THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0371

State of New Hampshire

v.

John Gates

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court erred by denying the motion to suppress the boots, because Gates had a reasonable expectation of privacy in the vestibule and utility closet.

Issue preserved by defense motion to suppress, the State's objection, the hearing on the suppression motion, the defense motion to reconsider, the State's objection, and the court's rulings. AD 31-46; A9-A23; M 1-269; R 3-10.*

* Citations to the record are as follows:
"A" refers to the separate appendix filed with this brief;
"AD" refers to the attached supplement containing the orders from which Gates appeals;
"M" refers to the consecutively-paginated transcript of the two-day suppression hearing, held on August 30 and September 12, 2018;
"R" refers to the transcript of the hearing on the motion to reconsider, held on January 24, 2019;
"T" refers to the consecutively-paginated transcript of the seven-day trial, held in March and April, 2019.

STATEMENT OF THE CASE

A Rockingham County grand jury indicted John Gates for six crimes arising out of an incident involving a fire discovered after midnight on January 17, 2018, in a commercial building in Kingston. A3-A8. Part of the building contained the Carriage Towne Market, and part stood empty after the closing of a restaurant. Specifically, the State alleged the attempted arson of the restaurant space and the arson of the market. T 3-6; A3-A4. In addition, the State charged Gates with two counts of burglary, one for the restaurant space and one for the market. T 4; A5-A6. In the final two charges, the State charged Gates with being a felon in possession of a dangerous weapon – a Molotov cocktail – and with the crime of using a Molotov cocktail. T 4-5; A7-A8.

Gates stood trial over seven days in March 2019. At the close of trial, the jury found Gates guilty on all charges. T 1417-19. The trial court (St. Hilaire, J.) sentenced Gates to concurrent stand-committed terms of seven-and-a-half to fifteen years for arson and attempted arson. A24-A25. The court further sentenced Gates to concurrent stand-committed terms of two-and-a-half to fifteen years for felon in possession and for use of a Molotov cocktail, to run consecutive to the arson sentences. A26-A27. Gates thus faces a cumulative stand-committed term of ten to thirty years on those charges. Finally, the court pronounced two consecutive but suspended

terms of seven-and-a-half to fifteen years on the two burglary convictions. A28-A31.

STATEMENT OF THE FACTS

In January 2018, John Gates lived in an apartment in a four-unit apartment building on the Magnusson Farm in Kingston. T 479-81. His mother, Amy Magnusson, lived in the apartment next to Gates's, and cousins lived in the two apartments upstairs. T 479-81, 851-56. Gates earned money playing online computer games but had not worked outside the home for some years, and some evidence indicated that he had very little income. T 485, 569-70, 860, 877, 882-83, 1115-16. Other than with his mother, he had little contact with the members of his extended family who lived in the building or worked on the farm. T 484-85, 862-64, 1175-76, 1213-15, 1237.

Around 3:30 a.m. on the night of January 16-17, police and firefighters responded to an alarm indicating a fire at the Carriage Towne Market, a convenience store just off Route 125 in Kingston. T 171-73, 259, 492-93, 702. The fire department quickly extinguished the fire. T 713-15. An examination of the scene by investigators yielded the opinion that the fire was intentionally set using gasoline-fueled Molotov cocktails. T 541-42, 550-52, 589, 938, 951, 975. The store's proprietor testified that money, in the form of bills and rolls of coins, and lottery tickets were missing. T 168-69, 988, 1044-45. An employee who worked the day before the fire estimated the amount of money missing at $400. T 821, 843-

45; see also T 55 (owner's testimony that typically $700 or $800 in cash is on hand overnight).

Upon arriving in response to the alarm, police saw signs of forced entry through the rear door of the vacant former Asian Gourmet restaurant space. T 538-39, 796, 902, 934-35. Inside the Asian Gourmet, a hole had been hacked in the wall separating the Asian Gourmet from the Carriage Towne Market. T 533, 537-38, 987. Outside, the police saw a track of footprints in the snow leading away from the building. T 175-77, 205-06, 737. According to the prosecution, signs in the snow indicated that the person dragged something heavy. T 181-83. Through a heavy snowfall, two police officers followed those footprints, lost the trail when it crossed a road that had been plowed, and then after about forty minutes of searching, found a similar track and followed it to the entrance of the building in which Gates lived. T 178-93, 209, 226, 230, 286, 739-49, 774-75, 791-93.

The track ended some yards short of the entrance leading to the apartments of Gates and his mother, as it appeared that somebody had recently shoveled the walkway between the building's exterior door and the end of the tracks in the snow. T 192-93, 232, 749. The police entered the apartment building into a vestibule in which they confronted three doors. T 193, 750. Their knock on one door was answered by Gates. T 193-94, 750.

Gates expressed displeasure at seeing the Kingston police officers, saying that he would talk with Chief Briggs but not with any other Kingston police officer. T 195, 270-71, 444-45, 751. He did, though, agree to speak with an officer from Brentwood who had responded to assist Kingston police with the alarm and joined in following the tracks in the snow. T 271, 751-52. Gates told that officer that he had just shoveled the sidewalk in front of the building, and when asked what shoes he had worn, produced a pair of sneakers. T 272-73, 286, 752-59. Seeing that the sneakers were dry, the officer asked whether Gates might have worn other shoes. T 273. Gates produced a second pair of shoes that was also dry. T 273-74.

Meanwhile, another officer opened a second of the vestibule's three doors and found that it led to a utility room. T 274-75, 291. In the utility room, the officer saw boots that seemed wet. T 275-77, 293-95, 308. When asked about those boots, Gates said that they might belong to one of his cousins who lived in an apartment upstairs. T 277. The cousin in question, along with other members of the Magnusson family, testified that the boots were not theirs and that they did not currently store clothes in the utility room. T 496, 868-70, 1178, 1216-19, 1236-37, 1243-45.

The police testified that the tread on the boots from the utility room matched the tracks in the snow. T 199, 205.

Testing also disclosed the presence of gasoline and Gates's DNA on the boots. T 340-43, 352, 393-98. That evidence thus connected the boots both to the gasoline-fueled fire at the Carriage Towne Market, and to Gates. In response to the forensic testing indicating the presence of gasoline on the boots, the defense emphasized that the police, at the unnecessary risk of cross-contamination, brought the boots to the Carriage Towne Market so that an accelerant-detection police dog could sniff the boots.[1] T 600-03, 610, 1003-08, 1074.

When questioned by the police, Gates denied any involvement in the crimes at the Carriage Towne Market. T 449-52, 455, 462. He did tell the officer that he had very little money, to the extent that he obtained food from dumpsters behind a Dunkin' Donuts near the Carriage Towne Market, and had gone there earlier that evening. T 452-54. The State attributed incriminating significance, therefore, to the fact that on the day following the fire, Gates made purchases at a Walmart. T 558-67. Gates's mother testified, though, that Gates would often shop at Walmart. T 858, 875.

During a search of Gates's apartment two days after the Carriage Towne fire, the police found a bottle filled with

[1] In response to the concern about contamination, police officers testified that they took measures designed to prevent gasoline at the store from contaminating the boots. T 607-08, 658-64. The defense noted that those measures were not timely disclosed to the defense in discovery, and the court read a stipulation to that effect. T 1305.

new-looking quarters, and a scrap of paper in the bottle evocative of the paper used to package rolls of coins. T 962-65, 1113. Otherwise, though, the police found nothing that could be linked to the Carriage Towne Market, and only $117 in cash, in small bills. T 1051-54, 1059-60, 1151-55. A search of the Magnusson Farm disclosed gasoline pumps from which one could get gasoline, and a missing crowbar. T 1222, 1230-33, 1239-40, 1247-50, 1304. The State contended that tread marks in that area of the farm also matched the boots linked to Gates. T 1379.

In an effort to prove motive, the State introduced evidence of Gates's diary and of correspondence between Gates and a Turkish woman with whom Gates had an on-line romantic relationship. T 1306-14, 1385-91. The State contended that the ending of the relationship in late December motivated Gates to seek money with which he could travel to Turkey. T 1385-91. In that connection, the State also introduced evidence that Gates filed papers within a day or two of the fire seeking the expedited issuance of a passport. T 1114, 1155, 1392.

SUMMARY OF THE ARGUMENT

The court erred in denying Gates's motion to suppress the boots found in the utility closet. Several features of the building compel the conclusion that Gates had a reasonable expectation of privacy in the vestibule and in the utility room. Among other features, the small size of the building, the fact that it was occupied entirely by members of the Magnusson family, and its location not in a residential neighborhood but on the Magnusson Farm, support the existence of a reasonable expectation of privacy. Because the boots, and other evidence associated with and derived from the boots, constituted important evidence in the State's case, the erroneous denial of the motion to suppress requires the reversal of Gates's convictions.

I. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE BOOTS FOUND IN THE UTILITY CLOSET, AND ALL EVIDENCE DERIVED FROM THE BOOTS.

In June 2018, the defense filed a motion to suppress, arguing that the police violated Gates's constitutional rights in entering the utility closet without a warrant. A9-A13. In that utility closet, the police found the boots that, in various ways, the State ultimately linked with the Carriage Towne Market fire and with Gates. The State objected, arguing only that Gates lacked a reasonable expectation of privacy in the utility closet. A14-A18. That framing of the issue narrowed the dispute. For example, the State did not argue that any exception to the warrant requirement justified the warrantless police entry. Rather, the suppression motion turned entirely on whether the police intruded on Gates's reasonable expectation of privacy when they entered the utility closet.[2]

Over the course of two days in August and September 2018, the court (Anderson, J.) convened a hearing on the suppression motions. At the hearing, the defense enlarged the argument such that it challenged not only the police entry into the utility closet without a warrant, but also the police entry into the building without a warrant. See AD 37

[2] Gates later filed a second motion to suppress, challenging on various grounds a search of his apartment conducted two days after the Carriage Towne Market fire. On appeal, Gates does not pursue a claim of error based on the denial of that motion to suppress.

(recognizing expansion of argument to encompass entry into vestibule); M 253. In November 2018, the court (Messer, J.) issued an order denying the motion to suppress. AD 31-46.

As relevant to the claim that Gates had a reasonable expectation of privacy on which the police unconstitutionally intruded, the court found the following facts. The apartment building was "located on the Magnusson Farm property." AD 34. Pictures of the building's exterior introduced at the hearing "depict three evenly-spaced doors with a stone walkway leading to the center door of the apartment." Id. One of the officers, LePage, "estimated that he had been called out to this particular apartment building once or twice during his seventeen-year career" with the Kingston Police Department. Id. LePage "described the apartment building as two-floored. However, he conceded that he had no knowledge of the building's internal layout." Id.

Upon approaching the building's central external door, the police could see,

> through a glass window in the center door, an illuminated vestibule area which contained three unmarked doors. Specifically, they observed a door to the left, one to the center, and one to the right.

Id. LePage opened the external door, which was unlocked. Id. The police then entered the vestibule and, after knocking on the door to his apartment, encountered Gates when he

opened his door. AD 34-35. "During this initial conversation, the officers learned that [Gates] was the lone occupant of his apartment, and that his elderly mother lived in the apartment across the hall." AD 35.

While Gates spoke with another officer, LePage "decided to enter the vestibule's center door to see if he could find a stairwell leading to the second-floor apartments." AD 36. The door, however, opened onto a utility closet containing a water heater, oil tanks, and electrical panels. M 111. The court described LePage's entry and search of that room as follows:

> The room was dark, so he entered with his flashlight on. Upon entering, he quickly learned that he had entered a utility room that did not contain a stairwell. While exiting the room, Sergeant LePage observed a pair of wet boots behind the utility room door.

AD 36.

Testimony at the suppression hearing established other facts about the nature of the Magnusson Farm property and the apartment building on it. In addition to the apartment building, the property contained a home in which the family patriarch and property owner, Conrad Magnusson, lived with his wife. M 51-54, 101-02, 115, 143. The family farmed the land, and the property contained greenhouses and a barn housing farm equipment. M 51-52, 75-79, 101. There was an

outbuilding that appeared to be used seasonally to sell vegetables or other foodstuffs. M 46, 52-53, 75-76.

With respect to the apartment building, testimony established that the building contained two apartments downstairs and additional apartments upstairs. M 104, 106, 115-16, 143, 163-64. Members of the Magnusson family occupied all of the apartments. M 143-44, 163-64. On the lower level, the three internal doors opening onto the vestibule contained no markings indicating a name or apartment number. M 106, 267. At the time the police entered it, the vestibule contained a coat rack mounted on a wall and a snow shovel. M 83, 109. The door to the utility closet had a somewhat different appearance from the doors to the two apartments. M 90, 267.

In the section of the order addressing Gates's claim, the court cited State v. Smith, 169 N.H. 602 (2017), as authority bearing on the question of the extent to which "a tenant had a reasonable expectation of privacy in the common areas of a rooming house." AD 38-39. Addressing first the entry into the vestibule, and treating the Magnusson Farm apartment building as a generic apartment building, the court concluded that Gates was, without question, "an apartment dweller," and that he and his mother "were not co-tenants sharing anything that resembled a single-family dwelling." AD 40. The court therefore found neither a subjective expectation of

privacy nor a reasonable expectation of privacy vis-à-vis the police entry into the vestibule. AD 40-42. The court next concluded, "for similar reasons," that Gates lacked a reasonable expectation of privacy in the utility room. AD 42.

The defense filed a motion to reconsider, arguing that the court erred in treating as materially indistinguishable the facts of State v. Smith, 169 N.H. 602 (2017). A19-A21. The State objected. A22-A23. The court convened a brief hearing, most of which was devoted to a discussion of a different motion to suppress. R 3-10. At the close of the hearing, though, the court denied Gates's motion to reconsider. R 8-9. In denying the motion to suppress and the motion to reconsider, the court erred.

When reviewing a trial court's ruling on a motion to suppress, the Court accepts "the trial court's factual findings unless they lack support in the record or are clearly erroneous." Smith, 169 N.H. at 607. The Court reviews legal conclusions *de novo*. Id.

Part I, Article 19 of the State Constitution provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." The Fourth Amendment to the United States Constitution provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated." Items obtained in violation of those constitutional provisions "may be subject to exclusion from evidence in a criminal trial." State v. Boyer, 168 N.H. 553, 557 (2016) (quotation omitted).

This Court has "held that the State Constitution is often more protective of individual rights than the Federal Constitution with respect to unreasonable searches and seizures." Id. at 556; see also State v. Goss, 150 N.H. 46, 49-50 (2003) (rejecting federal holding finding no reasonable expectation of privacy in garbage put out for collection, as State Constitution more protective); State v. Canelo, 139 N.H. 376, 386 (1995) (declining to adopt good-faith exception under State Constitution).

"The protections provided by Part I, Article 19 are never in sharper focus than when viewed in the protection of one's dwelling." Boyer, 168 N.H. at 558 (quotation omitted). "The search of a home is subject to a particularly stringent warrant requirement because the occupant has a high expectation of privacy." State v. Tarasuik, 160 N.H. 323, 328 (2010) (quotation omitted). "[T]he sanctity of the home is jealously guarded by a long line of cases." State v. Watson, 151 N.H. 537, 540 (2004) (quotation omitted). Among the areas protected from intrusion by the Fourth Amendment, "the home is first among equals." Florida v. Jardines, 569 U.S. 1, 6 (2013). "At the Amendment's very core stands the right of a

man to retreat into his own home and there be free from unreasonable governmental intrusion." Id. (quotation omitted).

Constitutional protections apply to the homes of the poor as well as the rich. "[A] man's house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown." Georgia v. Randolph, 547 U.S. 103, 115 (2006) (quotation and brackets omitted). A property-based interest in privacy in one's home is not granted solely to those who reside in a private, single-family residence. For example, "the privacy interest in a hotel room is comparable to that of the home." Watson, 151 N.H. at 540; see also State v. Zeta Chi Fraternity, 142 N.H. 16, 27-30 (1997) (considering constitutional protection from unreasonable searches granted those residing in a fraternity house). This is so because property rights exist in a variety of living situations. "A common idiom describes property as a 'bundle of sticks' – a collection of individual rights which, in certain combinations, constitute property." Boyer, 168 N.H. at 562 (quotation omitted). "One of these rights is the right to exclude others." Id.

A constitutional violation occurs if, without a warrant or an applicable exception to the warrant requirement, "government agents invade a person's reasonable expectation of privacy." Smith, 169 N.H. at 607 (citing State v. Robinson,

158 N.H. 792, 796 (2009)). The existence of a reasonable expectation of privacy depends on two factors: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Smith, 169 N.H. at 607 (citing Goss, 150 N.H. at 49). "The determination of whether a person has a legitimate expectation of privacy with respect to a certain area must be made on a case-by-case basis, considering the unique facts of each particular situation." Smith, 169 N.H. at 607 (citing Boyer, 168 N.H. at 558).

Because the building contained the residences of several people, Gates's claim implicates caselaw assessing the existence of a reasonable expectation of privacy in apartment buildings. "The protections afforded to a person's home are not limited to single-family dwellings: an apartment can be a home within the meaning of the State Constitution." Smith, 169 N.H. at 608 (citing State v. Chaisson, 125 N.H. 810, 817 (1984)).

In Smith, this Court confronted a case involving a boarding house in which people had separate bedrooms but shared hallways, a bathroom and a kitchen. Smith, 169 N.H. at 608. In that case, Smith advanced the claim that, as a matter of law, "the common areas in a rooming house, which include hallways, kitchen, and bathroom, should be protected

from government intrusion." Id. After canvassing decisions from other courts, this Court ultimately concluded that the existence of a reasonable expectation of privacy must be made on a case-by-case basis, taking account of the details of the multi-family residence in question. Id. at 607-11. In general, though, the Court recognized a distinction between the "common areas in rooming houses that are more like shared single-family dwellings [and] are usually protected," on the one hand, and "the common areas in rooming houses that are more like unsecured apartment buildings" and "are not usually protected," on the other. Id. at 608-09.

In Smith, the Court held that Smith's reasonable expectation of privacy began at his own bedroom door within the residence, and thus did not include the common areas. Id. at 611. In so ruling, the Court relied on several features of that boarding house that made it less like a single-family dwelling and more like an unsecured apartment building. The Court acknowledged that the sharing of a kitchen and bathroom weighed in favor of a finding of a reasonable expectation of privacy in the common areas, but ruled that other factors outweighed that consideration. These included that each tenant had a separate locked room with an individual number, that the building contained between eight and ten such rooms, that the front door was unlocked and generally left "wide open," and that the size of the building

showed that it was accessible to a fairly large number of people. Id. at 609-11.

For several reasons, this Court must conclude that the occupants of the apartment building on the Magnusson Farm had a reasonable expectation of privacy extending to the vestibule and to the utility room. First, and most important, the building was occupied exclusively by members of one extended family. Also, the building differed from most other apartment buildings in that it was not, in any essential sense, a residential building set in a neighborhood amongst other residential buildings. Rather, it sat on a large plot of land wholly owned by the Magnusson family, and the closest other buildings were not homes in which unrelated neighbors lived, but rather a barn, greenhouses, and Conrad Magnusson's house.

Consistent with its single-extended-family occupancy, the apartment building had a relatively small number of units. That small size supports a finding of a reasonable expectation of privacy in the disputed areas. Compare, e.g., United States v. Bain, 155 F.Supp.3d 107, 118 (D. Mass. 2015) (reasoning that residents of an apartment building with three units and a secured front door may have a greater expectation of privacy in the interior of the building than would be the case in a larger building without a lock or where the mail and other deliveries were made inside the front door);

United States v. King, 227 F.3d 732, 745-48 (6th Cir. 2000) (citing cases finding reasonable expectation of privacy in common areas of four-unit apartment buildings); and United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (to same effect; citing, in support of reasonable expectation of privacy in entry way, "fact that this building was not one containing many individual apartment units, but rather was comprised of only two apartments on the basement level and the landlord's living quarters on the upper floor"); with Smith, 169 N.H. at 609 (building contained eight to ten units).

As a Michigan court held in one such case,

> In the case at bar there were only two apartments sharing a common hallway, entry to which was limited by right to the occupants. These occupants certainly would expect that a high degree of privacy would be enjoyed in that area.

People v. Killebrew, 256 N.W.2d 581, 583 (Mich. App. 1977). Here, as in Killebrew, only two apartments could be reached from the common areas in question – the vestibule and the utility room. One therefore cannot say, as this Court said of the building in Smith, that a large number of visitors would enter the vestibule. Smith, 169 N.H. at 610. Rather, the only visitors would be people coming to see either Gates or his mother.

Further confirmation of the private character of the shared areas of this building appears in the fact that, unlike the residents' doors in the Smith building, id. at 609, the doors to the apartments here had no numbers or names identifying the occupants. Neither did the door to the utility room bear any sign indicating the purpose of the space behind it. That lack of any signage signals that the occupants of the house did not expect strangers in need of guidance about the layout to enter the vestibule. The lack of any expectation of visits by strangers is shown also by the presence in the vestibule of a coat rack and a snow shovel. One would not expect residents to leave personal property in a place they anticipated strangers would enter.

Finally, support for Gates's reasonable expectation of privacy appears in the fact that, although not locked, the exterior door to the building was closed at the time the police approached. In Smith, this Court attributed some significance to the fact that the exterior door was open. Id. at 609.

This Court should not attribute great weight to the fact that the exterior door was unlocked. In State v. Titus, 707 So. 2d 706, 710 (Fla. 1998), the Florida Supreme Court noted that the "absence of locks or even doors from entrances does not change the character of the building from a residence [and] [t]he privacy of residential premises does not arise from the nature of the security devices employed to keep unwanted

intruders out." Here, the fact that this apartment building sat on the Magnusson Farm, isolated by its location from routine approach by unrelated strangers, manifests an expectation of privacy at least equal to that shown by the placement of a lock.

Even if the trial court could properly find no reasonable expectation of privacy in the vestibule, the court erred in failing to find a reasonable expectation of privacy in the utility room. Nothing about the utility room manifests an expectation that strangers would enter it uninvited. Rather, its function as the repository of heating and electrical equipment supports the conclusion that, among outsiders, only invited workmen would enter it. Gates's subjective expectation of privacy is further shown, with respect to the utility room, by the fact that he put the boots there. See King, 227 F.3d at 744 (defendant's subjective expectation of privacy in basement of two-family house shown by fact that he hid cocaine there).

Because Gates had a reasonable expectation of privacy in the vestibule and in the utility room, the trial court erred in ruling otherwise. Because the police lacked a warrant, and because the State did not assert any exception to the warrant requirement, the police entry into those areas was unconstitutional. The trial court therefore erred in denying Gates's motion to suppress the discovery of the boots.

Because the boots constituted crucial evidence linking Gates with the Carriage Towne Market burglary and fire, this Court must reverse his convictions.

CONCLUSION

WHEREFORE, Mr. Gates respectfully requests that this Court reverse his convictions.

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

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains fewer than 5100 words.

Respectfully submitted,

By */s/ Christopher M. Johnson*
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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: March 3, 2020

ADDENDUM

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THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **State v. John Gates**
Case Number: **218-2018-CR-00090**

Enclosed please find a copy of the court's order of November 27, 2018 relative to:

Omnibus Order on Defendant's Motions to Suppress

November 28, 2018

Maureen F. O'Neil
Clerk of Court

(811)

C: Larissa Kiers, ESQ; Jennifer M. Haggar, ESQ; Lauren E. Prusiner, ESQ; Christopher O'Brien, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

State of New Hampshire

v.

John Gates

218-2018-CR-0090

Omnibus Order on Defendant's Motions to Suppress

Defendant John Gates is charged with the following felony-level offenses: Arson, Attempted Arson, two counts of Burglary, Felon in Possession of a Dangerous Weapon, and Possession of a Molotov Cocktail. He moves to suppress all evidence obtained as result of a warrantless entry into the vestibule of his apartment building, as well as a subsequent search of his apartment pursuant to a warrant, arguing that such evidence was obtained in violation of both the State and Federal Constitutions. The State objects. The Court held a suppression hearing on August 30, 2018, and September 12, 2018. For the reasons that follow, Defendant's motions to suppress are both DENIED.[1]

Factual Findings

On January 17, 2018, at approximately 3:30 a.m., Officer Andrew Garvin of the Kingston Police Department (the "KPD") was patrolling the area of Route 125, during a snow storm, when he was dispatched to the Carriage Town Plaza (the "Plaza") in Kingston, New Hampshire. When Officer Garvin arrived on scene he noticed that the alarm system for the Plaza's eastern-most building was activated. He then drove

[1] Although the undersigned was not present during the live testimony at the suppression hearing, undersigned reviewed the testimony and arguments by listening to the audio recordings.

behind the building and noticed that there was smoke emanating from the Carriage Town Market (the "Market") and fresh footprints in the snow leading from the Market, through an opening in a fence, and then across Route 125. The footprints then continued northbound on the eastern side of Route 125. Given the early hour and the steadily falling snow, these were the only tracks that Officer Garvin observed in the area.

Officer Garvin testified that the prints had a distinctive tread mark. It also appeared that the individual who created the tracks was carrying a heavy object, because a drag mark sporadically accompanied the prints. Officer Garvin followed the footprints for a few hundred feet until they reached the tree line that abuts the eastern portion of Route 125 northbound. Once the prints hit the tree line, Officer Garvin waited for back up to arrive which came in the form of Corporal Brett Wells of the Brentwood Police Department (the "BPD").

Corporal Wells arrived from the southbound side of Route 125 and pulled behind the Plaza. When he did, he observed the same footprints leading away from the Plaza and across Route 125. Thereafter, he located Officer Garvin on the northbound side of the highway, and the pair followed the tracks as they zig-zagged along the tree line. The officers observed the footprints twice traverse Route 125 before disappearing into freshly plowed snow. When the tracks were lost, Officer Garvin returned to the Market to help at the fire scene, while Corporal Wells attempted to relocate the tracks.

While traveling south in the breakdown lane of Route 125 northbound, Corporal Wells rediscovered the tracks near the Magnusson Farm. Specifically, Officer Wells noticed a disturbed snowbank and then, with his spot light, observed tracks—displaying

the same tread, gait, and sporadically accompanying drag mark—travel over the snowbank and towards an apartment building located on the Magnusson Farm property. Soon after this discovery, Corporal Wells was joined by Officer Garvin, as well as Officer Lutz[2] of the Fremont Police Department. All three officers then tracked the footprints through the Magnusson property, around some outbuildings, and then to the rear of the apartment building. The tracks then disappeared at the beginning of the apartment building's shoveled walkway. Defendant submitted pictures of the rear of the apartment building at the suppression hearing. Said pictures depict three evenly-spaced doors with a stone walkway leading to the center door of the apartment.

The officers took up positions around the apartment building and waited for Sergeant LePage of the KPD to arrive on scene. At the suppression hearing, Sergeant LePage estimated that he had been called out to this particular apartment building once or twice during his seventeen-year career with the KPD. He described the apartment building as two-floored. However, he conceded that he had no knowledge of the building's internal layout.

When Sergeant LePage arrived, Corporal Wells briefed him as to the fire at the Market and the footprints coming therefrom. All four officers then approached the apartment building's center door in an attempt to speak with the person responsible for the tracks. Upon approach, the officers observed, through a glass window in the center door, an illuminated vestibule area which contained three unmarked doors. Specifically, they observed a door to the left, one to the center, and one to the right. Sergeant LePage opened the unlocked vestibule door. Once inside, he knocked on the left

[2] The record does not reflect the first name of Officer Lutz.

apartment door and an individual, later identified as Defendant, answered. Sergeant LePage identified himself as a member of the KPD and informed Defendant that he was investigating a fire that had occurred at the Plaza.

From the beginning, Defendant was argumentative and refused to talk with Sergeant LePage. Specifically, Defendant repeatedly claimed that the KPD had treated him unfairly in the past, and demanded that he speak with KPD Police Chief Donald Briggs. During this initial conversation, the officers learned that Defendant was the lone occupant of his apartment, and that his elderly mother lived in the apartment across the hall.

Given Defendant's disdain for the KPD, Corporal Wells decided to insert himself into the conversation as a member of the BPD. When he did, Defendant became more cooperative. Corporal Wells asked Defendant if he had left his residence that night. Defendant explained that he had left his apartment that evening to purchase lottery tickets. Upon further questioning, he also told Corporal Wells that he had recently left his apartment to shovel the walkway and to throw out a headboard. Corporal Wells asked Defendant what shoes he was wearing when he shoveled the walkway and Defendant indicated that he had been wearing sneakers. Upon hearing this response, Sergeant LePage interjected and asked Defendant if he could see the sneakers that Defendant had worn while shoveling. Defendant entered his apartment and retrieved a pair of sneakers. Sergeant LePage examined the sneakers and discovered that they were completely dry. Corporal Wells asked Defendant if there were any other shoes that he could have been wearing while shoveling and Defendant indicated that he

owned some Harley Davidson boots. Defendant retrieved those boots but, like the sneakers, they too were dry.

At this point, Sergeant LePage decided to enter the vestibule's center door to see if he could find a stairwell leading to the second floor apartments. The room was dark, so he entered with his flashlight on. Upon entering, he quickly learned that he had entered a utility room that did not contain a stairwell. While exiting the room, Sergeant LePage observed a pair of wet boots behind the utility room door. Sergeant LePage grabbed the boots and asked Defendant if he owned them. Defendant denied owning the boots and insisted that they belonged to a cousin who was not currently present at the residence. Defendant allowed Sergeant LePage to seize the boots. It was later determined that their tread pattern matched the footprints in the snow.

Many of the facts outlined above were included in the warrant which authorized the search of Defendant's apartment. Most importantly, the search warrant stated that the officers tracked footprints from the scene of the fire to Defendant's apartment building and such prints matched the boots located in the utility room. *See* Warrant Aff. ¶ 12.

The warrant also included the following facts which are specifically challenged by Defendant:

> Mr. Patel[3] advised [Fire Investigator Matthew Wilmont] that approximately 10 year ago, a letter containing hateful and racist content was sent to him. He stated that this letter was sent by Mr. Gates. Mr. Patel stated that he still had the letter on a clip board within his business, alongside a photograph of Mr. Gates due to the concerning content of the letter. . . . This information regarding the letter was also corroborated by Chief Briggs, who stated that he recalled this incident but was not able to obtain a copy of this letter from his records.

[3] Mr. Patel is the owner of the Market.

Id. ¶ 13.

> KPD [o]fficials advised [Fire Investigator Matthew Wilmont] that Mr. Gates is very computer savvy and that he has used computers and other types of information technology to commit crimes related to fraud in the past. Mr. Gates has previously been both investigated and charged with federal offenses of credit card fraud, identity fraud, and false documents. KPD [o]fficials advised that they believe that computers / internet connected devices were used in the commission of these crimes.

Id. ¶ 24

> [New Hampshire Fire Marshall's Office] Investigators know that sometimes individuals, who set fires, particularly where pre-planning is involved, will sometimes use computers, cellular phones, or other internet connected devices to research properties that they intend to target, including the methods / means of setting fires or creating incendiary devices. It is also known that the general population regularly carry [sic] cellular phones on their person. Many models of cellular phones regularly record location data that can be specific enough to record the date, time and location of the cellular phone at random intervals, or when the cellular phone is in use.

Id. ¶ 25. The State concedes that the assertions made in paragraph 13 are false. Although Mr. Patel received a hateful letter, Defendant had nothing to do with it. Furthermore, Defendant asserts that the allegations made in paragraphs 24 and 25 are "reckless, irrelevant, and should not have been included in the search warrant affidavit." *See* Doc. 26 at ¶ 23. Finally, during the suppression hearing Defendant argued that a portion of paragraph 12 contained a misstatement. Specifically, Defendant challenged the claim made in that paragraph that the tracks at issue led "directly" to Defendant's apartment because Officer Garvin and Corporal Wells testified at the suppression hearing that they lost the tracks for a short period of time.

Analysis

Defendant argues that it was unlawful for the police to enter both the vestibule and the utility room. Defendant further argues that the allegations made in paragraphs

12, 13, 24, and 25 of the warrant affidavit were recklessly made and material to the magistrate's finding of probable cause. The Court will address each of these arguments in turn. Because the State Constitution is at least as protective as the Federal Constitution in this area, the Court addresses Defendant's claims under the State Constitution, citing to federal cases for guidance only. *See State v. Ball*, 124 N.H. 226, 231–33 (1983).

I. *Reasonable Expectation of Privacy*

"[The] State Constitution protects all people, their papers, their possessions and their homes from unreasonable searches and seizures." *State v. Smith*, 169 N.H. 602, 607 (2017) (quotation omitted). In particular, it protects people from unreasonable police entries into their private homes. *Id.* "A violation occurs if government agents invade a person's reasonable expectation of privacy." *Id.* (citation omitted). "This is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* (quotation omitted). An apartment, like a single-family dwelling, is a home within the meaning of the State Constitution. *Id.* at 608 (citation omitted). "The search of a home is subject to a particularly stringent warrant requirement because the occupant has a high expectation of privacy." *State v. Tarasuik*, 160 N.H. 323, 328 (2010).

Defendant argues that Sergeant LePage conducted an unconstitutional search when he entered the vestibule and then the utility room. The State contends that no such violation occurred because Defendant lacked a reasonable expectation of privacy in both areas. The Court finds *Smith* instructive on this point. In that case, the New

Hampshire Supreme Court addressed the more complex issue of whether a tenant had a reasonable expectation of privacy in the common areas of a rooming house.[4] *Id.* at 608. Specifically, the *Smith* defendant argued that he had a reasonable expectation of privacy in the hallway of his rooming house. *Id.* In addressing whether the defendant had such an expectation of privacy, the *Smith* court compared numerous cases from other jurisdictions which came to varying conclusions. *Id.* It then reasoned that, regardless of outcome, those jurisdictions focused on the particular facts of the living situation in question. *Id.* In short, the *Smith* court held that common areas that exist in homes which resemble single-family dwellings are usually protected. *Id.* at 608–09 (citation omitted). Put differently, a tenant that shares a single-family home with roommates—like a member of a nuclear family—has a reasonable expectation of privacy beginning at the threshold of the front door, as opposed to his or her personal bedroom. *See id.* In contrast, the *Smith* court held that "common areas in rooming houses that are more like unsecured apartment buildings are not usually protected." *Id.* at 609 (citation omitted).

In applying the above reasoning to the facts before it, the *Smith* court held that the defendant in that case did not have a reasonable expectation of privacy in the hallway of his rooming house because he lived more like an apartment dweller than a co-resident of a single-family dwelling. *Id.* at 611. Implicit in this holding was that apartment dwellers with individualized living spaces do not have a reasonable expectation of privacy in common areas. *See id.* at 609 (quoting *State v. Chaisson*, 125 N.H. 810, 816 (1984) ("The common areas of an apartment building, even if they are

[4] Although not explicitly defined in the opinion, the *Smith* court's use of the term "rooming house" clearly connotes a living arrangement where tenants share certain facilities such as kitchens and/or bathrooms.

normally kept locked, are not places in which tenants have a reasonable expectation of privacy." (quotation omitted));[5] *see also State v. Mouser*, 168 N.H. 19, 25 (2015) (citing *United States v. Rheault*, 561 F.3d 55, 56 (1st Cir. 2009)) (explaining that "it is beyond cavil ... that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building" (quotation omitted)). The Court now applies the above reasoning to the facts of this case.

A. *The Vestibule*

As stated above, when the officers approached Defendant's residence they looked through the glass window of the center door and observed a lit vestibule area with three unmarked doors. After entering the vestibule and contacting Defendant, the officers learned that Defendant's personal apartment was behind the left door, and that his elderly mother's apartment was behind the right door. Thus, unlike *Smith*, there is no question here that Defendant was an apartment dweller. The record is clear that Defendant and his mother were not co-tenants sharing anything that resembled a single-family dwelling. Accordingly, the Court concludes that Defendant lacked an objectively reasonable expectation of privacy in the common vestibule which provided ingress to both his and his mother's separate apartments. *See Smith*, 169 N.H. at 609.

The Court also concludes that Defendant did not exhibit a subjective expectation of privacy in the vestibule. The vestibule was unlocked and illuminated by an interior light (even though it was approximately 3:30 a.m). Moreover, a shoveled stone

[5] Although cited in *Smith*, this quote from *Chaisson* was taken from a federal case and is dicta. The *Chaisson* court did not decide the issue of whether a tenant had a reasonable expectation of privacy in the common areas of his or her apartment building. Indeed, the New Hampshire Supreme Court did not adopt the "reasonable expectation of privacy" test until almost 20 years after *Chaisson*. *See State v. Goss*, 150 N.H. 46, 48 (2003).

walkway led to the apartment's center door, behind which the vestibule at issue was located. These facts would lead a reasonable person to believe that the center door was the primary point of ingress into the rear of the apartment building. The Court heard no evidence that Defendant was permitted to exclude anyone from using this entrance. *Cf. United States v. Werra*, 638 F.3d 326, 336 (1st Cir. 2011) (reasoning, based on the facts of that case, that the defendant subjectively believed that he could prevent the entry into the foyer of anyone "whom he and his housemates wished to keep out."). Furthermore, any person (such as the landlord) who wanted to use the shoveled stone walkway to access either apartment would necessarily enter through this vestibule. Accordingly, the Court also concludes that Defendant lacked a subjective expectation of privacy in the vestibule.

In light of the foregoing, the Court finds that Sergeant LePage's warrantless entrance into the vestibule to knock on Defendant's door was not an unreasonable search under the State and Federal Constitutions. This conclusion is in accord with cases from outside of this jurisdiction that have reached similar conclusions in almost identical contexts. *See, e.g.*, *United States v. Mendoza*, 281 F.3d 712, 715–16 (8th Cir. 2002) (holding that the defendant did not have a reasonable expectation of privacy in the vestibule of a duplex); *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (holding that the defendant did not have a reasonable expectation of privacy in the entryway of a two-unit dwelling); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) ("The vestibule and other common areas are used by postal carriers, custodians, and peddlers. The area outside one's door lacks anything like the privacy of the area inside. We think the district court on solid ground in holding that a tenant

has no reasonable expectation of privacy in the common areas of an apartment building." (collecting cases)); *Fitzgerald v. State*, 837 A.2d 989, 1024–26 (Md. Ct. Spec. App. 2003), aff'd, 864 A.2d 1006 (2004).

B. *The Utility Room*

For similar reasons, the Court concludes that Defendant did not have a reasonable expectation of privacy in the utility room. As stated above, the utility room was located behind the vestibule's center door, which was beyond the four walls of both Defendant's apartment and his mother's separate apartment. As it was a utility room, the landlord who owned the apartment building presumably permitted various workmen and handymen to enter this room in order to service the instruments contained therein. The record does not reflect that Defendant had any control over the utility room at issue, nevermind exclusive control. *See United States v. Singleton*, 2013 WL 3196378, at *7 (E.D. Penn. Jun. 25, 2013) (finding no reasonable expectation of privacy in utility closet). The record is also devoid of any evidence demonstrating that the door to the utility room was ever locked, that Defendant stored (or was permitted to store) his personal items in the utility closet, or, most importantly, that Defendant subjectively believed that this room was an extension of his apartment and that he could exclude others from entering it. *See United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999) (holding that tenant of two-unit complex had no reasonable expectation of privacy in the shared hall closet of the dwelling, which was accessible by two other tenants and the landlord). For this reason, the Court concludes that any expectation of privacy that Defendant may have possessed in the utility room was unreasonable. *See id.* Accordingly, Defendant's motion to suppress is DENIED.

II. *Validity of the Warrant*

The Court now turns to the alleged misrepresentations contained in the warrant. As a preliminary matter, the Court notes that it reads warrant affidavits in a "commonsense manner, giving due consideration to the preference to be accorded warrants." *State v. Grimshaw*, 128 N.H. 431, 435 (1986) (quotation omitted).

"[A] defendant is entitled to be heard in attacking a facially valid warrant only after a preliminary showing that in demonstrating probable cause for issuing the warrant, the police made knowing or reckless misstatements that were material in the sense of being necessary for the finding of probable cause." *State v. Valenzuela*, 130 N.H. 175, 191 (1987).

"Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *State v. Ward*, 163 N.H. 156, 159 (2012) (citation omitted). "Probable cause does not require conclusive proof of illegal activity," but rather a fair probability that contraband will be found in a particular place. *State v. Letoile*, 166 N.H. 269, 274 (2014). Indeed, "neither certainty, nor proof beyond a reasonable doubt, nor even proof by a preponderance of the evidence, is required for a magistrate to find probable cause." *Id.* (citation omitted).

Assuming, *arguendo*, that paragraphs 13 contains knowing or reckless misstatements, the Court finds that they were not material to the magistrate's finding of probable cause in this case. *See id.* The excision of paragraphs 13 does not undercut the other assertions establishing that the same footprints led from the scene of the fire to Defendant's residence and, most importantly, that the boots discovered in the utility

room matched those prints. The Court concludes that this chain of observations, standing alone, established a fair probability that evidence of a crime would be discovered in Defendant's apartment. *See id.*

The Court also concludes that the assertion in paragraph 12 that the footprints led "directly" to the apartment—even though Officer Garvin and Corporal Wells temporarily lost sight of such prints—was neither a misstatement, nor a material component of the magistrate's finding of probable cause. First, the Court finds that the tracks did, in fact, lead directly to Defendant's residence, even though some of them were destroyed by a passing plow. Second, the Court concludes that the factual omission that Officer Garvin and Corporal Wells temporarily lost sight of the footprints was not material. Again, even if this observation had been included, probable cause still existed because the same tracks found at the fire scene were found at Defendant's apartment, and those tracks matched the tread of the wet boots found in the utility closet. *See Valenzuela*, 130 N.H. at 194 (holding that omissions in the warrant affidavit did not "affect [the] result for their inclusion would not have eliminated probable cause.").[6]

With regard to paragraphs 24 and 25, the defendant argues that such paragraphs are "reckless, irrelevant, and should not have been included in the search warrant affidavit." Def.'s Mot. Suppress ¶ 23. As quoted above, paragraph 24 alleged that the defendant was "very computer savvy," and that he has used computers to

[6] The Court also notes that Defendant's inconsistent statements regarding the boots, which were included in the search warrant affidavit, further supports the magistrate's finding of probable cause in this case. *See United States v. Humphrey*, 1991 WL 53288, at *4 (6th Cir. April 11, 1991) (noting that the defendant's repeated lies to the officer contributed to the finding of probable cause to search the vehicle because "[s]ome of the strongest inferences in law are drawn from lies, and courts routinely instruct juries that they may draw the inference of consciousness of guilt from proof of suppression of evidence or the making of false exculpatory statements.").

commit crimes in the past. *See* Warrant Aff. ¶ 24. Furthermore, paragraph 25 generally asserts that people who set fires typically use internet connected devices to research how to do so and that cell phones usually contain location data. *See id.* ¶ 25.

Although the defendant does not specifically challenge the search and seizure of the electronic devices listed in the search warrant, *see, e.g.*, Def.'s Mot. Suppress ¶ 24 (requesting that all evidence seized as a result of the warrant be suppressed), it appears that he is raising something in the nature of a particularity challenge. Specifically, the defendant argues that "[g]iven that everyone now carries a cell phone, the police could include [paragraph 25] in almost every search warrant application." Def.'s Mot. Suppress ¶ 23.

The above suggests the argument that there was insufficient probable cause within the affidavit to establish a nexus between the electronic devices to be searched, and the evidence of the crime sought. See State v. Ball, 164 N.H. 204, 209 (2012) (affidavit afforded the district court a substantial basis for believing defendant's computer contained child pornography); United States v. Ricciardelli, 998 F.2d 8, 13 (1st Cir. 1993) (describing an adequate warrant as creating a "tri-cornered nexus between the criminal act, the evidence to be seized, and the place to be searched."). The defendant's motion, however, is largely devoid of any law or analysis tailored to this particular issue. Moreover, the defendant did not make a particularity or nexus argument at the suppression hearing. See Hr'g 11:52:00 (asserting that the generality of paragraphs 24 and 25 contributed to the warrant's overall lack of probable cause). For its part, the State limited its objection to whether the above assertions were "reckless" or "irrelevant" and did not address particularity or nexus, presumably because

defendant did not expressly raise it. In light of the foregoing, the Court DENIES WITHOUT PREJUDICE defendant's request to suppress all evidence based upon paragraphs 24 and 25. If defendant seeks to raise a particularity argument with respect to paragraphs 24 and 25 he must do so by separate motion within 14 days of receipt of this order. In all other respects, however, Defendant's motion is DENIED.

So Ordered.

11/27/2018
DATE

Amy B. Messer
Presiding Justice