THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0270

State of New Hampshire

v.

Philip Perez

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court - North

BRIEF FOR THE DEFENDANT

Stephanie Hausman
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(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court erred by excluding the alleged victim's statement to a hospital employee, made two days after being hit by a car, that if discharged from the hospital he would throw himself in front of a car and kill himself.

Issue preserved by Perez's motion to admit the statement and the trial court's ruling. A24-A31[*].

[*] Citations to the record are as follows:
"A" refers to the addendum to this brief;
"T1 & T2" refer to the consecutively-paginated transcripts of the two-day trial held on April 8 and 9, 2021, followed by the page number of the PDF;
"S" refers to the transcript of the sentencing hearing, held on May 25, 2021.

STATEMENT OF THE CASE

Philip Perez was charged with four felony assaults, felony reckless conduct, and felony conduct after an accident, following a collision between his car and Dan Forlizzi on July 18, 2019. T1 20-21, 33. The four assault charges and the reckless conduct charge were alternate theories. T2 47. After a jury trial, the jury found him guilty of one count of first-degree assault, one count of second-degree assault, reckless conduct, and conduct after an accident. T2 54-56. The court (Anderson, J.) sentenced him on the first-degree assault to one to three years in prison, stand committed. S 28-29. On the conduct-after charge, he was sentenced to three to six years in prison, all suspended for five years from his release on the assault sentence; if imposed, this sentence will run consecutively. S 29.

STATEMENT OF THE FACTS

Mid-morning on July 18, 2019, Philip Perez got a call from his friend, Dan Forlizzi. T1 121. Forlizzi said that he was hungry and asked Perez if he would help Forlizzi get something to eat. Id. Perez had twenty dollars and he agreed to give ten to Forlizzi. Id. Forlizzi gave Perez an address and Perez went there to pick him up. Id.

Perez and Forlizzi chatted briefly, then Forlizzi asked Perez to pick up a woman who was walking across the street. T1 122-23. The woman got in the back of Perez's car. T1 124. Forlizzi asked Perez to do a few other things, besides get lunch, and Perez did not want to do those things. Id.

Perez pulled over on Elm Street, near the SNHU Arena. T1 40, 46-47, 55, 73. He and Forlizzi argued briefly and then Forlizzi punched him in the face. T1 45, 124-25. The force of the punch caused Perez's head to hit the driver's side window with enough force that a bystander outside heard the impact. T1 44. Perez's nose bled profusely and his glasses were broken. T1 125. Forlizzi and the woman got out of the car. T1 39, 43, 45, 126. Perez sat in his car for a few moments, stunned by the punch. T1 39, 45, 125-26.

Perez then drove to find Forlizzi, to ask why he had punched him. T1 126. Perez's car struck Forlizzi, who was in the crosswalk at the time of impact. T1 39-40. Perez testified that "[t]he next thing [he] knew, [Forlizzi] was on the [hood] of

[his] car" and punched the driver's door. T1 126-27. One witness, Michael Warner, testified that it looked like Perez's car "veered" towards Forlizzi. T1 40, 45. A second witness, Dominic Petrillo, testified that the car sped up before impact and that it looked like the driver purposely hit the pedestrian. T1 48-49. Warner testified that Forlizzi rolled up on the hood of the car and then landed on the sidewalk. T1 39-40. Perez sat still for several seconds and then drove home. T1 41, 49, 127.

Police responded to the scene and found Forlizzi bleeding on the sidewalk. T1 55-57, 73. Forlizzi was taken to the hospital where he was diagnosed with an acute comminuted nasal fracture. T1 92. He also had a fractured and deviated septum and indications of a microfracture of his wrist. T1 92, 94-97. His treating physician said the injuries were consistent with having been hit by a car. T1 108.

The police went to Perez's home to speak with him about the incident. T1 59. Perez told the police he was at the scene with Forlizzi, that Forlizzi had punched him, and that Forlizzi later jumped in front of his car. T1 60. Perez had a large laceration on his nose and there was fresh blood on his clothes and in his car. T1 61, 65. Perez was cooperative and consented to a search of his car. T1 60, 65.

Forlizzi died of unrelated causes after the incident and therefore did not testify at the trial. T1 34.

SUMMARY OF THE ARGUMENT

The court erred in excluding evidence that, two days after this incident, Forlizzi told hospital staff that he "had no reason to live" and would throw himself in front of a car. These statements were admissible under three separate hearsay exceptions: the excited utterance, statement of then-existing mental state, and statements for medical treatment exceptions. The court's rationale in excluding the statements is not supported by the law or the facts as presented in the pleadings. This Court must reverse.

I. THE COURT ERRED IN EXCLUDING FORLIZZI'S STATEMENT TO A HOSPITAL EMPLOYEE, MADE TWO DAYS AFTER THE INCIDENT, THAT IF DISCHARGED FROM THE HOSPITAL HE WOULD THROW HIMSELF IN FRONT OF A CAR AND KILL HIMSELF.

Forlizzi was admitted, on July 18, 2019, to Elliot Hospital following this incident. A28. On July 20, 2019, hospital social worker Amy Pelligrini visited Forlizzi to discuss his discharge from the hospital and to "further assess [his] needs." A28, A34. According to Pelligrini, Forlizzi became:

> Extremely emotional and began sobbing. [Forlizzi] stated that he has a 'horrible life' and 'no one in his life to help' him and 'no reason to live.' [Forlizzi] report[ed] that if he leaves the hospital today he will throw himself in front of a car to 'kill himself.'

A28-A29.

Perez moved pretrial to admit Forlizzi's statement to Pelligrini. A28-A31. He argued that it was relevant to Forlizzi's mental state at the time of the incident, that its relevance outweighed any prejudice, and that it was not excluded by the rule against hearsay because it was an excited utterance, a statement of then-existing mental state, and a statement made for the purposes of medical treatment. A29-A30. He noted that, because of Forlizzi's subsequent death, he was unable to question him about the circumstances of the event and argued that, under Part I,

Article 15 of the New Hampshire Constitution and his right to present all proofs favorable, the statement should be admitted. A30.

The State, in a motion to exclude the statement and in an objection to Perez's motion to admit it, argued that the statement was hearsay. A32-A37. It argued that the statement did not fall into the excited utterance exception because hospital notes indicate that hospital personnel noted Forlizzi's impending discharge the day before and because personnel also noted that Forlizzi "appears to claim that he wants to kill himself every time he is told he is ready for discharge. He appears to be malingering." A35. The State argued that the statement did not convey a then-existing mental state. Id. Finally, the State argued that the statement was not made for the purposes of medical treatment. A36. The State argued that the defense sought to admit the statement only for Forlizzi's propensity, which was inadmissible character evidence. Id. The State asked the court to schedule a hearing on the issue "if necessary." A32, A36.

Without a hearing, the court denied the motion. A24-A27. The court found that the statement was not an excited utterance because being discharged is not a normally startling event. A25. The court rejected the other two proffered hearsay exceptions – then-existing mental state and

statement for medical treatment – because Forlizzi "was malingering with respect to discharge from the Elliot." A26. It found Forlizzi's statement was "inherently unreliable" and could not "be taken at face value" because hospital staff concluded that he was malingering with respect to discharge, *i.e.*, that the staff did not believe him. Id. In so ruling, the court erred.

This Court reviews challenges to a trial court's evidentiary rulings under its unsustainable exercise of discretion standard. State v. Roy, ___ N.H. ___ (decided November 16, 2021) (slip op. at 5). For Perez to prevail under this standard, "he must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." Id. (quotation omitted). This Court determines "only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." Id. at 6 (quotation omitted).

"Hearsay is generally defined as an out-of-court statement offered in court to prove the truth of the matter asserted." State v. Munroe, 173 N.H. 469, 479 (2020). "Hearsay is generally inadmissible, subject to certain well-delineated exceptions." Id.

"A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is not excluded by the rule against hearsay.

N.H. R. Evid. 803(2). "To qualify as an excited utterance, the statement must be a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by the event, and before he had time to contrive or misrepresent." State v. Cavanaugh, 174 N.H. 1, 259 A.3d 805, 817 (2020) (quotation omitted). The "exception is premised on the theory that a condition of excitement temporarily stills the capacity of reflection, thereby producing utterances free of conscious fabrication." State v. Cole, 139 N.H. 246, 249 (1994).

"The guarantee of trustworthiness that justifies admission of [an excited utterance] flows from the declarant's excitement, which is inconsistent with a state of mind disposed to contrive or misrepresent." State v. Coppola, 130 N.H. 148, 153 (1987). "The declarant's spontaneity, then, is the requisite condition that removes a statement admissible under Rule 803(2) from the sort of 'mere narrative' that the hearsay rule would bar from evidence." Id. at 154. Volunteered statements are more generally considered spontaneous. See, e.g., MacDonald v. B.M.D. Golf Assocs., 148 N.H. 582, 585 (2002) (while statement was made in response to question, it was nonresponsive to question, which indicated that statement was spontaneous, not prompted by question); State v. Demeritt, 148 N.H. 435, 441 (2002) (that

statement not made in response to a question supports finding that it was spontaneous).

Here, Forlizzi's statement was a spontaneous response to the social worker's discussion about his discharge from the hospital. Contrary to the State's argument below that Forlizzi knew he would be discharged for twenty-four hours before the conversation at issue, A35, the notes cited by the State do not reflect that any hospital personnel told Forlizzi he would be discharged from this hospitalization prior to the conversation at issue. Nurse Lagasse's note from the day prior merely indicates that the hospital's goal was to discharge Forlizzi to "home or other facility with appropriate resources." Id. Similarly, Ms. Manzo's note states that Forlizzi "appears to claim that he wants to kill himself every time he is told he is ready for discharge." Id. This note, with no other reference to a conversation with Forlizzi about his current discharge or a conversation in which Forlizzi expressed the intent to kill himself, appears to refer to prior hospital visits.[1] Finally, Dr. Yadati noted only a request that Forlizzi be seen prior to discharge[2]. Id.

The court erred in basing its ruling on a finding that being discharged from the hospital is not a startling event.

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[1] Because there was ambiguity in this note, the court should have held an evidentiary hearing on the issue.

[2] The note did not indicate that Forlizzi made the request. Rather, it appears to be a note that Dr. Yadati was requesting that other hospital personnel visit Forlizzi before his discharge.

A25-A26. "Whether an event is 'startling' is a uniquely subjective inquiry." Wilson v. Laney, ___ P.3d ___, 317 Or.App. 324, 330 (2022) (quotation omitted). It does not matter whether the event that triggers a declarant's excited state would startle most people; rather, it matters only that it triggered an excited state *in the declarant*. See also State v. Pepin, 156 N.H. 269, 226-227 (2007) (declarant's emotional reaction to leaving her baby at home with its father was sufficiently startling *to her* to qualify her statement as an excited utterance).

Here, there was no question that Forlizzi was upset by the prospect of being discharged from the hospital. As recounted by Pelligrini, he "became extremely emotional and began sobbing." A24. Nor is that reaction incongruous with his circumstances. Forlizzi was apparently homeless[3], believed he had no supportive people in his life[4], and reported that he had no reason to live. For these reasons, the court erred in concluding that his statements did not qualify as excited utterances.

The court also erred in finding that the statements did not qualify under the then-existing mental state and statement for medical treatment exceptions, based on its

[3] Forlizzi was seen by a hospital social worker the day before his discharge to receive "shelter/housing resources." A32.
[4] Beyond his statement that he had "no one in his life to help him," A24, Forlizzi had just punched Perez for no apparent reason after Perez had agreed to give him money for food and drive him around.

finding that Forlizzi was "malingering." A26. This factual finding rested on the assertion in the State's objection that "Mary Manzo, PAC notes 'Patient appears to claim that he wants to kill himself every time he is told he is ready for discharge. He appears to be malingering.'" A35. Despite the record containing indications that Forlizzi was also seen by a doctor, at least two social workers, and a nurse, no other hospital personnel noted the opinion that Forlizzi was malingering. Finally, the court knew that Forlizzi had in fact died by drug overdose approximately two months after he was discharged from the hospital. A38.

Whether or not Forlizzi had been "malingering" was a question of fact not capable of resolution on the bare pleadings. Moreover, the party requesting that the court consider this allegation, the State, asked the court to schedule a hearing on the issue, "if necessary." A36. Finally, the court ruled on the issue two days after the State raised it, A27, A36, preventing Perez from responding to the allegation or from requesting an evidentiary hearing.

Here, Forlizzi's statements met the requirements for both the then-existing mental state and the statements for medical treatment exceptions to the hearsay rule.

"A statement of the declarant's then-existing state of mind such as motive, intent or plan, or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily

health)," but not generally including a statement of memory or belief, is admissible under Rule of Evidence 803(3). The Rule allows in statements regarding the declarant's planned or intended future acts. See, e.g., State v. Hall, 152 N.H. 374, 378 (2005); State v. Gabusi, 149 N.H. 327, 331 (2003).

Forlizzi was expressing his plan to kill himself by throwing himself in front of a car. This evidence was admissible under Rule 803(3).

Moreover, the court erred in excluding Forlizzi's statements under the then-existing mental state exception based on its finding that the statements were unreliable. A26. The 803(3) exception does not have a separate requirement that the court make a determination of the statement's reliability. Compare N.H. R. Ev. 803(3) with N.H. R. Ev. 803(4). This Court has never held that the then-existing mental state exception requires a separate finding of reliability.

The court erroneously held that reliability was a requirement that cut across all the hearsay exceptions. A26. It then accurately quoted State v. Ata, 158 N.H. 406, 409 (2009), a decision relating to the former Confrontation Clause standard, for the proposition that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id. Because the majority

rule[5] appears to be that the then-existing mental state exception is firmly rooted, the Ata quote further supports the idea that the exception in Rule 803(3) does not require a separate finding of reliability.

Forlizzi's statements were also admissible as statements for medical treatment. Such a statement is admissible if it "is made for – and is reasonably pertinent to – medical diagnosis or treatment" and "describes medical history; past or present symptoms or sensations; their inception; or their general cause;" and the court affirmatively finds that the statement was made "under circumstances" indicating its trustworthiness. N.H. R. Ev. 803(4). "The controlling issue, however, is the intent of the declarant." State v. Munroe, 161 N.H. 618, 627 (2011)).

The rationale for the medical diagnosis or treatment exception "is that statements made with a purpose of obtaining medical attention are usually made with the motivation to obtain an accurate diagnosis or proper treatment and, thus, they are inherently reliable because there is normally no incentive to fabricate." State v. Lynch, 169 N.H. 689, 702 (2017). "The guarantee of trustworthiness is that no one would willingly risk medical injury from improper treatment by withholding necessary data or

[5] See People v. Gash, 165 P.3d 779, 783-84 (Colo. Ct. App. 2000) (listing jurisdictions following this rule).

furnishing false data to the physician who would determine the course of treatment on the basis of that data." State v. Soldi, 145 N.H. 571, 577 (2000) (quotation omitted).

Here, Forlizzi was clearly trying to get help from the medical providers at the hospital. Statements made to obtain mental health treatment qualify under this exception. See, e.g., State v. Roberts, 136 N.H. 731, 740-41 (1993). People at risk of suicide are often brought to the hospital, so Forlizzi's statements to the hospital social worker indicate his intent to obtain treatment there.

Forlizzi's statements also related to the cause or source of his mental health needs – his lack of support and feeling of hopelessness. Finally, the circumstances surrounding Forlizzi's statements support their trustworthiness. Forlizzi's emotional response at the prospect of being discharged from the hospital indicate the connection in his mind between his release from the hospital and the risk to his mental health. There is no other reason a person would object so vehemently to being discharged. A hospital stay is not something that most people would lie to obtain, despite one hospital employee's opinion that Forlizzi was "malingering." The court erred in excluding Forlizzi's statements from Perez's trial.

This error prejudiced Perez. While distant witnesses testified that it appeared Perez intentionally hit Forlizzi in the crosswalk, Perez told police that Forlizzi jumped in front of

his car. Perez's mental state was the central issue in the case.

While a pedestrian would not normally jump on an approaching car, nothing about the facts of this case approached a typical hit-and-run scenario. The jury needed to hear evidence about Forlizzi's state of mind to weigh the competing theories in the case. It could not do that through Forlizzi's testimony. In the unusual circumstances of this case, the error was prejudicial and this Court must reverse.

CONCLUSION

WHEREFORE, Philip Perez respectfully requests that this Court reverse and remand for a new trial.

Undersigned counsel requests fifteen minutes of oral argument before the full Court.

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

This brief complies with the applicable word limitation and contains under 3500 words.

Respectfully submitted,

By */s/ Stephanie Hausman*
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10 Ferry Street, Suite 202
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CERTIFICATE OF SERVICE

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

/s/ Stephanie Hausman
Stephanie Hausman

DATED: March 7, 2022

A D D E N D U M

ADDENDUM - TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Philip Perez

216-2019-CR-1344

Order on Motion to Admit Statement of Complaining Witness

Defendant moves to admits the statement of the complaining witness in this case, D.F., who passed away after the alleged incident (his cause of death was unrelated to the incident). For the reasons stated below, the motion is DENIED.

Defendant is charged with First Degree Assault, Second Degree Assault, and Conduct After Accident in connection with an alleged incident on July 18, 2019. The assault indictments allege that he drove his vehicle into the alleged victim. In his discussion with police after the incident, Defendant stated that D.F. jumped in front of him.

D.F. was transported to Elliot Hospital after he was found lying on a sidewalk. He stayed at the hospital for a few days according to Defendant. Defendant's motion quotes the following discussion between a social worker and D.F. concerning his discharge:

> Pt became extremely emotional and began sobbing. Pt stated that he has a 'horrible life' and 'no one in his life to help' him and 'no reason to live.' Pt reports that if he leaves the hospital today he will throw himself in front of a car to 'kill himself.'

Motion, ¶ 6.

Defendant argues that the statement is clearly relevant given his claim after the incident that D.F. jumped in front of his car. As for overcoming the hearsay issue, Defendant points to the Excited Utterance, Then-Existing Mental, Emotional or Physical Condition, and Statement Made for Medical Diagnosis or Treatment exceptions.

The State objects, arguing that none of the exceptions applies. The State points to a portion of the medical records indicating that staff at the Elliot also noted that "Patient appears to be claim that he wants to kill himself every time he is told he is ready for discharge. He appears to be malingering." Objection, ¶ 5.

The Court agrees with the State on the inapplicability of these exceptions. Starting with the excited utterance exception, for this exception to apply, the statement must relate to a startling event at a time when the declarant is still "under the stress of the excitement" of the event. Rule N.H. Rule Evid. 803(3). The New Hampshire Supreme Court has explained that theory underlying this exception is that

> the circumstances under which the utterance was made afford a guarantee of truth in substitution for that provided by oath and cross-examination. To provide this substitute guarantee it must appear to the satisfaction of the presiding justice that the utterance was a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by that event, and before he had time to contrive or misrepresent.

State v. Bonalumi, 125 N.H. 485, 487 (1985) (quotations omitted). As Defendant acknowledges, the supposedly startling event at issue was the potential discharge from the Elliot. This is not normally a "startling event or condition," which is what this exception requires. Defendant does not provide any analysis or case law to support his contention that a discharge from a hospital is a sufficiently startling event to trigger this

exception. Accordingly, the request to admit the evidence under the Excited Utterance exception is DENIED.

The problem with the other two rules is the report that D.F. was malingering with respect to discharge from the Elliot. The quoted language from *Bonalumi* concerned the excited utterance rule but also applies to the other rules in that all hearsay exceptions are marked by the common understanding of their reliability. *See State v. Ata*, 158 N.H. 406, 409 (2009) ("[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.") When people are still under the effect of a startling event, are relaying information for diagnosis, or are relaying current mental, emotional or physical condition, the rules of evidence express a conclusion that these statements are inherently reliable and thus admissible even if the witness is available.

Here, however, D.F.'s statements are inherently unreliable. Staff at the Elliot concluded that Defendant was malingering with respect to discharge.[1] What that means is that the staff did not believe him. If Elliot staff did not believe D.F.'s statements concerning what he would do to himself if discharged when they were in the same room with him, this Court cannot ask a jury to do so based on an assumption that the statements are inherently reliable.

Accordingly, Defendant's motion to admit these statements is DENIED.

[1] D.F.'s report that he would jump in front of a car was made within a day of being hit by a car. That may explain why he thought of jumping in front of a car when trying to convince hospital staff that he would kill himself if discharged by the hospital. In any event, the statement cannot be taken at face value which is a prerequisite of the hearsay exceptions.

SO ORDERED.

March 21, 2021
Date

Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 03/22/2021

Filed
File Date: 3/17/2021 9:00 PM
Hillsborough Superior Court Northern District
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STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

NEW HAMPSHIRE

v.

PHILIP PEREZ

216-2019-CR-1344

MOTION TO ADMIT STATEMENT OF COMPLAINING WITNESS/UNDER SEAL

Philip Perez, through counsel, respectfully asks the Court to admit a statement made by the complaining witness, D.F. This statement is admissible under New Hampshire Rules of Evidence. This motion is grounded in Mr. Perez's rights pursuant to Part 1, Article 15 of the New Hampshire Constitution and the 6th and 14th Amendments to the United States Constitution.

As grounds for this motion, it is stated:

1. Statements referenced in this motion are contained in discovery provided by the State.
2. Mr. Perez is charged with first degree assault and other charges and alternatives stemming from an incident on July 18, 2019, involving his car and the complaining witness D.F.
3. D.F. died from a drug overdose unrelated to the above captioned matter and is therefore unavailable.
4. D.F. was transported to Elliot hospital after he was found lying on the sidewalk
5. D.F. was treated for various issues and spent a few days in the hospital.
6. During a social worker visit on July 20, 2019, D.F. became visibly upset while discussing being discharged from the hospital. The social worker notes:

DENIED for the reasons stated in this Court's March 21, 2021 order.

Honorable David A. Anderson
March 29, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 03/29/2021

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Hillsborough Superior Court Northern District
3/29/2021 9:50 AM

Pt became extremely emotional and began sobbing. Pt stated that he has a "horrible life" and "no one in his life to help" him and "no reason to live." Pt reports that if he leaves the hospital today he will throw himself in front of a car to "kill himself." [...] Bates 150.

7. In the first instance, the statement is relevant. The statement is probative as to D.F.'s mental state at the time of the incident. D.F. does not say he wants to kill himself because of the incident with Mr. Perez, but because of how horrible his life is. D.F. says he wants to throw himself in front of a car to "kill himself." When police spoke with Mr. Perez about what happened, he told them that D.F. "jumped out in front of him." Bates14. The statement makes it more likely than not that D.F. was suicidal at the time of the incident.
8. The statement is admissible under Rule 403. Rule 403 states that the Court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Here, the statement is outweighed by none of these things. The jury would be misled if it were not admitted.
9. Mr. Perez is charged with first degree assault. The State must prove a purposeful mental state. Mr. Perez told the police that D.F. jumped in front of his car. The method by which D.F. declares he will kill himself is by "throwing himself" in front of a car.
10. This statement is admissible as an exception to the hearsay rule. NH Rule Ev. 803.
11. Rule 803 (2) provides an exception to admit a statement as an excited utterance. An excited utterance is a "statement relating to a startling event or condition, made while the

declarant was under the stress of excitement it caused." Here, the social worker describes D.F. as "extremely emotional and sobbing" at the prospect of leaving the hospital.

12. Rule 803 (3) provides an exception for a present sense impression. "A statement of the declarant's then [...] emotional, sensory, or physical condition." The statement falls squarely under this rule.

13. Rule 804 (4) provides an exception for statements made for the purpose of medical treatment. The statement was made to a social worker at the hospital. The social worker met with D.F. to "discuss d/c plan and further assess needs." This is part of his medical treatment/diagnosis. As a result of D.F.'s outburst, the social worker consulted with the attending psychiatrist to arrange an evaluation to see if D.F. was physically able to live in the shelter. Bates 150.

14. The statement describes D.F.'s present medical and psychiatric symptoms. It was made under circumstances indicating the trustworthiness of the statement. D.F. was discussing his mental state and the pain he was experiencing and the difficulties he would have living at the shelter.

15. Mr. Perez has the right to all proofs favorable under Part 1, Article 15 of the New Hampshire Constitution. If D.F. were alive, he could be confronted and impeached with his statement. D.F.'s death does not extinguish Mr. Perez's right to present a defense.

WHEREFORE, Philip Perez, through counsel, moves the Court to:

A. Grant this motion; and

B. Grant other relief deemed equitable and just.

Respectfully submitted,

/s/ Kimberly A. Kossick
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded March 17, 2021 to ACA Thomas Craig

/s/ Kimberly A. Kossick
Kimberly A. Kossick

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 216-2019-CR-01344

SUPERIOR COURT
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

PHILIP PEREZ

STATE'S MOTION IN LIMINE:
EXCLUDE DF'S STATEMENT TO AMY PELLIGRINI

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and moves to Exclude DF's Statement to Amy Pelligrini, stating in support as follows:

1. On, or about, March 17, 2021, the Defendant filed his witness list. Therein, he indicated that he would be calling Amy Pelligirini as a witness.

2. The victim, D.F., spoke with Amy Pelligirini on, or about, July 20, 2019. Ms. Pelligirini's notes state that: "Pt became extremely emotional and began sobbing. Pt stated that he has a 'horrible life' and 'no one in his life to help' him and 'no reason to live'. Pt reports if he leaves hospital today he will throw himself in front of car to 'kill himself.'"

3. This statement should be excluded from evidence as hearsay.

4. Moreover, the declarant is not testifying, so the statement should not be used for impeachment.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Grant the State's Motion to Exclude D.F.'s Statement to Amy Pelligrini;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: March 18, 2021

Respectfully Submitted,

/s/ Thomas J. Craig
Thomas J. Craig #269608
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Kimberly A. Kossick, Esq., counsel for the defendant.

/s/ Thomas J. Craig
Thomas J. Craig

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
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SUPERIOR COURT
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v.

PHILIP PEREZ

STATE'S OBJECTION TO DEFENDANT'S MOTION TO ADMIT STATEMENT OF COMPLAINING WITNESS/UNDER SEAL

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Motion to Admit Statement of Complaining Witness, stating in support as follows:

1. On, or about, March 17, 2021, the Defendant filed a Motion to Admit a statement by D.F. to a social worker Amy Pelegrini.

2. The State objects.

a. The Statement is Hearsay without Exception

3. The victim, D.F., spoke with Amy Pelligirini on, or about, July 20, 2019, at 4:45 p.m. Ms. Pelligirini's notes state that: "Met with pt to discuss d/c plan and further assess needs (Pt already given SA and shelter/housing resources from inpt sw previously), Pt became extremely emotional and began sobbing. Pt stated that he has a 'horrible life' and 'no one in his life to help' him and 'no reason to live'. Pt reports if he leaves hospital today he will throw himself in front of car to 'kill himself.'"

4. The excited utterance exception is inapplicable. An excited utterance is "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." N.H. R. Evi. 803(2). "To qualify as an excited utterance, the statement must be a spontaneous verbal reaction to some startling or shocking event, made at a

time when the speaker was still in a state of nervous excitement produced by that event and before [s]he had time to contrive or misrepresent." State v. Pepin, 156 N.H. 269, 274 (2008).

5. The prospect of being discharged did not originate during the conversation with Amy Pellegrini on, or about, July 20, 2019, at 4:45 p.m.. At 11:59 a.m., that same day, approximately 5 hours earlier, D.F. met with Santharam Yadati, MD. Dr. Yadati's note reads: "The patient was requested to be seen prior to discharging." Bates 145. At 10:33 a.m. that same day, Mary Manzo, PAC notes "Patient appears to claim that he wants to kill himself every time he is told he is ready for discharge. He appears to be malingering." Bates 142. At 4:29 p.m. July 19, 2019, the day before, Nicole Lagasse, RN notes "Problem: Discharge Planning. Goal: Discharge to home or other facility with appropriate resources". Bates 130.

6. As such, the startiling event occurred the day before the spontaneous statement was made. Moreover, the assessment of malingering and the motive to give an unreliable statement in order to not leave the hospital raises issues about the trustworthiness of the statement. As such, it is clear that the statement was not a reaction to the prospect of discharge, but more likely one that was fabricated over time to stay at the hospital.

7. The Defendant cites 803(3) but titles it "present sense impression". Neither exception apply. In regards to "Then-Existing Mental, Emotional, or Physical Condition", the Defendant relies on "A statement of the declarant's … emotional, sensory, or physical condition.", N.H. R. Evi. 803(3). D.F.'s statement that he will "throw himself in front of a car to 'kill himself'" is not an emotional, sensory, or physical condition. He is stating what will happen if he leaves the hospital. It is not a condition but a conditional statement as to what will happen in the future. Neither is it a motive, intent, or plan. It is D.F.'s attempt to convince the medical staff to let him stay at the hospital.

8. The statement was not made for the purpose of medical treatment. A "Statement Made for Medical Diagnosis or Treatment is A statement that: (A) is made for - and is reasonably pertinent to - medical diagnosis or treatment; (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and (C) the court affirmatively finds were made under circumstances indicating their trustworthiness." N.H. R. Evi. 803(3). Here, the statement does not describe medical history; past or present symptoms or sensations; their inception; or their general cause."

a. <u>The Statement should be excluded by rule of evidence 404.</u>

9. Rule of evidence 404 states "Character Evidence Generally. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion".

10. Here, the Defendant is attempting to use D.F.'s statement that he would throw himself in front of a car to prove that D.F. acted in conformity with that statement and did throw himself in front of a when the Defendant drove his car at D.F.

11. As such the statement should be excluded as propensity evidence without exception.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the Defendant's Motion to Admit D.F.'s Statement;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: March 19, 2021

Respectfully Submitted,

/s/ Thomas J. Craig

Thomas J. Craig #269608
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Kimberly A. Kossick, Esq., counsel for the defendant.

/s/ Thomas J. Craig
Thomas J. Craig

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 216-2019-CR-01344

SUPERIOR COURT
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

PHILIP PEREZ

STATE'S MOTION IN LIMINE: D.F.'S OVERDOSE

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and brings this Motion in Limine to exclude testimony about D.F.'s Overdose, stating in support as follows:

1. The Defendant is charged with three class A felony counts of First Degree Assault, two class B felony counts of Second Degree Assault, one class B felony count of Reckless Conduct, and one class B felony count of Conduct After Accident.

2. The charges stem from an incident that occurred on July 18, 2019, in Manchester, NH, where the Defendant was witnessed to have caused bodily injury to D.F. by means of a motor vehicle, a deadly weapon as defined in RSA 625:11, V, by striking D.F. with said vehicle causing him to sustain injuries to his nose.

3. On or about September 27, 2019, D.F. was pronounced dead by means of a drug overdose.

4. The State brings the above-captioned Motion requesting that the Court exclude testimony pertaining to D.F.'s overdose from admission into evidence.

ARGUMENT

I. Evidence pertaining to the cause of D.F.'s death is should be excluded as character evidence under New Hampshire Rule of Evidence 404(b).

1. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." N.H.R.E. 404(b)(1). The court may admit other bad act evidence when: (1) it is relevant for a purpose other than to show the defendant's bad character or disposition; (2) clear proof that the defendant committed the prior bad act exists; and (3) any prejudice caused by admitting the prior bad act does not substantially outweigh the probative value of the evidence. See State v. Cook, 158 N.H. 708, 710 (2009); State v. Smalley, 151 N.H. 193, 196 (2004).

2. In order to be relevant under the first prong of the Rule 404(b) analysis, the moving party must articulate the purpose for which the evidence is offered as well as the "chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." Smalley, 151 N.H. at 196. Thus, the proffered evidence must be relevant to a disputed issue, and there must be a clear connection between the evidence and the purpose for which it is offered. See State v. Bassett, 139 N.H. 493, 496 (1995).

3. Here, there is no relevant purpose to introduce that D.F. died of an overdose. That fact will only be used to disparage the victim.

4. Also, admission of the information pertaining to D.F.'s death would be unfairly prejudicial. Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's

sympathies, arouse its sense of horror, and provoke instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. N.H. Rule of Evidence 403. Considering that the means of death was a drug overdose, the potential to invoke juror bias is high, and admission of this information would impermissibly disparage D.F. through emphasis that was a drug user, in order to invoke a discriminatory reaction among the jury.

II. Evidence pertaining to the cause of D.F.'s death is should be excluded as irrelevant under New Hampshire Rules of Evidence 401 and 402.

5. Rule 401 provides the test for whether or not evidence is relevant: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H.R.E. 401(a)-(b). Pursuant to New Hampshire Rules of Evidence, 402, irrelevant evidence is not admissible, and a trial court has no discretion to allow irrelevant evidence to be presented at trial.

6. The cause of death is unrelated to the instant case. Information pertaining to D.F.'s overdose does not have any tendency to make any of the facts presented more or less probable, nor does it hold any essential element of defense or substantive offense. It is irrelevant to the case and the Court should exclude it under N.H. Rules of Evidence 401, 402.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Grant the State's Motion in Limine: D.F.'s Overdose;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: March 11, 2020 Respectfully Submitted,