "CUSTOMERS" WERE ADMISSIBLE AS INTRINSIC TO THE CHARGED CRIME.

A. This issue is not preserved.

The State moved *in limine* to admit records of text exchanges between the defendant's 3908 number the defendant's other customers. DA15-22. The State proffered that these text conversations represented a series of transactions in which the defendant sold opiates to other individuals on the same day that he sold the fatal dose of fentanyl to the victim. The State first argued that the messages were intrinsic to the charged crime. Alternatively, it argued that the evidence would also be admissible under *N.H. R. Ev*. 404(b).

The State recounted in detail the content of the proffered text messages, DA11-24, the defense filed a conclusory objection that simply argued that none of the messages was admissible DBA28-29. The defendant cited the hearsay rule, contended that the messages were "not relevant and [that] any potential relevance [was] greatly outweighed by the potential prejudice," and suggested that Rule 404(b) did not apply. DA28. The defendant provided the trial court with no legal analysis to support these contentions. Although the defendant requested a hearing, DA28, he gave the trial court no reason to hold one.

"[P]reservation of an issue for appeal requires a contemporaneous and specific objection." *Ryan*, 135 N.H. at 588. A specific objection must be "sufficient to alert the trial court to [the defendant's] argument," such that "the court's written order demonstrates that the court considered it and ruled on it." *State v. Bennett*, 144 N.H. 13, 17 (1999).

By making only a blanket objection, the defendant did not preserve the claim that certain texts from one customer, R.M., were particularly prejudicial. Given the opportunity to amplify his objections at trial, T260, 302, the defendant did nothing to alert the trial court to the concerns that he now seeks to present to this Court. He did not even propose redactions, although the court was clear that it would consider proposed redactions. T176, 256-58, 294. ("[I]f [the texts] are coming in . . . both parties agreed they have to be redacted. Sounds like you've taken care of it.").

Notably, as the text messages were read to the jury, the defendant raised no objections. *See, e.g.*, T305-21. This failure only compounded his lack of specificity. As noted earlier, he made no legal argument in his objection to exclude the text messages. He did not seek reconsideration. He

did not ask the court to redact the text messages. He has not raised this claim as plain error, *State v. Euliano*, 161 N.H. 601, 605 (2011), and given this record, he has almost invited error. *State v. Goodale*, 144 N.H. 224, 227 (1999) ("A party may not avail himself of error into which he has led the trial court, intentionally or unintentionally."). Therefore, because the defendant's current argument relies on the trial court's failure to redact certain messages, messages he never asked the court to redact in the first place, this claim is waived and he is not entitled to relief.

B. The defendant opened the door to the evidence.

The defendant's claim focuses on a set of messages between himself and a particular female customer, R.M. DB 54. The messages between the defendant and R.M. show R.M. suffering through the effects of opiate withdrawal while attending to her daily responsibilities to work and family. T316-20, 406-08. While the defendant argues that the trial court should not have admitted these messages, the record shows that he opened the door to this evidence. Through his opening statement, cross-examinations, and closing argument, the defendant contended that the victim might have purchased opiates from multiple sources and the State could not prove it came from the defendant. T252-53, 350-52, 358, 360, 465-66.

Specific contradiction, one of two subsidiary doctrines of the "opening the door" doctrine, applies broadly to "situations in which a party introduces admissible evidence that creates a misleading advantage for that party, and the opposing party is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage." *State v. DePaula*, 170 N.H. 139, 146 (2017).

By arguing that the victim might have obtained drugs from multiple sources around the time of her death, the defendant opened the door to contrary evidence. In response, the State elicited evidence from Det. Mangu, that individuals addicted to opiates do not typically 'stockpile' drugs, but consume what they have before contacting a dealer to obtain more drugs. T392. The text exchange between the defendant and R.M. illustrated this point. The messages show that R.M. sought out the defendant while she was already experiencing withdrawal, obtained opiates from him, used those drugs, and then contacted the defendant again, approximately twelve hours later, to purchase more opiates. T406-09. This exchange directly responded to the defendant's argument.

C. The text exchanges were intrinsic to the charged crime.

If the defendant has preserved this issue, the messages were properly admitted, as they are intrinsic to the charged crime. This Court has recently opined about the nature of intrinsic evidence:

> Other act evidence 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'. . . 'Intrinsic' or 'inextricably intertwined' evidence will have a causal, temporal, or spatial connection with the charged crime. Typically, 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.

State v. Papillon, 173 N.H. 13, 24-25 (2020) (internal quotations and citations omitted). Evidence of the defendant's drug sales to other customers satisfies this description of intrinsic evidence for a number of reasons.

First, these other sales form part of the same criminal episode as the charged conduct. The defendant argues that the "sale to [the victim] did not depend in any way on the success or failure of those other sales." DB42. However, this argument misconstrues the nature of drug trafficking. As Det. Mangum testified, the defendant's supplier expected repayment. T397-98. Without the other sales, the supplier would not have fronted him the drugs and the defendant would have been unable to sell to anyone, including the victim. The defendant's text messages, setting up multiple sales—including the sale to the victim—were, therefore, directly relevant to the sale he made to her. Contrary to the defendant's claims, these were not "unrelated transactions," but pieces of a larger scheme to repay the supplier and give the defendant a profit.

The texts also show that, to repay his supplier, the defendant was trying to sell his supply of fentanyl as quickly as possible to whomever was available to purchase it. This also reinforces the State's argument that the victim did not obtain fentanyl from multiple sources on the night she died, but prepared for the possibility that the defendant would sell his supply before she could purchase from him. The texts, therefore, provide context for why the victim contacted Mr. Rand as a backup plan in case the defendant could not provide her with fentanyl.

Moreover, the defendant's large purchase and the other sales occurred on the same evening as the sale to the victim. These other sales

occurred in the Rochester area. As a result, the evidence of these sales has the necessary causal, temporal, and spatial connection to the charged crime. This supports the conclusion that the other sales "[arose] from the same events as the charged offense" and "complete[d] the story of the charged offense." *Papillon*, 173 N.H. at 25. Because the defendant's sales were inextricably intertwined with each other and with the original purchase in Lawrence, the trial court correctly exercised its discretion when it concluded that the evidence of other sales was intrinsic to the charged crime.

D. The text messages were otherwise admissible under Rule 404(b) to prove intent and plan.

Because the trial court determined that the evidence was intrinsic to the charged crime, it did not do a separate and detailed analysis the under Rule 404(b), but it did note that the messages would be admissible under a Rule 404(b) analysis. DD62. Under Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible to show that a person "acted in conformity therewith." That evidence can be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Before trial, the State argued that the texts to other customers demonstrated plan, intent, and identity. DA21-22. On appeal, the defendant concedes that some of the messages were probative of identity, but argues that the others were not admissible to prove plan or intent. DB47-53.

"When intent is not conceded by the defense, and it 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). "[W]hen charges of drug trafficking are involved, [courts have] often upheld the admission of evidence of prior narcotics involvement to prove knowledge and intent." *United States v. Manning*, 79 F.3d 212, 217 (1st Cir. 1996) (holding that a defendant's statements regarding his prior drug dealing were highly probative of knowledge and intent in prosecution for possession of cocaine with intent to distribute). *See also United States v. Hadfield*, 918 F.2d 987, 994 (1st Cir.1990); *United States v. Ferrer-Cruz*, 899 F.2d 135, 138 (1st Cir.1990); *United States v. Rubio-Estrada*, 857 F.2d 845, 850 (1st Cir.1988); *United States v. Molinares Charris*, 822 F.2d 1213, 1220 (1st Cir.1987).

The defendant contends that, because the charged crime required a "knowing" *mens rea*, rather than a "purposeful" one, intent was not sufficiently at issue to warrant the admission of this other acts evidence to show intent. According to the defendant, "other-acts evidence is relevant to prove a defendant's 'intent' only if the defendant is charged with acting with a specific purpose." DB50-51. This argument misapprehends the law concerning intent.

Contrary to the defendant's claim, this Court has never held that intent is at issue only when the State alleges the defendant acted purposefully. Although the defendant points to this Court's decision in *State v. Bassett*, 139 N.H. 493, 500 (1995) to support his proposition, his reliance on *Bassett* is misplaced. DB50-51. *Bassett* involved a sexual assault charge in which the requisite *mens rea* was "knowing," not "purposeful": "the State bore the burden of proving that the defendant knowingly committed each element of the offenses charged. Consequently,

the defendant's intent was sufficiently at issue . . . to require some evidence at trial." *Id*. at 500. Although the *Bassett* Court barred the other-acts evidence in that case, its reasoning was premised on the existence of an impermissible inference of propensity, not the requisite *mens rea*.

Because the defendant did not concede intent, the State was required to prove it and sought to do so with evidence of the defendant's other opiate sales to other customers. Unlike the acts in *Bassett*, in this case "the charged and uncharged acts occurred so close in time and with such factual similarity to clearly sustain the inference that the acts were committed with the same intent." *Bassett*, 139 N.H. at 500. *See also Cassavaugh*, 161 N.H. at 98 (concluding that evidence of an assault committed "just two months prior to [the victim's] murder was. . . not so remote in time as to eliminate the nexus between it and the charged event.").

The charged sale to the victim occurred over the same twenty-four hour period and these other sales, the defendant obtained all of the drugs from a single supplier in Lawrence, and the defendant used his cell phone to arrange all of the sales. All of these facts show that the defendant committed the charged and uncharged acts with the same intent. If the trial court had found that the evidence was not intrinsic to the charged crime, it would have properly admitted these texts as evidence of the defendant's intent.

The evidence of other sales was also admissible to prove plan. This Court has held that "[t]he distinguishing characteristic of a plan is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution." *State v. Glodgett*, 148 N.H. 577, 579-80 (2002). "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. "Viewed objectively, the other bad acts must clearly tend to show that the defendant had a definite prior design or system which included the doing of the act charged as a part of its consummation." *State v. Melcher*, 140 N.H. 823, 828 (1996) (internal quotations omitted).

The defendant argues that the State has not demonstrated a plan because "the sale to [the victim] in no way depended on the success of the effort to sell to any other customer." DB42. But this characterization misapprehends the State's use of the evidence to show the defendant's plan. The State argued that the charged crime constituted a single piece of the defendant's larger plan to purchase and redistribute opiates. The State introduced evidence that the defendant travelled to Lawrence, Massachusetts, purchased opiates from a supplier, returned to the Rochester area, and resold those opiates to customers, including the victim. The defendant executed this plan within the discreet timeframe of December 12-13, 2016, and the existence of this plan was evident at that time, not merely with the benefit of hindsight.

Each sale of opiates - whether to the victim or to others - formed an essential part of the "consummation" of the defendant's overall plan. This created the requisite mutual dependence between the charged and uncharged conduct and justified the admission of this evidence. If the trial court had not found that the evidence was intrinsic to the charged crime, it would have properly admitted the texts as evidence of the defendant's plan.

E. The risk of unfair prejudice did not substantially outweigh the probative value of this evidence.

"Unfair prejudice is not. . . mere detriment to a defendant from the tendency of the evidence to prove guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial." *State v. Palermo*, 168 N.H. 387, 395 (2015) (internal quotations and citations omitted). "Rather, the 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." *Id*. Evidence of the defendant's other drug sales were intrinsic to the charged crime and highly probative of the defendant's identity, intent, and plan. Against this substantial probative value, the risk of unfair prejudice was minimal.

First, the text messages demonstrated that the defendant was distributing drugs, not that he was engaged in unrelated criminal acts. The defendant points to this Court's decision in *State v. Pelkey*, 145 N.H. 133,136 (2000) for the proposition that evidence that the defendant earned money selling drugs had "substantial prejudicial potential." DB 54. But the defendant in *Pelkey* was charged with driving while intoxicated. During his release from police custody, he *sua sponte* informed police that his wallet contained $500 in proceeds from drug sales. This Court found that, while the unexpected admission was probative of the defendant's intoxication, evidence of unrelated drug sales in the context of a DWI trial would unfairly prejudice the defendant.

Unlike *Pelkey*, this defendant's drug dealing and the victim's subsequent overdose were central to this case. As such, evidence of drug distribution, as well as drug withdrawal and overdose symptoms, were

central to this case, not incidental. Viewed through this lens, the contested evidence was not more inflammatory or prejudicial than evidence of the defendant's sale to the victim or her resulting overdose. Given the nature of the charge and evidence in this case, the prejudicial effect of this evidence was slight compared to its probative value and the trial court sustainably exercised its discretion by admitting it.

The court neutralized any potentially inflammatory effect from the admitted text messages through its instruction – repeated three times during the jury charge and printed at the top of the written jury instructions – that the jury "decide the facts in this case without prejudice, without fear, and without sympathy." T491, 508. "Jurors are presumed to follow the court's instructions." *Palermo*, 168 N.H. at 397. Therefore, the defendant has not demonstrated that the trial court committed reversible error.

III. IF THE TRIAL COURT ERRED, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

"An error is harmless if we can say beyond a reasonable doubt that it did not affect the verdict." *State v. Beede*, 156 N.H. 102, 109 (2007). "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 contested evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." *Id*.

First, if Ms. Bourne's testimony that the victim habitually purchased drugs from the defendant was inadmissible, the error was harmless. The defendant's conviction was not affected by the admission of this testimony. The alternative evidence of the defendant's guilt, specifically, evidence identifying the defendant as the person who supplied the lethal dose of fentanyl, was substantial and varied.

The text message exchange between the victim and the 3908 number used by the defendant, described drug negotiations between her and the defendant. T393-94. The 3908 number was labelled in the victim's phone as belonging to "Ben MacKenzie." Det. Mangum also confirmed a number of calls between the 3908 number and a number associated with the defendant's brother, Zach MacKenzie. T410-14. In these texts, the defendant and his brother refer to going to "Mom's." T414. The defendant's friend Tyler Bergeron testified not only that the 3908 number belonged to the defendant but that he believed that the defendant was the phone's exclusive user. T238-45. The defendant had listed that number as his cell phone number on two separate employment forms, only two months prior to the victim's death. T219-21.

Texts between the 3908 number and the defendant's mother further confirmed the defendant's identity. Not only did his mother refer to him as "Ben" in those messages, she reminded him about a probation meeting on December 14, 2016 and offered to wake him up so that he would not miss it. T311. The defendant's probation officer, Chuck Wolfert, confirmed that the defendant did attend a probation meeting on December 14, 2016. T183. R.M. also repeatedly referred to the holder of the 3908 number as "Ben." T406-07. Another of the defendant's customers texted the 3908 number, asking, "Where are you, Benny?" T402.

In addition, the State referred to Ms. Bourne's testimony in its closing argument only twice. T472, 477. When a prosecutor does not call particular attention to potentially prejudicial evidence, its admission may be harmless. *State v. Hennessey*, 142 N.H. 149, 159 (1997), abrogated on other grounds by *State v. Quintero*, 162 N.H. 526 (2011). The State's proof of the defendant's guilt was overwhelming and Ms. Bourne's testimony was inconsequential in relation to the strength of the State's case. Its admission was, therefore, harmless beyond a reasonable doubt.

If the court erred in admitting evidence of opiate sales to other customers, the error was similarly harmless beyond a reasonable doubt because the evidence was cumulative. "Cumulative evidence is defined as additional evidence of the same kind to the same point." *State v. Pennock*, 168 N.H. 294, 313 (2015), *as modified on denial of reconsideration* (Dec. 3, 2015). Evidence of the defendant's identity was otherwise corroborated. Likewise, the State offered corroborating evidence of his plan and intent in the text messages between the defendant and his supplier. T397-99.

Therefore, the admission of the text exchanges was ultimately cumulative of the other evidence admitted in this case.

The defendant argues that certain texts between himself and R.M. "invited a strongly negative emotional reaction." DB 54. But the defendant did not object when the detective testified to these exchanges. T316-320, 406-08. Moreover, the jury heard testimony from Det. Rousseau and Det. Mangum on the effects of addiction and the symptoms associated with withdrawal. T317-18, 403-04. This testimony was admitted without objection and R.M.'s texts were consistent with that testimony.

In addition, while the text messages from R.M. involve withdrawal, the text messages with the victim do not. The defendant's alleged uncaring response that R.M. needed to "chill" (DB54) simply did not apply to his exchanges with the victim. Moreover, juries are generally aware of the effects of opiate addiction, withdrawal, and the risks of overdose. Evidence of other individuals struggling with addiction was not more inflammatory than the central facts put before the jury, which included the victim's death by overdose.

Finally, the State mentioned these texts only once in its closing argument (T480), supporting a determination that this evidence was harmless. *Hennessey*, 142 N.H. at 159. Given the strength of the State's alternative evidence, the collateral nature of the contested evidence, as well as the lack of emphasis placed on this evidence in closing, any error, if it existed, was harmless.

CONCLUSION

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

The State waives oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,333 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.

August 11, 2021 /s/*Zachary L. Higham*
Zachary Higham

CERTIFICATE OF SERVICE

I, Zachary L. Higham, hereby certify that a copy of the State's brief shall be served on Christopher Johnson, Esquire, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 11, 2021 /s/*Zachary L. Higham*
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