THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0148

State of New Hampshire

v.

Javon Brown

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTION PRESENTED

1. Whether the court erred by admitting evidence of a phone call between a police officer and person who claimed to be Javon Brown.

Issue preserved by Brown's motion in limine to exclude the evidence, A 7*, the State's objection, A 11, the parties' arguments, H 13–17, and the court's ruling, H 19–20.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"H" refers to the transcript of the motions hearing on January 31, 2020; and
"T" refers to the transcript of trial on February 5–6, 2020.

STATEMENT OF THE CASE

In August 2019, the State filed a complaint in the Merrimack County Superior Court charging Javon Brown with misdemeanor domestic violence — simple assault — unprivileged physical contact. A 3. In October 2019, the State obtained indictments charging Brown with second-degree assault — domestic violence, and witness tampering. A 4–5. In January 2020, the State filed a complaint charging Brown with criminal threatening. A 6. At the conclusion of a two-day trial on February 5 and 6, 2020, the jury found Brown not guilty of second-degree assault — domestic violence, witness tampering, and criminal threatening, but guilty of domestic violence — simple assault — unprivileged physical contact. T 259–61. On February 11, 2020, the court (Kissinger, J.) sentenced Brown to serve twelve months at the house of corrections. A 19.

STATEMENT OF THE FACTS

B.B. met Javon Brown at her divorce party. T 28. The pair were an unlikely couple. B.B. was in her late thirties, the mother of two, college educated, gainfully employed, and owned a car. T 25–26, 59–61, 65, 161–62. Brown was in his mid-twenties, childless, a ninth-grade drop-out, unemployed, carless, a convicted felon and recovering drug addict. T 31, 61, 65, 154–55, 161–62, 175–76; A 3–6. Despite their differences, the two fell in love. T 28, 31, 170, 175. Brown spent a lot of time with B.B.'s children, although primary physical custody was later awarded to B.B.'s ex-husband. T 26, 34, 59–61. In about February 2019, after they had been together for almost a year, B.B. became pregnant with Brown's child. T 27–29, 31, 55, 93, 156, 175.

In May 2019, while B.B. and Brown were living together in Manchester, B.B. walked in on Brown having sex with another woman. T 28–29, 156–57. Believing that the relationship was over, Brown moved to Michigan to live with his sister. T 157, 179. Unbeknownst to Brown, B.B. made allegations regarding Brown to the Manchester Police, the details of which were not disclosed at trial. T 29–30, 68, 160. She also obtained a temporary restraining order, but the order was never served on Brown. T 31–32, 66–67, 158–59.

In late July, Brown returned to New Hampshire, B.B. reached out to him, and they reconciled. T 31, 63, 158. B.B.

brought Brown to stay with her at her apartment, which was then in Concord. T 31, 34–35, 37, 58–59. B.B. testified that she "still loved [Brown]," "was about to his have baby," and "hop[ed] it would work out." T 31. Immediately following the reconciliation, she testified, the relationship "was . . . going really well." T 38.

On or about August 1, B.B. was involved in a car collision. T 54–55, 65, 197. She was treated at two hospitals and released. T 66, 200.

Around the day of the collision, Brown overheard B.B. on the phone with her lawyer discussing the restraining order. T 33–34, 158–59, 189. The lawyer explained that, because B.B. had not appeared for a scheduled court hearing, the order was dismissed. T 33–34, 158–59, 179. Shortly thereafter, Brown and B.B. parted ways again. T 56, 164–65, 184–85.

In the afternoon of August 4, B.B. went to the Concord Police Department and told Officer Brian Cregg that, in the early morning hours of August 3, Brown assaulted and bit her. T 56–58, 70, 79, 86–87, 93–95, 105, 122. She had bruises on her shoulder and head, and what she claimed was a bite mark on her arm, although the skin was not broken. T 51–54, 69, 83–85, 100, 122–23.

At trial, B.B. described Brown as "very controlling and jealous." T 28, 33, 38–40, 72. She testified that, after she

returned from work on the evening of August 2, Brown went through her phone and accused her of cheating on him. T 37–40, 43. He then hit her multiple times with both a closed fist and an open hand, suffocated her, threatened her and their unborn child, restrained her, and prevented her from using her phone. T 40–50, 79. He forced her to write a letter recanting the allegations that formed the basis for the restraining order. T 46–47, 68.

B.B. further testified that, after the assault, Brown apologized, told her that he loved her and didn't want to break up, and that they had sex later that day. T 50–51, 69. The following morning, August 4, when an insurance adjuster came to examine the damage to B.B.'s car from the collision, Brown accompanied her during the 45-minute meeting, which prevented her from escaping. T 54–56. Later that day, she drove Brown to several locations in Concord and then to Manchester. T 56, 72. When Brown got out of the car in Manchester, she drove away and went directly to the Concord Police Department. T 56.

Brown testified that he did not assault or threaten B.B. T 164–66, 168–69, 186–87. Brown first heard about the restraining order when he overheard B.B. discussing it with her lawyer. T 158–59, 188–89, 199. He explained that he was disappointed because, as a black man in New Hampshire, he felt particularly vulnerable to the danger of false accusations

of violence. T 161–63, 166–67, 169, 189–90, 202. Brown tried to leave, but B.B. grabbed him and pleaded with him to stay, telling him that she "made a mistake" by making false allegations about him. T 160–62, 180, 189–92. In a futile effort to convince Brown to stay, B.B. wrote the letter recanting her false allegations. T 163, 165, 169, 187–88, 191. Brown still wanted to end the relationship and leave but, afraid that B.B. would respond by making more false allegations against him, he stayed until he thought it was safe to go. T 162–63, 188–92. After a couple days, Brown had B.B. drop him off near the Market Basket in Concord, where he stayed with a homeless friend. T 164–65, 184–85. Brown testified that he was not responsible for any of B.B.'s bruises, and that some of them may have been the result of the car collision. T 166, 192–97, 200, 202–04.

The defense emphasized Officer Cregg's failure to investigate B.B.'s allegations with any meaningful degree of diligence. T 22–24, 207–13, 220–22. He failed to obtain accident reports or hospital records regarding the car collision. T 107, 200–01. Although B.B. told Cregg that she wet her bed during the assault, he failed to visit her apartment for months. T 102, 106. Although B.B. told Cregg that Brown yelled at her during the assault, he failed to interview the neighbors in B.B.'s apartment complex. T 124–25. He also failed to examine B.B.'s phone for months,

by which point, B.B. claimed, her texts and emails were no longer available. T 102, 126. He did not conduct a close examination of what B.B. claimed was a bite mark, nor did he seek to determine whether that mark, if it was a bite mark, matched Brown's teeth. T 123–24. He failed to interview the insurance adjuster who visited during the time B.B. claimed that Brown held her captive. T 106–07. He failed to identify or visit the multiple locations to which B.B. drove Brown during that time. T 107–08.

SUMMARY OF THE ARGUMENT

Statements made over the phone may only be introduced if their proponent offers evidence sufficient to support a finding regarding the speaker's identity. Absent voice-identification or a connection between the number used and the purported speaker, substantial evidence of the speaker's claimed identity is required. Here, the only evidence corroborative of the speaker's claimed identity were his references to B.B.'s bruises and recantation letter. Because B.B. could have fed that information to the speaker, or Cregg could have disclosed it at the beginning of the call, the evidence was insufficient to support a finding that the speaker was Brown. The court's ruling admitting the speaker's statements was inconsistent with case law from around the country and, if affirmed, would render the phone-call-authentication requirement virtually meaningless.

I. THE COURT ERRED BY ADMITTING EVIDENCE OF A PHONE CALL BETWEEN A POLICE OFFICER AND A PERSON WHO CLAIMED TO BE JAVON BROWN.

Prior to trial, Brown moved in limine to exclude evidence of a telephone conversation between Officer Cregg and someone claiming to be Brown. A 7. He explained that, when B.B. went to the Concord Police Department, she told Cregg that she received several phone calls from numbers she did not recognize and that she believed that the caller might be Brown. A 7. B.B. did not answer the calls and the caller or callers did not leave any messages. A 7. B.B. provided Cregg with one of the numbers, and Cregg dialed it. A 7. The person who answered the phone claimed to be Brown and made statements about B.B.'s allegations. A 7.

Brown moved to exclude evidence about the phone call under New Hampshire Rule of Evidence 901. A 8. He noted that there was no evidence connecting the number Cregg dialed to Brown. A 7. B.B. did not state that Brown had ever used that number previously. A 7. There was no evidence "regarding whom the number was registered to, or, indeed, even what the number was." A 7. Brown added that there was no evidence that Cregg was familiar with Brown or could identify his voice. A 8.

In its objection, the State did not allege that there was any evidence connecting the phone number to Brown. A 13. Indeed, the State did not dispute that Cregg failed even to

document what the phone number was. A 13. It conceded that "the mere assertion of identity by a party to the conversation is not sufficient evidence of authenticity." A 14.

The State argued, however, that "the content of the phone call contains abundant identifying facts, that together with the circumstances, link the phone call to [Brown]." A 15. It argued that the person "relayed information to . . . Cregg that only [Brown] would have personal knowledge of." A 15. The State proffered that the person admitted that he was at B.B.'s apartment the prior night, "claimed that [B.B.'s] injuries were from rough sex," denied assaulting her, and "told . . . Cregg that [B.B.] wrote a letter recanting the Manchester assault," which he still had in his possession. A 13.

At the hearing on the motion, Brown noted that B.B. could have simply informed a third party of her allegations and given that person's phone number to Cregg. H 15. He argued that State's argument would "swallow[]" Rule 901; unless entirely irrelevant, the proponent could always argue that the statements in a phone call, "viewed in a certain light[,] could tie it to [a particular] individual." H 13–14.

Brown also noted that there was no basis to conclude from the State's proffer that the person "just, sort of, sua sponte said, 'my name is Javon Brown, she has these injuries, I have this letter.'" H 15. Rather, Cregg could have

informed the person of B.B.'s allegations at the beginning of the call, which would explain his later statements about those matters. H 15. In response to the court's suggestion that Brown simply present these arguments to the jury, Brown reminded the court of its obligation to serve as the gatekeeper for evidence. H 16.

The State then proffered that Cregg had recently listened to a recording of Brown's voice, and that he "identified that as being the same voice as the one that he spoke with during this phone call." H 17. Brown, in response, argued that it was implausible for Cregg to claim that he was able to identify his voice almost six months after a single brief telephone conversation. H 17. On the issue of Cregg's voice identification, the court agreed with Brown, noting the suggestiveness of the identification procedure, and declined to give any credence to Cregg's identification. H 19–20.

On the broader issue, however, the court found that evidence of the phone call was admissible. H 19–20. The court explained that "the substance of [the call] convinces me . . . that [the person's identity as Brown is] sufficiently authenticated." H 19–20. "[I]t's the very specificity of the conversation that[,] in my view, provides an adequate foundation for its admissibility." H 20.

At trial, Cregg testified that B.B. told him that she was receiving calls from unfamiliar numbers. T 95, 113. Cregg used a police-department phone to call one of the numbers but failed to write it down. T 96, 113–14. When someone answered the call, Cregg "asked if [he] could speak to Javon Brown." T 96. The person said, "[T]his is Javon Brown." T 96. Cregg then "explained . . . [his] investigation to [the person,] . . . why [he] wanted to speak with him." T 96. The person told Cregg that he was at B.B.'s apartment the previous night. T 96, 99–100. "[They] talked about bruising." T 96. The person "told [Cregg] the bruising came from rough sex, most likely." T 96, 100, 119. The person "told [Cregg] that . . . [B.B.] had written a letter recanting what she said about [him] earlier." T 96. The person "denied assaulting her." T 96.

Brown testified that he was not the person Cregg spoke to on the phone, and that he had no idea who that person was. T 165, 185–86. Brown disavowed any claim that B.B.'s injuries were the result of "rough sex" with him. T 200. By admitting evidence of the phone call, the court erred.

If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. State v. Munroe, 173 N.H. 469, 479 (2020). Under that standard of review, the

question is whether the ruling was clearly untenable or unreasonable to the prejudice of the appellant's case. Id.

The trial court's interpretation of the rules of evidence, however, is not afforded deference. Id. at 472 ("[W]e review the trial court's interpretation of court rules de novo, as with any other issue of law"); see also State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary."); see also Koon v. United States, 518 U.S. 81, 100 (1996) (abuse-of-discretion "label" "does not mean a mistake of law is beyond appellate correction," because "[a] district court by definition abuses its discretion when it makes an error of law.")

To authenticate an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." N.H. R. Evid. 901(a). This authentication requirement applies to "[e]vidence about a telephone conversation." N.H. R. Evid. 901(b)(6). "It has long been established that if a communication made to or from a disembodied voice is relevant only if it is connected to a particular person, this connection must be proved prior to the admission of any evidence proving the content of the communication." Kenneth S. Broun et al., McCormick on Evidence § 228 (8th ed., Jan. 2020 update).

Due to recent technological developments, in many cases, courts face the challenge of applying Rule 901's authentication requirement to novel forms of communication. This is not one of those cases. The issue here — whether the evidence was sufficient to establish that the speaker on a telephone call was a particular person — is one that courts have addressed repeatedly since the advent of the telephone over a century ago. While this Court has not yet addressed this issue, the case-law from other jurisdictions is well-developed and long-settled. The facts presented in those cases fall generally within four categories.

The first category includes those cases in which the witness recognizes the speaker's voice, "the most usual if not the most reliable mode of identification." State v. Marlar, 498 P.2d 1276, 1280 (Id. 1972). Voice identification alone is sufficient to identify a speaker and if such evidence is present, then no other evidence, including self-identification, is required. N.H. R. Evid. 901(b)(5).

The second category includes those cases in which there is no voice identification, but the speaker uses a "telephone [number] assigned at the time to . . . [the] particular person" alleged to be the speaker. N.H. R. Evid. 901(b)(6). In this situation, additional evidence is needed, but the requirement is not substantial. "[I]f circumstances, including self-identification, show that the [speaker]" was a particular

person, then Rule 901 is satisfied. Id. In Bond Pharmacy, Inc. v. City of Cambridge, 156 N.E.2d 34 (Mass. 1959), for instance, a witness's testimony that he called a number registered to the water department and that someone answered the call by saying "water department" was sufficient to authenticate the speaker as an authorized agent of the water department. Id. at 37; cf. State v. Palermo, 168 N.H. 387, 391–94 (2015) (additional circumstantial evidence was sufficient to authenticate messages sent from a Facebook account registered to the defendant).

Rule 901, however, "suggests that self-identification is sufficient to identify an answering party only when combined with evidence that the call was made to the number assigned to such a party." Victor J. Gold, Federal Practice and Procedure § 7111 (1st ed., Apr. 2021 update). In Bond Pharmacy, for instance, the court noted, "The situation here is to be distinguished from that of an incoming call[1]. Bond Pharmacy, 156 N.E.2d at 37. "The fact that the person initiating the call says he is A is not enough to make the conversation admissible." Id.

[1] Many older cases make a distinction between incoming phone calls — which are assumed to be from an unknown number, and outgoing phone calls — which are assumed to be to a number listed in the telephone directory as assigned to the purported speaker. Due to changes in modern telephones (the demise of telephone directories, the rise of anonymous, prepaid cellular phones, caller ID and caller ID "spoofing"), the better distinction today is that between calls in which the proponent of the evidence can show that the speaker used a number registered to the purported speaker and those in which the proponent cannot.

The third category includes those cases in which there is no voice identification and the speaker uses a number that is not registered to the specific person alleged to have been the speaker, but is registered to a person or business associated with that person. In this circumstance, more circumstantial evidence is needed; self-identification is not enough. Broun et al., supra § 228; accord N.H. R. Evid. 901 Reporter's Notes; Fed. R. Evid. 901 Committee Notes.

In People v. Metcoff, 64 N.E.2d 867 (Ill. 1946), for instance, a witness testified that she twice called a business for whom the defendant, Metcoff, worked, that the speaker identified himself as "Metcoff" and said that he would not rent an apartment to those with children, the charged offense. Id. at 868. The Illinois Supreme Court reversed the conviction, holding that the witness's testimony "falls far short of a proper identification of the person to whom she talked by telephone." Id.

When the telephone number is registered to a person or business associated with the person alleged to have been the speaker, however, the additional evidence need not be substantial. In United States v. Espinoza, 641 F.2d 153 (4th Cir. 1981), for instance, the witness had telephone conversations with a speaker who used the phone number of a business founded by the defendant and identified himself with the defendant's first name. Id. at 169. The speaker

accepted and fulfilled an order for child pornography. Id. The court acknowledged that "[t]hese facts, standing alone, perhaps would not be sufficiently probative" to authenticate the speaker as the defendant. Id. at 170. But given the additional fact that the defendant's fingerprints were found on invoices for the child pornography, the evidence authenticated the defendant as the speaker. Id. at 170–71. Similarly, in Commonwealth v. Lopez, 151 N.E.3d 367 (Mass. 2020), the Court held that text messages sent from the defendant's girlfriend's phone, the author of which identified himself with the defendant's nickname, were authenticated as having been authored by the defendant because the exculpatory "story" proposed in the messages "mirror[ed]" the defendant's statements to the police. Id. at 375–76.

The fourth and final category includes those cases in which there is no voice identification, no evidence that the telephone number used by the speaker was registered to the person alleged to have been the speaker, and no evidence that the entity to whom it was registered had any association with the person alleged to have been the speaker. Because the number of potential speakers in this circumstance is unlimited, there exists "greater opportunity to premeditate fraud." Gold, supra § 7111; see also Wiggins v. State, 191 So. 2d 30, 32 (Ala. Ct. App. 1966) (noting "the ease with which such evidence c[an] be counterfeited"). Thus, cases in

this category require the most circumstantial evidence to satisfy the authentication requirement. Admitting evidence of a call absent voice identification, telephone-number identification, or any other compelling evidence corroborating the speaker's purported identity "would open the door for fraud and imposition." Dentman v. State, 99 So. 2d 50, 55 (Ala. 1957).

In Benson v. Commonwealth, 58 S.E.2d 312 (Va. 1950), the State alleged that the defendant, who was charged with bribery, paid "protection money" to police officers to avoid the arrest of his associates. Id. at 313. At trial, a police officer, who had never met the defendant, testified that he heard that the defendant had a "list" of officers receiving money and that the officer's name was on the list. Id. at 314. The officer obtained a phone number, purportedly the defendant's, but did not document what the phone number was. Id. He dialed the number and asked for the defendant by name. Id. The person answering identified himself as the defendant. Id. When the officer asked whether his name was on the list, the speaker said, "Yes." Id. When the officer asked why, the speaker said, "You are supposed to know why," and then explained that the officer was supposed to receive $10 a month from "the payoff man down at headquarters." Id.

On appeal, the Virginia Supreme Court held that the court erred by admitting evidence of the call because the

officer's testimony "fail[ed] to measure up to the requirement necessary to identify the defendant." Id. at 315. The court noted that there was no evidence that the number was registered to the defendant. Id. Although the speaker demonstrated knowledge that there was a "list" of officers, and that the calling officer was to receive a $10 monthly payment, the Court held that those statements were not sufficient to corroborate the speaker's identity as the defendant. Id.

In Marlar, the alleged victim of a physical assault testified that, following the assault, he received several calls, both at work and at home, from a person claiming to be the defendant. Marlar, 498 P.2d at 1279. The speaker first asked the witness to drop the charges and then threatened to "put [the witness] in the morgue." Id. at 1279–80. The witness also testified that he had a face-to-face confrontation with the defendant at the courthouse, in which the defendant encouraged him to drop the charges. Id. at 1281–82. The prosecutor, however, did not ask whether the caller's voice matched the defendant's. Id.

On appeal, the Idaho Supreme Court held that the court erred by admitting evidence of the phone calls. Id. Even though the speaker made several phone calls, all concerning the dismissal of the charges, and even though the defendant encouraged the witness to dismiss the charges in person,

"these circumstances d[id] not sufficiently identify the appellant as the caller." Id. at 1281. "Any interested person," the court noted, "could determine that the [defendant's] case was pending, and make inquiries of the nature revealed by [the witness's] testimony." Id.

In State v. Williams, 413 N.E.2d 1212, 1213 (Ohio Ct. App. 1979), the alleged victim of an armed robbery testified that, a few days before trial, he received a call from a person claiming to be the defendant. Id. at 1214. The speaker mentioned that he was a barber and asked the witness to drop the charges. Id. The witness did not recognize the defendant's voice. Id.

On appeal, the court held that the trial court erred by admitting evidence of the phone call. Id. at 1215. The court rejected the State's argument that "[i]t is highly improbable that there existed another barber [with the defendant's name], who was charged with the crime of aggravated robbery against a victim [with the witness's name], whose trial was scheduled four days after the phone call." Id. at 1214. It found that "the circumstances . . . lack sufficient indicia that the caller was the defendant." Id. at 1215. It observed that "[t]he conversation did not relate to matters uniquely within the knowledge of the defendant, nor was the identity of the [speaker] corroborated by independent facts." Id. "Anyone

with the slightest knowledge of the accused," the court noted, "could have placed the call." Id.

In Madison v. State, 726 So. 2d 835 (Fla. Dist. Ct. App. 1999), an alleged victim of an armed robbery testified that, following the robbery, he received a call from a friend who was in jail. Id. at 836. The friend told the witness that another inmate wanted to speak to him and put that inmate on the line. Id. That inmate identified himself as the defendant and offered the witness money in exchange for not testifying. Id. When the witness asked the speaker why he robbed him, the speaker responded, "[I]t just be like that. You know what I am talking about? It is just a late night or whatever and you know, that's the rules of the game or whatever, long story short." Id. The witness was not familiar with the defendant's voice. Id.

On appeal, the court held that the trial court erred by admitting evidence of the phone call. Id. It rejected the State's argument that the circumstances of the call, including the speaker's "explanation as to why he had robbed [the witness,] demonstrated that the [speaker] was familiar with the details of the crime." Id. "The explanation regarding the robbery," the court held, "d[id] not show that the [speaker] had sufficient details of the robbery so as to identify the [speaker] as having participated in the robbery." Id.

In In re Rhyne, 571 S.E.2d 879 (N.C. Ct. App. 2002), writ denied, review denied, 577 S.E.2d 637 (N.C. 2003), a juvenile was found to have committed arson. Id. at 879. Two witnesses testified that, after the fire, they received a phone call from a person claiming to be the juvenile and admitting to having set the fire. Id. at 880. They did not recognize the juvenile's voice. Id.

On appeal, the court held that the lower court erred by admitting evidence of the phone call. Id. at 881. Even though the speaker identified himself as the juvenile and exhibited knowledge of the fire, the court held, "there was no proper identification of [the juvenile's] voice or any circumstantial evidence that would lead to his identification." Id.

In addition to the cases cited above, appellate courts have frequently held that, in the absence of voice identification or evidence connecting the speaker's number to a known person, the mere facts that the speaker claims to be a particular person and exhibits some knowledge of the matters at issue is not sufficient to authenticate a telephone conversation. In the interest of brevity, counsel presents additional cases in a footnote.[2]

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[2] United States v. Pool, 660 F.2d 547, 560 (5th Cir. 1981) (trial court erred by admitting evidence of a phone call between an undercover DEA agent and someone using a defendant's nickname, even though the speaker asked the agent to obtain another boat, the method the defendant was accused of using to transport large amounts of marijuana); Dentman, 99 So. 2d at 52–55 (trial court erred by admitting evidence of a phone call between a city-council member and someone claiming to be the defendant, even though the speaker complained that

To be sure, there are cases in which courts have affirmed the admission of evidence of a telephone conversation, even if the absence of voice identification or

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his water was turned off, the defendant's alleged motive for murdering the police chief); Wiggins, 191 So. 2d at 31–32 (trial court erred by admitting evidence of a phone call between a deputy sheriff and a person claiming to be the defendant, even though the speaker "sounded like" the defendant, the speaker threatened to kill the murder victim, and the call took place on the same day as the murder); Hargrove v. State, 530 So. 2d 441, 442–43 (Fla. Dist. Ct. App. 1988) (trial court erred by admitting evidence of a phone call from person claiming to be the defendant, even though the speaker "sounded somewhat like" the defendant and said that he shot the murder victim in the leg); Price v. State, 69 S.E.2d 253, 254 (Ga. 1952) (trial court erred by admitting evidence of a phone call between a witness and a person claiming to be the defendant, even though the speaker asked to borrow money on an insurance policy for the defendant's granddaughter, the murder victim); Greble v. Morgan, 26 S.E.2d 494, 495–96 (Ga. Ct. App. 1943) (trial court erred by admitting evidence of a phone call between the plaintiff's husband and someone claiming to be the defendant, even though the speaker said that she owned the car involved in the collision and that the driver was using the car at her request); Stewart v. Fisher, 89 S.E. 1052, 1053 (Ga. Ct. App. 1916) (trial court erred by admitting evidence of a phone call between the plaintiff and someone claiming to be the defendant, even though the speaker admitted to the correctness of the plaintiff's demand and promised to pay it); People v. Rogers, 490 N.E.2d 191, 193–95 (Ill. App. Ct. 1986) (trial court erred by denying defendant's motion for a mistrial after erroneously admitting evidence of a phone call between a police officer and someone claiming to be a defense witness, even though the speaker said that the defendant beat her and threatened to beat her again if she testified against him); State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 463–64 (Mo. 1930) (en banc) (trial court erred by admitting evidence of a phone call from someone claiming to be the plaintiff's employee, even though the speaker discussed promissory notes assigned by "Smith" regarding "the sale of a mill at Republic," which matched the note at issue in the case); Citrin v. Tansey, 153 A. 523, 523–24 (N.J. 1931) (trial court erred by admitting evidence of a phone call from someone claiming to be a plaintiff, even though the speaker referred to a promissory note assigned by "Nelson & Duchin," which matched the note at issue in the case); Worley v. State, 253 P.2d 573, 574–77 (Okla. Crim. App. 1953) (trial court erred by admitting evidence of a phone call, overheard by a sheriff's deputy, involving someone claiming to be the defendant, even though the speaker said that he had two kinds of whiskey and whiskey was later found in the defendant's possession); State v. Parmely, 199 P.2d 112, 115–16 (Wyo. 1948) (trial court erred by admitting evidence of a phone call between a prosecutor and a person claiming to be the shooting victim's physician, even though the speaker described treatments he had given the victim).

evidence connecting the speaker's number to a known person. In these cases, however, there tends to be substantial circumstantial evidence establishing the identity of the speaker.

In Jackson v. State, 677 S.W.2d 866 (Ark Ct. App. 1984), for example, the witness received several phone calls from someone who "sounded like" the defendant, seeking to purchase marijuana. Id. The witness agreed to meet the speaker at a designated time and place, and the defendant showed up to the meeting. Id. The court held that the trial court did not err in admitting evidence of the phone call. Id. at 868.

In State v. Nickles, 728 P.2d 123 (Utah 1986), a prosecution for arson and insurance fraud, a member of the arson task force received a call, three weeks after a fire at the defendant's home, from a speaker who identified himself as the defendant. Id. at 128. The speaker inquired about specific items that had been removed from the home. Id. The Utah Supreme Court distinguished these facts from Marlar, discussed above. Id. at 129. Because the speaker "offered information . . . that only [the defendant] or someone in his family would have known," the court held that the trial court did not err in admitting evidence of the phone call. Id. at 128–29.

In State v. Silverman, 36 P.2d 342 (Or. 1934), the defendant was taken to the police station for questioning regarding a homicide. Id. at 343. The defendant's brother testified that, at about the same time, someone called him, told him that the defendant had "some tire trouble," and directed him to "get the car and fix it up." Id. at 344. During questioning, the defendant admitted that he "sen[t] [his brother] after [his] car," although he later maintained that he merely asked his brother "to go over and see if his car was still there." Id. Given the defendant's admission, the court held, the trial court did not err in admitting the brother's testimony regarding the phone call. Id.; see also Marlar, 498 P.2d at 1281 (noting that the defendant's admission in Silverman was "clearly corroborative" of his identity as the caller).

Here, although the State proffered that Cregg, almost six months after the phone call, identified the speaker as Brown, H 17, the court sustainably ruled that any such testimony would not be credible, H 19–20, and Cregg did not testify to any such voice identification. Thus, this case does not fall within the first category identified above.

Because Cregg did not document what number he called, there is no evidence that the number was registered to any particular person. Thus, this case does not fall within the second or third categories. It can only fall within the fourth

category, which requires the most corroborative evidence of the speaker's identity.

In applying Rule 901, however, however, the court failed to recognize the high degree of corroboration that is required when there is neither a voice-identification nor any evidence of any connection between the phone number the speaker used and the person the speaker claimed to be. Because the court failed to recognize or apply a corroboration requirement commensurate with the high risk of fraud posed in these circumstances, its ruling should be reviewed de novo. Munroe, 173 N.H. at 472. But even if reviewed under an unsustainable exercise of discretion standard, the court's ruling was clearly untenable or unreasonable to the prejudice of the Brown's case.

The risk of fraud manifested itself here in two possibilities. First, B.B. could have informed a third person of her allegations and instructed that person to call her while she was at the police department and pretend to be Brown. The mere fact that the speaker may have had knowledge of two simple facts — B.B.'s bruises and her recantation letter — does little to preclude this possibility. In this sense, Cregg's failure to document the phone number was particularly troubling, because it deprived Brown of the opportunity to prove that the number was connected to a person associated with B.B.

The State may argue that, if B.B. enlisted someone to pretend to be Brown on the phone, she would have instructed that person to give a full confession, not the denial that the speaker here gave. But B.B. likely anticipated that a full confession would have motivated the police to document the number and identify its owner, which would have revealed the ruse. By giving an implausible denial, however, B.B. and the speaker were able to avoid scrutiny of the caller's identity while still fabricating evidence that would undermine Brown's actual denials.

A second possibility is that the speaker was a random person who was not previously involved in B.B.'s allegations, and who simply decided to "play along" with Cregg's inquiries. While the speaker identified himself as Javon Brown and, at some point in the conversation, said that B.B. had bruises and had written a letter recanting prior allegations, the State's proffer did not establish that the speaker had this information prior to call. Rather, Cregg could have provided that information at the beginning of the call, enabling the speaker to simply parrot it back.

Cregg's trial testimony suggests that this is exactly what occurred. Cregg testified that he did not ask the speaker what his name was; he "asked if [he] could speak to Javon Brown[, a]nd [the speaker] said[, "T]his is Javon Brown." T 96. Cregg then "explained . . . [his] investigation to him[,] . . . why [he]

wanted to speak with him," and they "talked about bruising." T 96. Only after Cregg provided this explanation did the speaker tell Cregg that the bruising came from "rough sex," and that B.B. had written a recantation letter. T 96, 99–100.

The court's ruling here was inconsistent with case law from other jurisdictions. The speaker's statements here were no more corroborative of his purported identity than those in Benson, Marlar, Williams, Madison, Rhyne, and the cases cited in footnote 2. The corroborative evidence here fell far short of that presented in Jackson, Nickles, and Silverman.

Even setting aside these cases, affirmance on these facts would render Rule 901's authentication requirement virtually meaningless. Although the speaker made statements that, if made by Brown, would be relevant to the case, that is true in every case in which a party seeks to introduce evidence of statements made in a telephone call. Litigants do not seek to introduce evidence of irrelevant statements about, for instance, celebrity gossip or the weather. Thus, as a practical matter, nearly every phone call in which a speaker claimed to a particular person would satisfy Rule 901's authentication requirement. But see N.H. R. Evid. 901 Reporter's Notes ("the mere assertion of identity by a party to the conversation is not sufficient evidence of authenticity").

The court's ruling prejudiced Brown. The jury's verdicts demonstrate that it had substantial doubts about B.B.'s

credibility, as it found Brown not guilty of second-degree assault, witness tampering, and criminal threatening. T 259–61. Regarding the simple-assault charges, however, it was undisputed that B.B. had injuries; the only dispute was what caused those injuries. Brown testified that he did not cause any of the injuries. The speaker on the phone call contradicted this testimony, identifying himself as Brown and claiming that he caused B.B.'s injuries during "rough sex." This likely caused the jury to conclude that Brown's "story had changed," demonstrating his consciousness of guilt, and to discredit his testimony that he did not cause B.B.'s injuries.

CONCLUSION

WHEREFORE, Javon Brown respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decision was not in writing and therefore is not appended to the brief.

This brief complies with the applicable word limitation and contains 6,590 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Thomas Barnard
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