THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0404

State of New Hampshire

v.

Corey V. Donovan

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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(15-minute Oral Argument Requested)

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ISSUES PRESENTED

I. Whether the trial court properly denied the defendant's motion to suppress evidence that officers seized during the defendant's arrest.

II. Whether the trial court sustainably exercised its discretion when it barred irrelevant evidence that the defendant's passenger possessed drugs.

STATEMENT OF THE CASE

In September 2019, a Merrimack County Grand Jury indicted the defendant, Corey Donovan, on seven felony charges stemming from a June 29, 2019 arrest in Andover, New Hampshire. DA[1] 3. The charges included two counts of attempted taking a firearm from a law enforcement officer (RSA 642:3-a; RSA 629:1), four counts of felon in possession of a deadly weapon (RSA 159:3, I), and possession of a controlled drug (RSA 318-B:2, I) subject to a sentence enhancement under RSA 318-b:27. DA 3-9. The State also filed a class-A misdemeanor complaint for resisting arrest (RSA 642:2). DA 10.

In October 2019, the defendant moved to suppress all evidence seized during the June 2019 arrest and the State objected. DA 11-34. The trial court (*McNamara*, J.) held a two-part suppression hearing on

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[1] Citations to the record are as follows:
"BC5," "BC6," and "BC7" refer to the body worn camera video files contained on State's Exhibit 1, introduced at the suppression hearing on November 26, 2019 and transferred directly to this Court. "BC5" refers to the file labelled AMBA0005.MOV. "BC6" refers to the file labelled AMBA0006.MOV and "BC7" refers to the file labelled AMBA0007.MOV;
"DA __" refers to the separately bound appendix to the defendant's brief and page number;
"DAD__" refers to the defendant's separately bound appendix of appealed decisions and page number;
"DB __" refers to the defendant's brief and page number;
"JV__" refers to the transcript of the January 13, 2020 jury verdict and page number;
"SH1__" refers to the transcript of the suppression hearing held November 26, 2019 and page number
"SH2__" refers to the transcript of the suppression hearing held December 9, 2019, and page number;
"T __" refers to the four-volume, consecutively paginated transcript of the defendant's jury trial held January 8-10 and January 13, 2020, and page number.

November 26 and December 9, 2019, during which the four officers involved in the arrest testified and the court reviewed body worn camera footage captured during the arrest. SH1; SH2. On December 11, 2019, the trial court denied the defendant's motion to suppress. DAD 3-11. The defendant filed a motion to reconsider, which the court denied in a January 2, 2020 margin order. DA 35-38; DAD 14.

The court held a four-day jury trial between January 8 and January 13, 2019, after which the jury found the defendant guilty of possession of a controlled drug and not guilty on the remaining seven charges. JV 3-7. The court sentenced the defendant to twelve months in the Merrimack County House of Corrections, all suspended for three years. DA 39-40.

This appeal followed.

STATEMENT OF FACTS

A. Facts of the Arrest

On June 29, 2019, Joseph Mahoney, Chief of the Andover Police Department, was leaving a call in Hill, New Hampshire, when dispatch informed him of a complaint of two individuals "passed out or sleeping" in a Jeep outside a Circle K convenience store in Andover, New Hampshire. SH1 4-6. At the time of the complaint, approximately 8:00 a.m., Chief Mahoney was headed to a firearms' training in Andover with Chief Andrew Williamson of the Hill Police Department, as well as Chief David Suckling and Sergeant Spencer Marvin, both of the Danbury Police Department. SH1 6. Each officer was driving his own cruiser to the training. SH1 5.

When Mahoney received the call from dispatch, he and the other three officers responded to it. SH1 6. While he was driving to the Circle K, dispatch informed Mahoney that the Jeep was registered to the defendant, who had a valid driver's license. BC5 at 02:30-02:35. Dispatch also relayed that the defendant was subject to supervised release from federal prison. BC5 at 02:35-02:42; SH1 6.

When Mahoney arrived at the Circle K, he parked some distance behind the defendant, leaving space between his cruiser and the Jeep. SH1 7. Mahoney testified that he left enough space that the defendant could have backed the Jeep out of its parking spot. SH1 7. Williamson parked directly behind Mahoney's cruiser. SH1 7. Marvin parked to the left of Mahoney and Suckling parked behind Marvin. SH1 7. A customer was parked to the right of the defendant's Jeep, but no one was parked to the defendant's left.

BC6 at 03:30-03:35. This configuration of vehicles left a broad corridor behind and to the left of the defendant's Jeep. BC6 at 05:25-05:32.

The four officers approached the Jeep, with two officers on either side of the vehicle. The Jeep had a soft top and the front window panels had been removed, so the passenger compartment was open and unobstructed. SH1 60-61. The defendant and a female passenger were asleep in the front seats. SH1 8. The officers did not immediately wake the Jeep's occupants; they first observed the vehicle and the sleeping occupants and communicated using hand gestures. BC6 at 03:00-04:10.

The defendant woke up approximately two minutes after the officers arrived, while the female passenger slept for several more minutes. SH1 8. Mahoney testified that, upon waking, the defendant had "weird, bug-like eyes" and "wiggled his tongue around" at Mahoney. SH1 8. The defendant gave Mahoney his driver's license and registration. SH1 9. While the defendant was producing his license and registration, Sucking firmly tapped on the passenger's upper arm several times. BC6 at 05:00-05:12. The passenger shifted position slightly but did not wake. *Id*. Mahoney returned to his cruiser to run the defendant's information through dispatch. SH1 9. The other officers remained at the Jeep. SH1 9.

While Mahoney was running the defendant's information in his cruiser, Marvin talked to the defendant. Marvin asked the defendant about "where he was going," and "where he [was] coming from." SH1 60. The defendant could not answer where he came from and was unclear on where he was. BC6 at 05:59-06:10. As Marvin was speaking with the defendant, the female passenger, later identified as Courtney Donahue, woke up, BC6 at 06:40-06:50, and Suckling asked her to step out of the Jeep for officer

safety reasons. T 77. Williamson spoke to Donahue next to the passenger side of the Jeep.

The body worn camera footage depicts a casual conversation between Williamson and Donahue. BC6 at 06:40-07:30. During this conversation, Williamson turned and looked into the back of the Jeep, where he identified a "Flambeau" brand rifle case. SH2 9-10. Williamson testified that he worked a second job as a gunsmith and sales manager at a sport shop and recognized Flambeau as a manufacturer of gun cases. SH2 10. He told Mahoney about the rifle case and then returned to the Jeep where he spoke with Donahue further and pointed out the rifle case to Suckling. BC6 at 07:40-10:00; T 77-78.

Suckling walked over to the defendant and asked about the rifle case in the back of the Jeep. SH1 78. The defendant claimed that the case contained Donahue's guitar. SH1 78. Mahoney, Williamson, and Suckling did not believe a guitar would have fit in the case and were certain it was a rifle case. BC7 at 00:25-00:29; SH1 79.

Around this time, the individual who was parked in the spot next to the defendant approached the officers and said, "I'm parked right next to them, is it ok if I pull out? Not in anybody's way?" Williamson replied, "yep, that's fine," and the individual drove out of the parking lot. BC7 at 01:00-01:05 and 01:47-02:15.

The encounter with the Jeep continued to be non-confrontational. For most of this time, only Marvin and Suckling were speaking with the Jeep's occupants, while Williamson and Mahoney were talking to each other at Mahoney's cruiser, some distance away from the Jeep. BC7 at

00:40-4:53. During this period, dispatch confirmed the defendant's status as a felon. BC7 at 03:45-03:50.

During his conversation with Marvin, the defendant decided to call his mother. SH1 60. While the defendant made his call, Marvin walked back to Mahoney's cruiser to relay the substance of his conversation with the defendant to the other officers. SH1 60. Marvin described the conversation as being "on the level." SH1 59-60. But Marvin also explained that the defendant was falling asleep during the conversation and did not know what time it was. BC7 at 04:50-05:15. Marvin then returned to the Jeep and spoke with the defendant again.

Shortly thereafter, Marvin saw a sheathed machete within the defendant's reach between the driver's seat and the driver's side door. SH1 61; DAD 6. Marvin removed the machete for safety reasons. SH1 62. The officers then removed the defendant from the Jeep and arrested him for felon in possession of a deadly weapon. SH1 38. During a search of the defendant incident to the arrest, the officers found a wad of cash wrapped around a bag of methamphetamine in the defendant's pocket. BC7 at 07:15-07:1; SH1 17. The entire encounter, from the time the defendant woke up until the arrest, lasted approximately twelve minutes. BC6 at 04:13 to BC7 at 6:20.

The Jeep was impounded and its contents were later searched pursuant to two search warrants. SH1 17-18. These searches confirmed that the Flambeau case contained multiple firearms and a homemade silencer. SH1 17-18. The search also uncovered additional drugs in Donahue's backpack. SH1 18.

B. The defendant's case

The defendant and Donahue testified at trial. Donahue described the encounter with the police as a "well check" that turned into an arrest. T 352. She testified that the defendant did not resist arrest or grab any of the officers' guns. T 352-53.

Donahue testified that the rifle case in the back of the Jeep was hers and the defendant did not know what was in it. T 351. She testified that the defendant was present when she acquired the gun case, but she loaded it into the Jeep. She stated that she got the gun case from her uncle and she was "just like a middle-man," because she had intended to give it to a friend. T 351. She admitted, however, that her account of the gun case changed several times throughout the investigation. T 353, 355-56.

A week after the arrest, Donahue told a defense investigator "that there definitely weren't any firearms in the Jeep[.]" T 353, 355. She also said that she wouldn't have gotten into the Jeep, if it had guns in it. T 356. She acknowledged at trial that she had lied in this interview. T 356-57. During a subsequent interview two months after the arrest, Donahue stated that she got the guns from her uncle and planned to "bury them at the Defendant's mom's house" because her uncle "didn't want them to be around his kids." T 357. In another report, Donahue claimed that she had the guns for her own protection. T 358. Finally, the day before trial, she alleged that she got the guns from a friend and was taking them to her uncle. T 361.

The defendant testified that he used the machete in his Jeep to do work around the house. T 377. Specifically, he testified that he used the machete the evening before the arrest to cut down some brush at a friend's

house. T 388. The defendant testified that he was working at his friend's house until "after midnight." T 389. Contrary to Donahue's testimony, the defendant testified that he loaded the gun case into his Jeep as he was preparing to leave his friend's property that evening. T 436. He also testified, however, that he did not know what was in it and did not notice the sticker on it that said "gun case." T 422.

He then testified that he drove from his friend's property, which was near the Laconia ice arena, towards his home in Wilmot. T 373, 387. He testified that he pulled over four times during the drive, including at the Penguin gas station in Belmont and the Circle K in Andover where he was arrested. T 391. He testified that Donahue handed him a wad of money as he pulled into the Circle K, but he fell asleep before he could go into the store to buy cigarettes for her. T 393. Then the defendant testified about the encounter with police and his subsequent arrest. T 394-407. He also described the injuries he sustained during the arrest. T 408-09.

On cross-examination, the defendant testified that he did not look at the wad of money and drugs that Donahue handed to him before he pocketed it. T 435-36. He also testified that he did not feel the bag of drugs inside the money. T 436. The defendant also testified that while he noticed the heavy-duty padlocks on the gun case, he did not question Donahue's statement that the case contained a guitar. T 436.

C. The Suppression Hearing

During the two-part hearing on the defendant's motion to suppress, the court heard testimony from the four officers involved in the arrest and viewed the body worn camera footage. SH1 3, 20-21, 56, 75; SH2 4.

Defense counsel then argued that the officers arrived at the Circle K and "determined possibly before they even got there that these were frankly bad people who must have done something, and that there must be some basis to arrest these individuals." SH2 28.

The defense emphasized that the officers did not immediately wake the defendant, but first made observations of the interior of the vehicle. SH2 29. Defense counsel further argued that the defendant and Donahue were never free to leave and the fact that the officers ordered Donahue out of the vehicle and took the defendant's identification documents reinforced that point. SH2 29-30.

The State argued that the factors outlined in *State v. Grey*, 148 N.H. 666, 670 (2002), provided a useful framework for the court to determine whether the defendant had been stopped. These factors included the defendant's familiarity with his surroundings, the number of officers present, the degree of physical restraint during the interaction, and the duration and character of the interaction. SH2 37.

The State argued that the defendant exhibited familiarity with the area to the officers during their conversation. SH2 37. The State noted that while four officers were present, only two were interacting with the defendant and Donahue for the majority of the encounter. SH2 37. The State emphasized that the defendant was not physically restrained, the Jeep had space to drive out of the parking lot, and the defendant was able to make a phone call during the conversation with the officers. SH2 38. Finally, the State noted that the conversation itself was casual and non-confrontational before the defendant's arrest and the entire interaction leading up to the arrest took only twelve minutes. SH2 38.

D. Trial Court's Order on the Defendant's motion to Suppress

In its December 11, 2019 order, the court denied the defendant's motion to suppress. Relevant to this appeal, the court found that the interaction between the defendant and the officers prior to the defendant's arrest did not constitute an investigative stop amounting to a constitutional seizure. DAD 8. The court observed, "there was no investigative stop; police officers simply found the defendant 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." DAD 8. The court relied on two cases, *State v. Licks*, 154 N.H. 491, 493 (2006) and *State v. Joyce*, 159 N.H. 440, 445 (2009), when it concluded, "a seizure does not occur simply because a police officer approaches a person seated in a parked car and asks a few questions or asks to examine the person's identification." DAD 8.

SUMMARY OF THE ARGUMENT

I. The defendant's encounter with police did not amount to an investigatory stop for constitutional purposes. Officers responded to a call about two people "sleeping or passed out" in a vehicle parked in the parking lot of a local business at eight o'clock in the morning. When the officers arrived on the scene, the situation matched the call they had received. None of the officers used his sirens or activated his blue lights and the officers did not block the Jeep's potential path out of the parking lot. Although four officers were present on the scene, two of the officers kept their distance during the encounter. The tone of the conversation prior to the defendant's arrest was calm and casual. The trial court, therefore, correctly concluded that the interaction between the police and the defendant did not constitute an investigatory stop or seizure.

II. Even if the interaction between the police and the defendant developed into an investigatory stop, the stop was lawful because the police were engaged in their community caretaking function. The officers arrived at the Circle K with information that the Jeep's occupants were passed out and might require assistance. Upon waking, the defendant acted strangely and appeared disoriented, all of which caused the officers to question his fitness to drive. The passenger did not wake up when firmly tapped on the upper arm by an officer. The defendant was also falling asleep while speaking to one of the officers. Under these circumstances, the officers had a

good faith belief that the defendant was unfit to drive. As their interaction with the defendant continued, the officers developed additional reasons to continue the encounter. They knew from dispatch that the defendant was on federal supervised release and, subsequently learned that he was a convicted felon. This led first to the suspicion, and then to the near certainty, that the defendant's possession of a firearm and a machete might constitute a crime. This justified the defendant's arrest. During a lawful search incident to that arrest, officers found methamphetamine in a wad of cash in the defendant's pocket.

III. Evidence that Donahue had methamphetamine in her backpack was irrelevant to the question of whether the defendant knowingly possessed methamphetamine. The fact that the defendant's passenger possessed methamphetamine does not make it less likely that the defendant knew he also had drugs in his pocket. However, if this Court concludes that the trial court unsustainably exercised its discretion by excluding this evidence, the error was harmless beyond a reasonable doubt, particularly in light of the defendant's own testimony that he handled the drugs when he put them into his pocket.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS

A. Standard of Review

Appellate review of a ruling on a motion to suppress is a mixed question of law and fact. This Court accepts the trial court's factual findings unless they lack support in the record or are clearly erroneous and reviews legal conclusions *de novo*. *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014). This Court typically reviews search and seizure cases under the New Hampshire Constitution first and relies upon federal constitutional law for guidance. *State v. Ball*, 124 N.H. 226, 231-33 (1983); *State v. Perez*, 173 N.H. 251, 256 (2020).

B. The trial court correctly ruled that the defendant was not seized prior to his arrest.

The trial court correctly found that the defendant's consensual interaction with the police prior to his arrest did not rise to the level of a seizure. "A police encounter with a citizen does not always amount to a seizure of the person." *State v. Licks*, 154 N.H. 491, 493 (2006) (quoting *State v. Beauchesne*, 151 N.H. 803, 809 (2005)). "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen. . ." *State v. Riley*, 126 N.H. 257, 263 (1985) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)). "So long as a

reasonable person would feel free to leave, or terminate the encounter, the citizen is not seized under Part I, Article 19 of the State Constitution." *Licks*, 154 N.H. at 493 (cleaned up). *See also United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

A constitutional seizure only occurs "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of the person." *State v. Sullivan*, 157 N.H. 124, 130 (2008). "Circumstances indicating a 'show of authority' might include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Beauchesne*, 151 N.H. 803, 810 (2005). Other signs of a show of authority may include use of "blue lights" or officers ordering the defendant to step out of the car. *Licks*, 154 N.H. at 494. This Court has also considered the lateness of the hour and the "lack of other people in the area" when conducting this analysis. *State v. Joyce*, 159 N.H. 440, 445-46 (2009). "When assessing whether a seizure occurred, courts must consider all of the circumstances surrounding the encounter, and no single factor is dispositive." *State v. Jones*, 172 N.H. 774, 777 (2020).

In this case, the totality of the circumstances support the trial court's determination that the defendant was not seized prior to his arrest. Officers responded to a call about two people "sleeping or passed out" in a vehicle in the parking lot of a Circle K at eight o'clock in the morning. The Jeep was parked in in a public area, near other members of the public, in front of the main door to the Circle K. None of the officers used his sirens or activated his blue lights. Instead, they approached the parked Jeep to

evaluate the situation and speak with its occupants, much like they would approach a pedestrian standing on a sidewalk. "'Numerous courts recognize that when an officer approaches a person seated in a parked car and asks questions, this in and of itself does not constitute a seizure.'" *Joyce*, 159 N.H. at 445 (quoting *Licks*, 154 N.H. at 493); *see also Atchley v. State*, 393 So. 2d 1034, 1044 (Ala. Crim. App. 1981) (defendant not seized when "officers approached him as he slept in the parked car and asked him for identification and questions as to his activities."); *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980) ("it does not by itself constitute a seizure for an officer to simply walk up and talk to a person standing in a public place or to a driver sitting in an already stopped car."); *State v. Porter*, 570 P.2d 111, 112–13 (Or. Ct. App. 1977) ("It was not a restraint of defendant's liberty for the officer to approach the vehicle or to speak to him."); *People v. Rudasil*, 53 A.D.2d 541, 542 (N.Y. App. Div. 1976), *aff'd*, 43 N.Y.2d 789, 373 N.E.2d 286 (N.Y. 1977) ("approaching the parked car without any other acts or words did not amount to a 'stop' or 'seizure'; and that looking into the car was not a 'search,'").

Nor does the fact that Mahoney asked to examine the defendant's driver's license transform this consensual encounter into a seizure. As this Court has noted, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions, or asks to examine the individual's identification." *Joyce*, 159 N.H. at 445 (quoting *State v. Daoud*, 158 N.H. 779, 782 (2009)). Conducting a routine request for identification does not constitute a "show of authority." *Licks*, 154 N.H. at 494.

The tone of the conversation prior to the defendant's arrest reflects the consensual nature of the encounter. The officers' tones and postures were casual throughout. They engaged in small talk with the defendant and Donahue. Suckling was casually leaning up against the Jeep while he spoke with Donahue and Marvin displayed relaxed body language, with his hands casually folded over his belt buckle, as he spoke with the defendant. BC7 at 2:00-2:40 and 3:20. None of the officers drew his firearm or used threatening or coercive language. None of the officers physically touched the defendant prior to his arrest.

The officers also did not block the Jeep's potential path out of the parking lot. The body worn camera footage shows that the defendant had ample room behind and to the left of the Jeep through which he could have left the parking lot. BC6 at 03:30-03:3505:25-05:32. The vehicle of another Circle K customer occupied the parking spot to the Jeep's right. This customer left the parking lot during the encounter, further freeing routes for the defendant's departure.

The defendant notes that this Circle K customer "requested the officers' permission to leave." DB 24. This, the defendant argues, demonstrates that a reasonable person would not have felt free to leave. DB 24. But the record does not support the defendant's interpretation of this interaction. The customer said, "I'm parked right next to them, is it ok if I pull out? Not in anybody's way?" BC7 at 01:00-01:05. This interaction reflects a basic human courtesy – it alerted one of the officers that she was leaving and sought to ensure she was not in anybody's way in doing so. *Id*. Moreover, this Court has previously considered the presence of other

people as a factor that supports a finding that an encounter was consensual. *Joyce*, 159 N.H. at 445-46; *State v. Quezada*, 141 N.H. 258, 260 (1996).

The defendant also emphasizes that the encounter involved four officers, a number that he argues represents a show of authority. DB 24-25. But the record reflects that the four officers were present on the scene by happenstance and that one of the officers, Mahoney, spent most of the encounter away from the Jeep in his cruiser. Williamson, likewise, stood away from the Jeep near Mahoney's cruiser for most of the encounter. This left Marvin and Suckling to speak with the defendant and his passenger, respectively. A single officer speaking and interacting with the defendant is neither excessive nor coercive, and the totality of the circumstances does not reflect a show of authority.

The fact that the passenger was asked to get out of the Jeep also did not transform this encounter into a stop. Suckling asked her to get out of the Jeep shortly after she awoke for officer safety reasons. She complied. This encounter was similarly casual and not did not constitute a seizure.

Finally, the entire encounter lasted only twelve minutes and during this timeframe the defendant made a phone call. Considering the totality of the circumstances, this Court should uphold the trial court's finding that this was a consensual encounter with law enforcement and did not rise to the level of a seizure prior to the defendant's arrest.

II. EVEN IF THE ENCOUNTER WITH THE DEFENDANT DEVELOPED INTO A SEIZURE, THE SEIZURE WAS LAWFUL PURSUANT TO THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT.

"Under the New Hampshire Constitution, warrantless seizures are considered *per se* unreasonable unless they fall 'within the narrow confines of a judicially crafted exception.'" *State v. Psomiades*, 139 N.H. 480, 481 (1995). The community caretaking exception to the warrant requirement applies to investigatory stops, *State v. Craveiro*, 155 N.H. 423, 427 (2007), and justifies any seizure that may have developed in this case. Specifically, pursuant to that exception, an officer may conduct a check "when they in good faith reasonably believe that the driver of a particular vehicle may be ill and physically unfit to drive." *State v. Maynard*, 114 N.H. 525, 526-27 (1974). Moreover, "in performing their community caretaking functions, the police may make a limited intrusion into an individual's vehicle provided that the intrusion is not a mere pretext to an investigative search." *Psomiades*, 139 N.H. at 481.

A search is justified under the community caretaking exception when the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *State v. LaBarre*, 160 N.H. 1, 8 (2010). This Court judges these facts against an objective standard: "would the facts available to the officer at the moment of the seizure warrant a person of reasonable caution to believe that the action taken was appropriate." *Id*.

In this case, officers received a call about two individuals "sleeping or passed out" in a vehicle at eight o'clock in the morning in a busy public parking lot. Based on the initial call, the officers had reasonable grounds to believe that the occupants of the Jeep were in need of assistance. Medical emergencies such as opioid overdoses are common occurrences to which New Hampshire police routinely respond. The place to be searched, the

Jeep, was specifically tied to the "passed out" individuals. And the primary purpose of the officers' initial contact was to check on the wellbeing of the vehicle's occupants and assess whether further action was required.

When the officers arrived, they approached the vehicle, which was open to the outside world, made some initial observations, and then made contact with the Jeep's occupants. BC6 at 04:13. When the defendant woke, Mahoney observed that the defendant had "weird, bug-like eyes" and "wiggled his tongue around" at him. SH1 8. This behavior was so odd that Mahoney testified it was "something [he] hadn't experienced on a motor vehicle stop" in the course of his law enforcement career and he "would have asked somebody to do some type of field sobriety to make sure that he was indeed fit to drive" before letting the defendant leave. SH1 32. Marvin likewise described how the defendant was falling asleep while speaking with him and had difficulty orienting himself. SH1 14. This initial contact and subsequent observations supported the decision, based on community caretaking considerations, to speak with the defendant and determine whether he was fit to drive.

This Court recently held that law enforcement's warrantless entry of a vehicle to check on a "nonresponsive" occupant under similar circumstances was justified under the community caretaking exception. *State v. Kathryn Pate*, Case No. 2020-0033 (N.H. Dec. 16, 2020) (unpublished). In *Pate*, an officer received a call about "a 'nonresponsive' male in a black Honda SUV." *Id*. at *1. When he arrived at the parking lot, the officer found the Honda and saw that the engine was running and the windshield wipers were on, though it was not raining. *Id*. The officer saw an individual in the driver's seat slumped over the center console, so he

opened the door to determine if the individual was breathing. *Id*. "After he shook her awake, the defendant started mumbling in a slow, low tone. *Id*. The officer searched the defendant's car, arrested her, and had her transported to the hospital where her blood was drawn by hospital personnel." *Id*. She was later charged with aggravated DWI. On appeal, this Court agreed with the State that "the officer's action in opening the vehicle's door was reasonable and justified under the community caretaking exception." *Id*.

The officers' interaction with the defendant and his passenger in this case was less intrusive than the actions taken in *Pate*. Specifically, the initial interaction in this case focused on the wellness of the occupants and determining whether and to what extent the defendant was oriented and fit to drive.

Within minutes of the officers' initial contact, they observed the rifle case in the back of the Jeep. BC6 at 07:40-10:00; SH2 9-10. At that point, the officers already knew that the defendant was subject to federal supervised release and reasonably suspected that the defendant was a felon who could not legally possess firearms. SH1 6, 59. Then, approximately five minutes later, dispatch confirmed the defendant's status as a felon. BC7 at 03:50. Finally, Marvin observed the machete within the defendant's reach shortly thereafter. BC7 6:10. The development of these facts, which gave the officers probable cause for the arrest, was separate and incidental to the initial community caretaking purposes of the contact. *State v. D'Amour*, 150 N.H. 122, 126 (2003) (separation of community caretaking function from investigation of criminal matter "need only relate to a sound and independent basis for each role").

Accordingly, if a seizure occurred prior to the defendant's arrest, it was justified under the community caretaking exception. An expansion of the scope of this stop was then permissible based on the officers' reasonable articulable suspicion that the defendant was a felon who illegally possessed deadly weapons. *State v. McKinnon-Andrews*, 151 N.H. 19, 25 (2004). When this reasonable suspicion matured into probable cause, the officers arrested the defendant and searched him incident to the arrest, at which point they lawfully discovered drugs in the defendant's pocket. *State v. Farnsworth*, 126 N.H. 656, 662, (1985) ("It is well settled that in the case of a lawful arrest, law enforcement officers may conduct a full search of the arrested individual.").

Finally, because the trial court found that no stop occurred, the State did not argue below that an exception to the warrant requirement applied. But "where the trial court reaches the correct result on mistaken grounds, [this Court] will affirm if valid alternative grounds support the decision." *State v. Dion*, 164 N.H. 544, 552 (2013). The suppression record before this Court, which includes testimony from all four of the officers, as well as body worn camera footage of the entire encounter, is sufficient for this Court to find that a warrantless stop, if one occurred, was lawful under the community caretaking exception and this Court's decisions in *Craveiro* and *Maynard*. This Court, therefore, should conclude that seizure of the defendant was justified under well-established exceptions to the warrant requirement and suppression is unnecessary.

III. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED IRRELEVANT DRUG EVIDENCE FROM THE DEFENDANT'S TRIAL.

A. Standard of Review

"The admissibility of evidence is a matter left to the sound discretion of the trial court." *State v. White*, 155 N.H. 119, 123 (2007). "[This Court] will not reverse the trial court's decision to admit evidence absent an unsustainable exercise of discretion." *State v. Lopez*, 156 N.H. 416, 420 (2007). "To sustain his burden, the defendant must show that the trial court's decision was unreasonable to the prejudice of his case." *White,* 155 N.H. at 123. "[In determining] whether a ruling made by a judge is a proper exercise of judicial discretion, [this Court considers] whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *State v. Lambert*, 147 N.H. 295, 296 (2001).

B. The fact that Donahue also possessed drugs did not make it less probable that the defendant knew he had drugs in his pocket.

When officers arrested the defendant, they performed a search of his person incident to the arrest. *Farnsworth*, 155 N.H. at 123. During that search, the officers found a wad of money wrapped around a bag of drugs. SH1 17. It is undisputed that these drugs were on the defendant's person. BC7 07:33; SH1 17; DB 18. He argued, however, that Donahue gave him the wad of money and that he did not know the wad also contained a bag of drugs. T 133-37. Donahue's backpack, which was found in the Jeep, also

contained drugs. T 134-37. At trial, the defendant attempted to introduce evidence of the drugs in Donahue's backpack to support his argument that he did not know the money in his pocket contained a bag of drugs. T 133-37. The trial court correctly ruled that the evidence of Donahue's drug possession was irrelevant to the question of whether the defendant knew that he, too, possessed drugs. T 137-39.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the fact." N.H .R. Ev. 401. "Admissibility of evidence initially depends on relevancy alone." *State v. Guyette*, 139 N.H. 526, 529 (1995).

The defendant's claim of error rests on two assertions. Specifically, he alleges that "[t]he fact that Donahue contemporaneously possessed methamphetamine in her backpack made it more probable that the methamphetamine [wrapped] in the money was also hers," and that this, in turn, "made it more probable that Donovan was unaware that it was there." DB 33. But these two statements are inaccurate.

First, the fact that Donahue had drugs in her backpack does not make it more probable that the drugs in the money were also hers. "Generally, drug evidence is fungible[.]" *State v. Moscillo*, 139 N.H. 79, 81 (1994). One bag of drugs is not necessarily connected to another, merely because the bags' owners associate with each other or because the drugs are located in close proximity to one another. One bag of drugs was located in the defendant's pocket, while the other was found in Donahue's backpack.

While the defendant testified that he got the drugs from Donahue, he did not testify that the drugs she gave him were in any way connected to the

drugs in her backpack. Nor did Donahue, who had a Fifth Amendment claim, concede that the defendant's drugs came from her or that they were connected to the drugs in her backpack. T 381. The fact that Donahue possessed drugs, absent some additional factual nexus, did not make it more probable that the defendant's drugs also came from her.

Moreover, even if assuming that the drugs did come from Donahue, the State was not required to prove that the defendant's possession was exclusive. "Proof of joint possession [is] sufficient for conviction." *State v. Cartier*, 133 N.H. 217, 221 (1990). And the origin of the defendant's drugs was not relevant to the question of the defendant's knowledge, because, even if Donahue gave him the drugs, this fact did not make it less probable that the defendant knew about the drugs in his own pocket.

If anything, the claim that Donahue gave the defendant the wad of money and drugs, moments before he pulled into the Circle K (T 393, 435-36), made it more probable that the defendant knew about the drugs. The defendant would have seen and handled the wad of money and drugs as Donahue gave them to him and as he put them into his pocket.

Other courts have found that a defendant's "actual, exclusive, physical possession" of drugs is "sufficient for a jury to conclude that [the defendant] knowingly possessed a controlled substance." *Wilborn v. State*, No. 03-03-00186-CR, 2004 WL 34878, at *2 (Tex. App. Jan. 8, 2004). *See also State v. Spates*, 588 So. 2d 398, 402 (La. Ct. App. 1991) ("[I]t must be assumed that any object in a person's front pants pocket must have been placed there by the party or with his knowledge.").

The cases cited by the defendant are inapposite. DB 36-37. Those cases relate to the admission of intrinsic evidence, which forms an

exception to the general prohibition on "other acts" evidence under Rule of Evidence 404(b). But Rules of Evidence 401 and 402 are the gatekeepers of admissibility. "The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is inadmissible . . . constitute the foundation upon which the structure of admission and exclusion rests." *Fed. R. Evid*. 402 Advisory Committee Notes. Therefore, before evidence can be evaluated as "other act" evidence, it must first be relevant. *See N.H. R. Ev*. 404(b)(2)(A).

As the trial court found, and for the reasons outlined above, the evidence of Donahue's drugs was not relevant for any purpose. "Irrelevant evidence is not admissible." *N.H. R. Ev*. 402. Intrinsic evidence is not an exception to Rule 402. Therefore, because the potential evidence failed to meet the threshold relevance requirement under Rules 401 and 402, this Court does not need to consider a hypothetical debate about intrinsic evidence as the defendant urges.

C. If the trial court erred, the error was harmless beyond a reasonable doubt.

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *State v. Mason*, 150 N.H. 53, 60 (2003). "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the inadmissible evidence is merely cumulative or

inconsequential in relation to the strength of the State's evidence of guilt." *State v. Enderson*, 148 N.H. 252, 255 (2002).

Even if he had been permitted to introduce the contents of Donahue's backpack, this evidence would not have affected the verdict. The evidence against the defendant was overwhelming. The drugs that formed the basis of the defendant's possession conviction were found in the defendant's pocket in a clear plastic bag. The body worn camera footage shows that the bag of drugs was not hidden and even a cursory glance at the money would have revealed the presence of those drugs. BC7 at 07:28-07:33.

Additionally, the defendant's case, which was replete with inconsistencies, bolstered the State's evidence. *Cf. State v. Tibaldi*, 165 N.H. 306, 314 (2013) ("Even though a defendant is not required to present a case, if he chooses to do so, he takes the chance that evidence presented in his case may assist in proving the State's case."). The defendant testified that he handled the money containing the drugs when he took them from Donahue. T 393. But he did not explain why he did not feel the bag as he put it into his pocket. T 393, 436. Moreover, while the defendant disavowed possession at trial, he offered no such explanation at the time of his arrest. While he certainly had the right to remain silent, he also had the right–and motivation–to tell the police that the drugs belonged to Donahue, if indeed that was the case.

Because Donahue did not testify that the drugs belonged to her or that she gave them to the defendant, the jury had to evaluate this claim based on the defendant's credibility. This Court "accord[s] considerable weight to the trial court's judgments on the credibility of witnesses and the

weight to be given testimony." *In re Est. of Couture*, 166 N.H. 101, 113 (2014). "In determining witness credibility, the jury may accept some parts and reject other parts of testimony, and adopt one or the other of inconsistent statements by witnesses." *State v. Woodbury*, 172 N.H. 358, 364 (2019) (cleaned up).

The fact that the jury found the defendant guilty on this charge, but acquitted him of the firearm possession charges demonstrates that it made nuanced credibility determinations based on its observations of each of the defendant's claims. In this way, the jury demonstrated that it was "clearly capable of discriminating among the evidence applicable to each count." *State v. Ramos*, 149 N.H. 118, 121 (2003), as modified on denial of reh'g (Apr. 7, 2003). Plainly, the jury did not believe the defendant's claim that he did not know about the drugs, drugs he admitted he put into his own pocket. Because the defendant's proffered evidence was inconsequential in the face of the State's overwhelming evidence of guilt, any error in excluding the evidence of drugs in Donahue's bag was harmless beyond a reasonable doubt.

CONCLUSION

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

The State requests 15-minute oral argument.

Respectfully Submitted,

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December 30, 2021

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,173 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 30, 2021 *<u>/s/ Zachary L. Higham</u>*
Zachary L. Higham

CERTIFICATE OF SERVICE

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

December 30, 2021 *<u>/s/ Zachary L. Higham</u>*
Zachary L. Higham