THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0404

State of New Hampshire

v.

Corey V. Donovan

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

BRIEF FOR THE DEFENDANT

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TABLE OF CONTENTS

Page

Table of Authorities 3

Questions Presented 7

Statement of the Case 8

Statement of the Facts 9

Summary of the Argument 20

Argument

I. THE COURT ERRED BY DENYING DONOVAN'S MOTION TO SUPPRESS. 21

II. THE COURT ERRED BY EXCLUDING EVIDENCE THAT POLICE FOUND METHAMPHETAMINE IN COURTNEY DONAHUE'S BACKPACK. 31

Conclusion 38

TABLE OF AUTHORITIES

Page

Cases

Commonwealth v. Lyles,
905 N.E.2d 1106 (Mass. 2009) 27

Courtemanche v. State,
24 So. 3d 770 (Fla. Dist. Ct. App. 2009)..........................37

Florida v. Bostick,
501 U.S. 429 (1991) 23

Florida v. Jardines,
569 U.S. 1 (2013) 29, 30

Koon v. United States,
518 U.S. 81 (1996) 32

Ex parte Lane,
303 S.W.3d 702 (Tex. Crim. App. 2009) 37

State v. Brown,
155 N.H. 164 (2007)...26

State v. Daniel,
12 S.W.3d 420 (Tenn. 2000) 27

State v. DePaula,
170 N.H. 139 (2017)...34

State v. Dion,
164 N.H. 544 (2013)...34, 35

State v. Jones,
172 N.H. 774 (2020)..passim

State v. Joyce,
159 N.H. 440 (2009) 28, 29

State v. Licks,
154 N.H. 491 (2006) 29

State v. McInnis,
169 N.H. 565 (2017) 22, 25, 26

State v. Morrill,
169 N.H. 709 (2017) 33

State v. Munroe,
173 N.H. 469 (2020) 31, 32

State v. Nightingale,
160 N.H. 569 (2010) 35

State v. Papillon,
173 N.H. 13 (2020) 35, 36

State v. Pullin,
266 P.3d 1187 (Id. Ct. App. 2011) 37

State v. Saucier,
926 A.2d 633 (Conn. 2007) 32

State v. Steeves,
158 N.H. 672 (2009) 24

State v. Wells,
166 N.H. 73 (2014) 34

United States v. Bell,
337 F. App'x 663 (9th Cir. 2009) 36

United States v. Bowie,
232 F.3d 923 (D.C. Cir. 2000) 36

United States v. Brooks,
670 F.2d 625 (5th Cir. 1982) 37

United States v. Butcher,
926 F.2d 811 (9th Cir. 1991) 36

United States v. Carrafa,
59 F.3d 176 (9th Cir. 1995) 36

United States v. Fields,
823 F.3d 20 (1st Cir. 2016) 24

United States v. Gilmore,
811 F. App'x 997 (9th Cir. 2020) 36

United States v. Mendenhall,
446 U.S. 544 (1980) 25, 26, 29

United States v. O'Dell,
204 F.3d 829 (8th Cir. 2000) 36

United States v. Rodriguez Fernandez,
833 F. App'x 803 (11th Cir. 2020) 36

United States v. Smith,
794 F.3d 681 (7th Cir. 2015) 28

Constitutional Provisions

New Hampshire Constitution, Part I, Article 19 22

United States Constitution, Fourth Amendment 22

United States Constitution, Fourteenth
Amendment 22

Rules

New Hampshire Rule of Evidence 401 ....33, 37

Other Authorities

Kenneth Broun et al., McCormick on Evidence
(8th ed. Jan. 2020 update) 33

QUESTIONS PRESENTED

1. Whether the court erred by denying Donovan's motion to suppress.

Issue preserved by Donovan's motion to suppress, A 11*, the State's objection, A26, the court's ruling denying the motion, AD 3, Donovan's motion to reconsider, A 35, and the court's ruling denying the motion, AD 14.

2. Whether the court erred by excluding evidence that police found methamphetamine in Courtney Donahue's backpack.

Issue preserved by the State's objection, T1 132, the parties' arguments, T1 132–37, and the court's ruling sustaining the objection, T1 137–39.

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* Citations to the record are as follows:
"A" refers to the appendix to this brief containing documents other than the appealed decisions;
"AD" refers to the appendix to the brief containing the appealed decisions;
"BC6" and "BC7" refer to the body-camera videos within the folder labelled "Body Camera," contained on State's Exhibit 1, introduced at the suppression hearing on November 26, 2019, to be transferred directly to this Court. "BC6" refers to the file labelled AMBA0006.MOV and "BC7" refers to the file labelled AMBA0007.MOV;
"CP" refers to the cell phone video labelled 20190619_082410.mp4, contained on State's Exhibit 1, introduced at the suppression hearing on November 26, 2019, to be transferred directly to this Court;
"H1" and "H2," refer, by volume number, to the transcript of the suppression hearing on November 26 and December 9, 2019;
"T1", "T2", etc. refer, by volume number, to the transcript of trial on January 8–13, 2020.
"V" refers to the transcript of the verdict on January 13, 2020.

<u>STATEMENT OF THE CASE</u>

In September 2019, the State obtained indictments from a Merrimack County grand jury charging Corey Donovan with four counts of being a felon in possession of a deadly weapon, two counts of attempted taking of a firearm from a law-enforcement officer, and one count of possession of methamphetamine. A 3–9. The State also filed a complaint charging him with resisting arrest. A 10. At the conclusion of a four-day trial on January 8–13, 2020, the jury found Donovan guilty of possession of methamphetamine and not guilty of the remaining charges. V 3–7. On August 10, 2020, the court (Kissinger, J.) sentenced Donovan to twelve months at the house of corrections, all suspended for three years. A 39.

STATEMENT OF THE FACTS

Suppression Hearing

In the morning of June 19, 2019, Andover Chief of Police Joseph Mahoney, Danbury Chief of Police David Suckling, Danbury Sergeant Spencer Marvin, and Hill Chief of Police Andrew Williamson were together in Hill searching for a suicidal person. H1 5; H2 6–7. They then went to Danbury to execute a search warrant. H1 5, 57, 75–76; H2 6. They planned next to attend a firearms training in Andover, but Chief Mahoney received a call that two people were sleeping in a Jeep parked at the Circle K convenience store in Andover. H1 4–6, 57–58, 75–76; H2 6–7; AD 4. All four officers responded to the convenience store, in full uniform, each in their own SUV-style cruisers. H1 5–7, 58, 76; H2 7; AD 4; BC6 2:40. While en route, the dispatcher informed Mahoney that the Jeep was registered to Corey Donovan, who had a valid driver's license and was on federal probation. H1 6–7, 59, 64; AD 4.

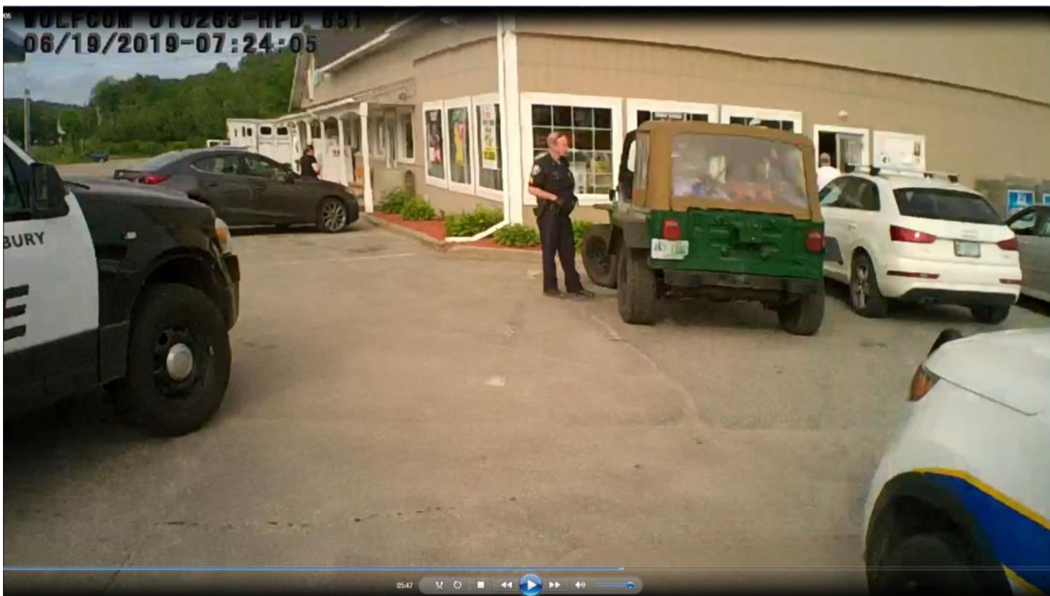
When the officers arrived at about seven or eight o'clock, the Jeep was appropriately parked in a marked parking spot, front to the curb, with its wheels turned to the left. AD 4; BC6 2:55. Another car was parked immediately to the Jeep's right. H1 24, 81; AD 4; J6 2:55. Mahoney parked his cruiser squarely behind the jeep, leaving only about a car's length between them. H1 7, 23, 80–81; BC6 2:45.

Marvin parked his cruiser to the left of Mahoney's, also about a car's length away from the Jeep. H1 7, 23, 80–81; BC6 2:45. Williamson parked his cruiser behind Mahoney's, and Suckling parked his cruiser to the left of Williamson's. H1 7, 23, 80–81; H2 7; BC6 2:40, 3:30. The photographs below demonstrate the position of the four cruisers behind the Jeep[1]:

BC6 3:31

[1] The trial court found that "[t]he video of the encounter . . . establishes that the four police officers parked their cars some distance away from [the Jeep]." AD 4. As these photographs demonstrate, the record does not support this characterization, except in the trivial sense that any distance is "some distance."

CP 0:24

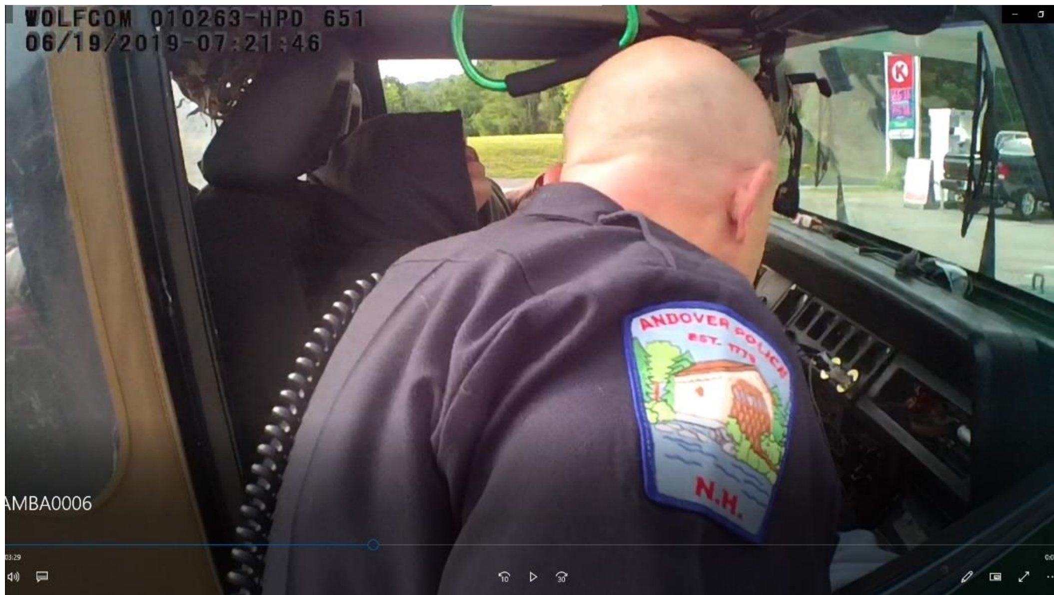


BC6 5:47

BC7 00:35

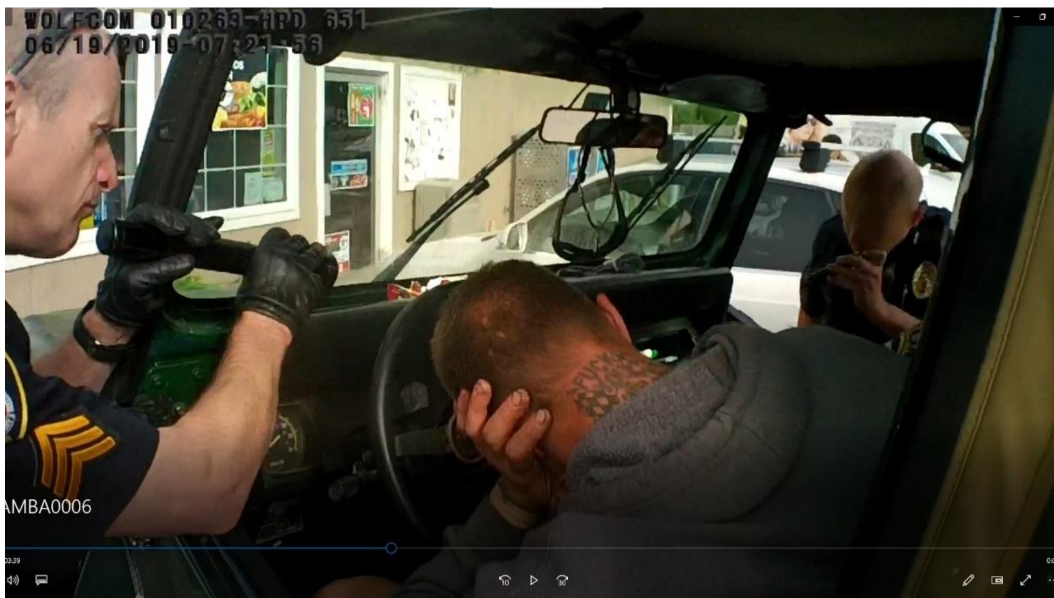
Mahoney immediately approached the driver's side, observed Donovan and his passenger, Courtney Donahue, sleeping, and peered in. H1 7–8, 24, 64, 76; H2 8, 16; AD 4; BC6 2:50. Williamson approached the passenger side and also peered in. H1 7, 24, 64; H2 7–8; AD 4; BC6 3:00. Marvin and Suckling approached the driver's side and stood with Mahoney. H1 7, 24, 64; AD 4; BC6 3:00. The officers whispered and used hand gestures to avoid waking the occupants. H1 24, 64, 81; AD 4; J6 2:55–4:10.

Suckling pointed to something on the dashboard. BC6 3:15. Suckling and Mahoney then walked to the passenger side, and Mahoney inserted his head into the Jeep, as shown in the picture below. A1 76.



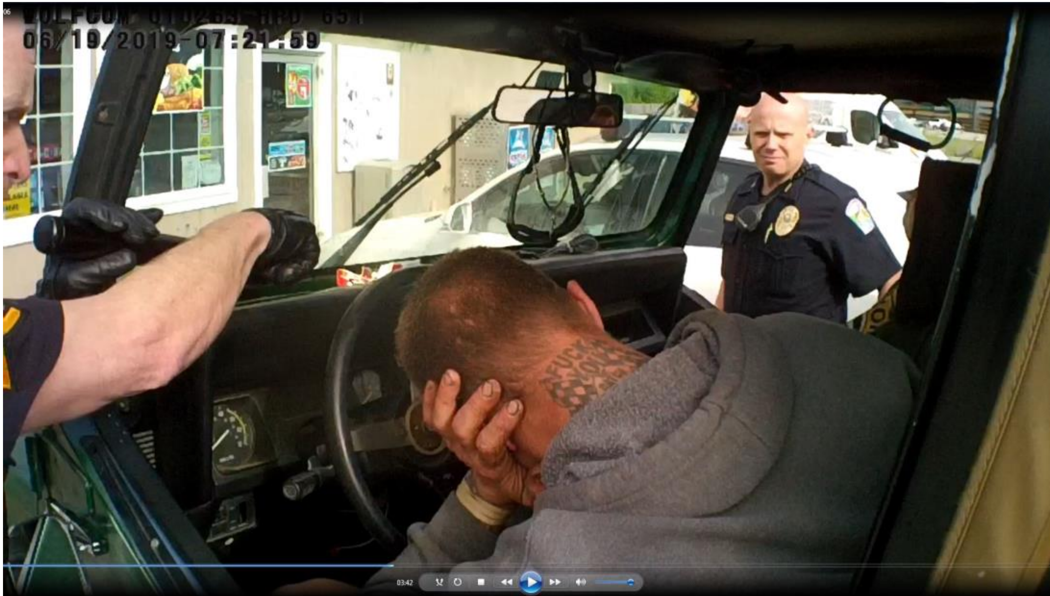
BC6 3:29.

Williamson walked to the driver's side. BC6 3:30. Marvin and Mahoney then inserted their flashlights into the jeep, Marvin from the driver's side and Mahoney from the passenger side, as shown in the picture below.



BC6 3:39.

Marvin gestured and pointed to a cigarette pack on the dashboard, H1 26–27, 65–66; AD 5, and inserted his hand and flashlight about a foot into the Jeep, as shown in the following photograph[2]:



BC6 3:42.

Mahoney then returned to the driver's side, while Sucking continued to peer in from the passenger side. BC6 3:45. Suckling then made an emphatic key-turning gesture to the officers on the driver's side. BC6 4:00. Williamson walked back to the passenger side, with Suckling. BC6 4:05.

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[2] The trial court found that, "[b]ecause it was daylight, [the officers] did not have flashlights." AD 5. The evidence clearly contradicts this finding.

At that point, Donovan awoke, and Suckling, leaning his arm and head on the door frame, asked, “How you doing, Bud? How are ya?” H1 8, 77, 82; AD 5; BC6 4:10. Williamson immediately said, “Just to let you know everything’s being audio and video recorded.” H2 9; BC6 4:15. Mahoney asked Donovan, “You got any ID on you?” BC6 4:20; H1 8, 29.

While Donovan retrieved his license and registration, Williamson peered into the back of the Jeep before joining Mahoney and Marvin on the driver’s side. BC6 4:35. Suckling, still at the passenger’s side, repeatedly poked Donahue in her arm to wake her up, but she didn’t respond. J6 5:00. After Donovan gave the officers his license and registration, Mahoney and Williamson took it back to Mahoney’s cruiser. H1 9, 67; AD 5; J6 5:25.

Williamson then returned to the driver’s side, where Marvin was speaking with Donovan about his travels. H1 9–10, 60; J6 5:55. Donovan told Marvin that he had been up all night driving and stopped to sleep. H1 66. Marvin asked Donovan, “Do you know where you are now?” J6 6:10. Donovan initially said he was in Wilmot, then corrected himself, saying, “Wilmot’s that way, I’m in Andover.” H2 19; J6 6:15. Marvin then asked, “Where are you trying to go?” and “What’s your name?”, even though Donovan had already provided his license and registration to Mahoney. J6 6:20.

Donovan asked for permission to call his mother, which Marvin granted. H1 15, 60, 69.

Williamson again peered into the back of the Jeep. J6 6:30. After Suckling woke Donahue and got her out of the Jeep, Williamson greeted her by saying, "Morning! Wakey wakey!" H1 36, 60, 77, 82; H2 19; AD 5; J6 6:40. He told her that everything was being recorded. H2 9; J6 6:45. He then asked Donahue, "What are you guys doing here? Just fucking sleeping?" H2 19; J6 6:50. Donahue responded, "We stopped for cigarettes and I guess we fell asleep." H2 19; J6 6:55. Williamson asked, "Have you guys been up for a while or what's going on?" J6 7:00. When Donahue started to answer, Williamson interrupted her, saying, "It's just weird that you're passed out at like, eight o'clock in the morning." J6 7:00. Donahue told Williamson, "We came from Tilton and then we stopped and I guess we didn't get enough sleep last night." H2 19; J6 7:05.

Donahue asked Williamson for permission to take off her sweatshirt. J6 7:15. Williamson responded, "I don't care. As long as you've got something on underneath." J6 7:20.

Williamson then peered again into the back of the Jeep and, for the first time, observed what he recognized to be a rifle case. H2 9–10, 19–21; AD 5–6; J6 7:40. Williamson informed Mahoney. H1 11, 37; H2 10; AD 5–6; J6 7:40. When Suckling questioned Donovan about it, he said that it

contained a guitar. H1 11, 68, 78, 84–86; AD 6; J6 9:40; J7 0:25.

A few minutes later, the dispatcher informed Mahoney that Donovan had felony convictions. H1 11–13; H2 12; AD 6; J6 3:45. Suckling asked Donovan for permission to open the case, but Donovan declined. H1 78; J6 5:25. When Marvin informed Mahoney, Mahoney responded, "I'm just going to impound the fucking vehicle and do a search warrant." H1 12–13; H2 11; AD 6; J6 5:40.

After finding a machete in its sheath near the driver's seat, Marvin ordered Donovan out of the Jeep and arrested him. H1 15–16, 37–39, 60–62, 69–70; H2 12; AD 6; J6 6:05. Williamson pulled a wad of cash from Donovan's pocket, exclaimed, "You got a bunch of cash on you," and opened the wad to find a bag containing about five grams of methamphetamine.[3] H1 17, 62–63; H2 13, 23–24; AD 6; J6 7:15.

Trial

On the morning of June 19, 2019, police officers responded to a report of two people sleeping in a vehicle

[3] After finding the methamphetamine, Williamson exclaimed, "Whoa!" and asked Donovan, "What's in the cash?" BC7 7:15. When Donovan responded by turning his head to look, the officers became aggravated. BC7 7:20. The arrest quickly devolved into a physical struggle in which the officers deployed their tasers and pepper spray, resulting in Donovan's hospitalization. BC7 7:20. While dramatic, these events are not relevant to the issues raised on appeal.

parked at a convenience store in Andover. T1 45–46, 105; T2 171, 261–62. When they arrived, they found Corey Donovan and Courtney Donahue asleep inside a Jeep. T1 47–48, 106; T2 172, 219, 237, 239, 262–63, 279. They found, in Donovan's pocket, a wad of $127 in cash. T1 55, 123; T2 178, 203, 226, 250, 257; T3 401, 412, 435, 438. When they asked him what was inside the cash, Donovan turned around to look. T1 55; T2 179, 204, 250; T3 412. Inside the cash, police found a clear cellophane bag that contained methamphetamine. T1 55, 91–92; T2 178, 203–04, 226, 257.

Donovan testified that he and Donahue pulled into the convenience store because they were tired. T3 391–93. As they pulled in, Donahue asked Donovan to purchase cigarettes for her, and gave him a wad of money. T3 393, 435–36. Donovan put the money in his pocket but fell asleep before he got out. T3 393. Donovan did not notice that anything was inside the money. T3 436.

Donovan testified that he was not using methamphetamine, but that Donohue was. T3 386, 393. Donahue described herself at trial as a recovering drug addict, T3 360, but neither party questioned her about the source of the money or methamphetamine found in Donovan's pocket.

Upon searching the Jeep, police found a backpack belonging to Donahue. T1 139. No evidence was admitted, however, as to what that backpack contained.

SUMMARY OF THE ARGUMENT

1. A seizure occurs when a reasonable person in the defendant's position would not feel free to leave or otherwise terminate the encounter. Here, four uniformed, armed police officers parked their cruisers behind Donovan's Jeep, impeding its exit. All four officers paced back and forth between the driver's and passenger's side, constantly peering in. They inserted their heads, hands and flashlights into the Jeep. One repeatedly poked Donahue. They persistently questioned Donovan and Donahue. They took Donovan's license and registration back to a cruiser. In these circumstances, no reasonable person in Donovan's position would have believed that he was free to leave or otherwise terminate the encounter.

2. Evidence is relevant if it tends to alter the probability of a fact of consequence. Evidence can be relevant because it is intrinsic to the charged offense. Thus, evidence that an individual possessed an object or substance in one location is generally relevant to prove that the same individual contemporaneously possessed a similar or related item nearby. Here, evidence that Donahue possessed methamphetamine in her backpack made it more probable that the methamphetamine in the money was also hers, which made it more probable that Donovan was unaware that it was there.

I. THE COURT ERRED BY DENYING DONOVAN'S MOTION TO SUPPRESS.

Donovan filed a motion to suppress prior to trial. A 11. He argued, among other things, that by the time they asked Donahue out of the Jeep, the police had conducted an unconstitutional seizure. A 17. He argued that the police, at that time, lacked reasonable suspicion to justify any seizure, and that they seized him merely to conduct "a fishing expedition." A 19. He moved to suppress all evidence obtained as a result of the seizure, including the methamphetamine later found in his pocket. A 24.

The State objected. A 26. It argued that Donovan was not seized until he was placed under formal arrest. A 29–31. The prior encounter, the State argued, was merely "a relaxed, non-confrontational interaction." A 30. The State did not argue that, if Donovan was seized prior to his formal arrest, the seizure was constitutional.

Following an evidentiary hearing, the court (McNamara, J.) denied Donovan's motion to suppress. AD 3. It ruled that Donovan was not seized prior to the formal arrest. AD 8. "[P]olice officers," the court ruled, "simply found [Donovan] sleeping in a public place at 8 o'clock in the morning in a busy parking lot outside the entrance to a store and approached the vehicle." AD 8. The court did not rule that, if

Donovan was seized prior to his formal arrest, that seizure was constitutional.

Donovan filed a motion to reconsider. A 35. He argued, among other things, that the court erred by ruling that he was not seized prior to his formal arrest. A 35–36. "Four uniformed officers, in four separate cruisers," he summarized, "surrounded [him], took his identification and ordered his passenger to get out of the vehicle." A 36. Under these circumstances, he argued, a reasonable person would not have felt free to leave. A 36.

The court summarily denied the motion to reconsider. AD 14. By ruling that Donovan was not seized prior to his formal arrest and denying his motion to suppress on that ground, the court erred.

Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution protect against unreasonable seizures. Any warrantless seizure is unreasonable, per se, unless it falls within a recognized exception to the warrant requirement. State v. McInnis, 169 N.H. 565, 569 (2017).

"A seizure occurs during an encounter with the police when, in view of all the circumstances surrounding the encounter, a reasonable person in the defendant's position would believe that he or she is not free to leave or could not terminate the encounter." State v. Jones, 172 N.H. 774, 777,

(2020); accord Florida v. Bostick, 501 U.S. 429, 439 (1991). "The analysis thus focuses on whether an officer objectively communicates by means of physical force or a show of authority that he or she is restraining the person's liberty." Jones, 172 N.H. at 777; accord Bostick, 501 U.S. at 434. "When assessing whether a seizure occurred, courts must consider all of the circumstances surrounding the encounter, and no single factor is dispositive." Jones, 172 N.H. at 777; accord Bostick, 501 U.S. at 439. Courts focus on the conduct of the police, not of the defendant. Jones, 172 N.H. at 780. The State has the burden of proving that the defendant was not seized. Id. at 777.

"When reviewing a trial court's determination of whether a seizure occurred, [this Court] accepts its factual findings unless they are unsupported by the record or clearly erroneous." Id. at 776. "[This Court] review[s] its legal conclusion regarding whether a seizure occurred de novo." Id. at 776–77.

In this case, numerous factors compelled the conclusion that Donovan was seized. The most prominent among these was the position of the cruisers. Mahoney parked his cruiser squarely behind Donovan, leaving only about a car's length between them. Marvin parked his cruiser to the left of Mahoney's, also about a car's length away from Donovan. Two additional cruisers were parked behind them. With

another car parked immediately to Donovan's right, it would have been extremely difficult for Donovan to have maneuvered his Jeep around the cruisers and out of the parking lot. See State v. Steeves, 158 N.H. 672, 676 (2009) (defendant not seized where officer "parked his cruiser so as not to block or restrict the defendant's movement."); United States v. Fields, 823 F.3d 20, 29 (1st Cir. 2016) (cited in Jones, 172 N.H. at 777) (defendant not seized where "the positioning of the officers did not restrict [him] from walking in the direction in which he was originally traveling.")

The response of the driver of the car parked next to Donovan demonstrates the degree to which the cruisers impeded Donovan's egress. Even though she was clearly not the target of the police's attention and there was no cruiser parked directly behind her, that driver nevertheless requested the officers' permission to leave. BC7 0:55. When they granted her permission to leave, she had to make a three-point turn to maneuver around Mahoney's cruiser. BC7 1:50. In light of the fact that that driver felt compelled to request permission to leave, and was able to do so only with difficulty, it is clear that a reasonable person in Donovan's position, with the police focused on him and a cruiser parked directly behind him, would not have felt free to leave.

The second factor weighing in favor of a finding of seizure is the number of officers involved. A total of four

officers, all in uniform, responded to the convenience store and approached Donovan. See McInnis, 169 N.H. at 570 ("Circumstances indicating a show of authority might include the threatening presence of several officers. . ."); accord United States v. Mendenhall, 446 U.S. 544, 554 (1980). Each of the officers was visibly armed. See McInnis, 169 N.H. at 570 (Circumstances indicating a show of authority might include . . . the display of a weapon by an officer . . ."); accord Mendenhall, 446 U.S. at 554.

The third factor is the officers' physical demeanor. They crowded around Donovan's Jeep, repeatedly pacing back and forth between the driver's side and passenger side and constantly peering in. BC6 2:50. They were initially silent, pointing to objects inside and communicating through whispers and exaggerated hand gestures. BC6 3:15. Mahoney inserted his head into the Jeep. BC6 3:25. Marvin and Mahoney then inserted their flashlights into the Jeep from both sides. BC6 3:35. Donovan awoke to Suckling leaning his arm and head on the window frame. BC6 4:10. Suckling repeatedly poked Donahue in the arm. BC6 5:00; see McInnis, 169 N.H. at 570 ("Circumstances indicating a show of authority might include . . . some physical touching of the person . . ."); accord Mendenhall, 446 U.S. at 554. No reasonable person would infer from this behavior that the encounter was optional.

Fourth, the officers' words and tone suggested that compliance was mandatory. See McInnis, 169 N.H. at 570 ("Circumstances indicating a show of authority might include . . . the use of language or tone of voice indicating that compliance with

the officer's request might be compelled."); accord Mendenhall, 446 U.S. at 554. When Donovan awoke, Mahoney did not ask him if he would mind showing him his identification; he said, "You got any ID on you?" BC6 4:20. Even after Donovan provided his license and registration, Marvin peppered him with questions: "Do you know where you are now?"; "Where are you trying to go?"; "What's your name?" BC6 6:10.

Williamson's language and tone with Donahue was no better. Although there is no evidence that Williamson had ever met Donahue before, he greeted her by exclaiming, "Morning! Wakey, wakey!" BC6 6:40. Although Donovan and Donahue spoke respectfully to the officers, Williamson asked Donahue, "What are you guys doing here? Just fucking sleeping?" BC6 6:50. When Donahue tried to explain, Williamson cut her off, exclaiming, "It's just weird that you're passed out at like, eight o'clock in the morning." BC6 7:00. Donahue felt compelled to ask Williamson for permission to remove her sweatshirt. BC6 7:15. He responded, "I don't care. As long as you've got something on underneath." BC6 7:20.

Finally, Mahoney's treatment of Donovan's identification documents suggests that Donovan was seized. Donovan concedes that "[a]n individual is not seized merely because an officer asks to examine his identification." Jones, 172 N.H. at 779; see also McInnis, 169 N.H. at 570, (defendant not seized where, although the police asked for identification and the defendant verbally identified himself, "at no point during the encounter did the officer obtain any identification documents belonging to [him]); State v.

Brown, 155 N.H. 164, 168 (2007) (defendant not seized where police obtained defendant's identification but did not remove it from defendant's presence). Here, however, Mahoney took those documents back to his cruiser. "An officer c[an] . . . objectively communicate a show of authority rising to the level of a seizure if the officer retains possession of an individual's identification, because a reasonable person would not feel free to terminate the encounter under such circumstances." Jones, 172 N.H. at 779; see also Commonwealth v. Lyles, 905 N.E.2d 1106, 1110 (Mass. 2009) (cited in Jones, 172 N.H. at 779) ("By retaining the defendant's identification to perform [a warrant check], [the officer] was implicitly commanding the defendant to remain on the scene[;] . . . [a] reasonable person simply would not relinquish his identification to the police and continue on with his business."); State v. Daniel, 12 S.W.3d 420, 427 (Tenn. 2000) (cited in Jones, 172 N.H. at 779) ("[W]hen an officer retains a person's identification for the purpose of running a [warrant check], no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification.").

The officers' behavior, actions, demeanor, statements, and tone effectively communicated their understanding of the situation: Donovan was not free to leave. At the suppression hearing, Mahoney and Marvin both testified that Donovan was not free to leave. H1 32, 36, 67, 69. While "the subjective beliefs and intent of the officers are relevant to the seizure analysis only to the extent they have been conveyed to the person confronted," Jones,

172 N.H. at 778, this testimony shows that this is not a case in which the defendant contends that the officers inadvertently created a misimpression that he was not free to leave. Rather, Donovan's argument is that police communicated exactly what they intended to communicate: that Donovan was seized. See United States v. Smith, 794 F.3d 681, 687 (7th Cir. 2015) (the officers "intended to and in fact did communicate to [the defendant] precisely what was going on — that he was a suspect in their investigation and was not free to leave before submitting to their questioning.").

State v. Joyce, 159 N.H. 440 (2009) is analogous. In Joyce, three police officers responded to a report of a woman smoking marijuana outside some apartment buildings. Id. at 441–42. They parked on the street and walked around one of the buildings to a parking lot, where they discovered a vehicle in which the defendant and a female passenger were smoking cigarettes. Id. at 442. The police explained why they were there, asked both the defendant and the passenger for identification, requested that the passenger exit the car, questioned the passenger about their reasons for being there, and called for a drug-detection dog. Id. at 442–43.

This Court held that, by that point, "at the latest," the defendant was seized. Id. at 445. "Three police officers," it noted, "surrounded the defendant's car." Id. They asked the passenger to exit the car, "[t]he persistence of the[ir] questioning indicated that [they] would not terminate the encounter," and they "never told the defendant that he was free to leave." Id.

Here, as in Joyce, multiple police officers surrounded Donovan's Jeep, asked his passenger to exit the vehicle, repeatedly questioned both and never told them that they were free to leave. To the extent the facts here differ from those in Joyce, those differences weigh in favor of finding Donovan seized. Unlike in Joyce, the police here parked in a manner that impeded Donovan's exit, there were four rather than three officers, they inserted their heads, hands and flashlights into Donovan's vehicle, and they took his license and registration back to their cruisers.

Donovan does not mean to suggest that the police are powerless to inquire of occupants of parked vehicles. "Police officers," after all, "enjoy the liberty (. . . possessed by every citizen) to address questions to other persons." Mendenhall, 446 U.S. at 553 (1980); see also Florida v. Jardines, 569 U.S. 1, 8 (2013) (police conduct does not constitute a search when officers do "no more than any private citizen might do."). Just like any private citizen, an officer here could have driven to the convenience store, parked his vehicle in a marked parking spot, respectfully approached Donovan's Jeep and requested to interact with the occupants. See State v. Licks, 154 N.H. 491, 494 (2006) (the defendant was not seized when a single officer parked his cruiser away from the defendant's car, walked up, and asked the defendant if he was "all set").

But that is not what happened. Normal private citizens would not park in the manner the police here parked. Nor would four of them approach a stranger's car, pace back and forth in silence, peer inside and insert their heads, hands and flashlights.

Finally, normal private citizens would not speak to the occupants in the way the police here spoke to Donovan and Donahue. Put simply, if four private citizens did what the officers did here, it "would inspire most of us to — well, call the police." Jardines, 569 U.S. at 9 (distinguishing between police conduct that complies with "background social norms" and conduct that does not).

For all of these reasons, the court erred by ruling that Donovan was not seized prior to his formal arrest. Because the State did not argue, and the court did not find, that the warrantless seizure fell within any exception to the warrant requirement, this Court must reverse.

II. THE COURT ERRED BY EXCLUDING EVIDENCE THAT POLICE FOUND METHAMPHETAMINE IN COURTNEY DONAHUE'S BACKPACK.

At trial, during his cross-examination of Mahoney, Donovan's lawyer attempted to ask whether police found drugs inside the Jeep, but the State objected, arguing that any drugs found in the Jeep were irrelevant. T1 132. Donovan's lawyer proffered that Mahoney would testify that police found methamphetamine inside a backpack belonging to Donahue. T1 134, 137. The State conceded that the backpack in which the drugs were found "was clearly identified as [Donahue's]." T1 135–36. Evidence that Donahue possessed methamphetamine in her backpack, Donovan's lawyer argued, was relevant to support the defense that Donahue also possessed the methamphetamine in the money, and that Donovan did not realize that it was there. T1 133, 137.

The court sustained the State's objection, permitting Donovan's lawyer to elicit from Mahoney only that the police located Donahue's backpack in the Jeep, not that it contained methamphetamine. T1 137–39. By prohibiting Donovan from eliciting testimony that Donahue possessed methamphetamine in her backpack, 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.").

Here, the trial court's ruling — that Donahue's possession of methamphetamine in her backpack was irrelevant to whether Donovan knew of the methamphetamine in his pocket — was based solely on its interpretation of the relevance requirement and not on any factual determination. Thus, its ruling should be reviewed de novo. But even if reviewed under an unsustainable exercise of discretion standard, the court's ruling was clearly untenable or unreasonable to the prejudice of Donovan's case.

New Hampshire Rule of Evidence 401 provides that evidence is relevant if it tends to alter the probability of a fact of consequence in determining the action. Here, the State's theory of the case was that Donovan knew that the wad of money in his pocket contained methamphetamine. Donovan's theory of defense was that Donahue gave him the wad of money, which he put in his pocket without realizing that it contained methamphetamine.

The fact that Donahue contemporaneously possessed methamphetamine in her backpack made it more probable that the methamphetamine in the money was also hers, which made it more probable that Donovan was unaware that it was there. Donovan concedes that Donahue's ownership of the methamphetamine in the money did not conclusively establish that Donovan was not aware of its presence. See State v. Morrill, 169 N.H. 709, 720–21 (2017) (possession need not be exclusive). However, "[a]n item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered." 1 Kenneth Broun et al., McCormick on Evidence §185 (8th ed. Jan. 2020 update). "It need not even make that proposition appear more probable than not," only more probable than it would be without the evidence. Id.

The methamphetamine in Donahue's backpack was in close physical and temporal proximity to the

methamphetamine found in Donovan's pocket. On several occasions, this Court has found relevant an individual's activity in close physical and temporal proximity to the charged offense.

In State v. DePaula, 170 N.H. 139 (2017), for example, this Court held that physical and sexual assaults committed by the defendant's associates were relevant to prove that the defendant committed burglary. Id. at 151–52. Those assaults, it explained, "were contemporaneous to and inextricably intertwined with the home invasion." Id. at 151.

In State v. Wells, 166 N.H. 73 (2014), this Court held that the defendant's digital penetration of his minor daughter was relevant to prove that he then had sexual intercourse with her. Id. at 77–80. "[T]he child's description of digital penetration immediately preceding the sexual intercourse," this Court held, "was relevant because it was integral to the telling of her story." Id. at 80. It "gave the jury a more complete understanding of the alleged crime and better enabled the jurors to assess the likelihood that the charged sexual assault occurred." Id.

In State v. Dion, 164 N.H. 544 (2013), this Court held that the defendant's use of a cellular telephone while driving was relevant to prove that she negligently struck a pedestrian. Id. at 551–52. "[T]he records of the calls," this Court held,

"bore directly on the issue of the defendant's attentiveness in the minutes leading up to the collision." Id. at 552.

In State v. Nightingale, 160 N.H. 569 (2010), this Court held that the defendant's offer to sell an undercover officer cocaine was relevant to prove that she sold him Oxycontin. Id. at 573–75. The offer, this Court held, was "relevant and probative to show the context of the sale as well as the defendant's motive for selling" drugs." Id. at 575. It "w[as] also relevant and probative to show that selling Oxycontin to [the officer] was part of the defendant's overall plan, which began with her plan to sell him cocaine." Id. Finally, this Court held, it was "relevant and probative to show that, despite her claims to the contrary, it was the defendant, and not the informant, who sold the Oxycontin to the [officer]." Id. at 575.

This Court has characterized such evidence as "intrinsic" to the charged offense. State v. Papillon, 173 N.H. 13, 24 (2020). It is "inextricably intertwined" with the charged offense, "part of a single criminal episode," or constitutes "necessary preliminaries to the crime charged." Id. (internal quotation omitted). It has "a causal, temporal, or spatial connection with the charged crime." Id. "Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's

testimony, or completes the story of the charged offense." Id. at 849–50. "[E]vents do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence." Id. at 850 (brackets omitted).

Appellate courts in other jurisdictions have also recognized the relevance of such evidence. See United States v. Bowie, 232 F.3d 923, 928 (D.C. Cir. 2000) ("Every circuit now applies some formulation of the inextricably intertwined 'test.'"). Most notably for purposes of this appeal, several courts have held that evidence that an individual possessed an object or substance in one location is relevant to prove that the same individual contemporaneously possessed a similar or related item nearby. For the sake of brevity, counsel presents these cases in a footnote.[4]

[4] United States v. Rodriguez Fernandez, 833 F. App'x 803, 807–08 (11th Cir. 2020) (defendant's possession of child erotica was relevant to prove his possession of child pornography, as it "helped complete the story of the offense."); United States v. Gilmore, 811 F. App'x 997, 999 (9th Cir. 2020), cert. denied, 141 S. Ct. 865 (2020) (defendant's possession of methamphetamine in his pocket was relevant to prove his possession of methamphetamine in his truck's spare tire, as "it was inextricably intertwined"); United States v. Bell, 337 F. App'x 663, 665 (9th Cir. 2009) (defendant's possession of one gun was relevant to prove that his possession of another gun, as "it is inextricably intertwined"); United States v. O'Dell, 204 F.3d 829, 833–34 (8th Cir. 2000) (defendant's possession of a small amount of methamphetamine was relevant to prove that he conspired to distribute a larger amount); United States v. Carrafa, 59 F.3d 176 (9th Cir. 1995) (unpublished, available at 1995 WL 378685) (defendant's possession of a stun gun and lock-pick set in his car was relevant to prove his possession of a firearm in his pocket, as "they were inextricably intertwined"); United States v. Butcher, 926 F.2d 811, 815–16 (9th Cir. 1991)

While it is typically the prosecution that seeks to introduce such evidence, nothing in Rule 401 or any other rule of evidence suggests that the principles of relevance depend on which party offers the evidence in question. Just as the State is entitled to "complete[] the story" of guilt using evidence that is "inextricably intertwined" with its theory, so too is a defendant entitled to "complete the story" of innocence using evidence that is "inextricably intertwined" with his theory. Just as the State is entitled to prove that the defendant possessed an item by showing that he contemporaneously possessed a similar, nearby item, so too is a defendant entitled to prove that he lacked knowledge of the item he is charged with possessing by showing that the real owner possessed a similar, nearby item.

(defendant's possession of drugs in his truck and guns and methamphetamine in his house was relevant to prove his possession of a firearm in his truck, given the "nexus between guns and narcotics, and between guns and other guns"); United States v. Brooks, 670 F.2d 625, 628–29 (5th Cir. 1982) (defendant's possession of marijuana in his car was relevant to prove his contemporaneous possession of cocaine in the car, as it "[o]bviously . . . arose out of the same transaction"); Courtemanche v. State, 24 So. 3d 770, 771 (Fla. Dist. Ct. App. 2009) (defendant's possession of a small amount of methamphetamine on his person was relevant to prove that he contemporaneously possessed a larger amount of methamphetamine in his nearby shed, as it was "inextricably intertwined"); State v. Pullin, 266 P.3d 1187, 1191–92 (Id. Ct. App. 2011) (defendant's possession of methamphetamine in his vehicle was relevant to prove his contemporaneous possession of methamphetamine in his pocket, as it was "part of the same criminal episode" and "inextricably intertwined"); Ex parte Lane, 303 S.W.3d 702, 710 (Tex. Crim. App. 2009) (defendant's possession of a small amount of methamphetamine in a cosmetics bag in a car was relevant to prove her contemporaneous possession of larger amount of methamphetamine in the center console, as it was "inextricably intertwined").

CONCLUSION

WHEREFORE, Corey V. Donovan respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions on the first issue were in writing and are included in a separate appendix containing no other documents. The appealed decision on the second issue was not in writing.

This brief complies with the applicable word limitation and contains 6,305 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 New Hampshire Attorney General's Office through the electronic filing system's electronic service.

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DATED: August 20, 2021