THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0270

State of New Hampshire

v.

Philip Perez

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

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# REPLY BRIEF FOR THE DEFENDANT

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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 Perez's opening brief;
"DB" refers to Perez's opening brief;
"SB" refers to the State's 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.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Perez argued that the trial court erred in excluding, as hearsay, the alleged victim's statement to a hospital employee that he intended to throw himself in front of a car to kill himself. DB 10-20. He argued that the statement fit under three hearsay exceptions: excited utterance, statement of then-existing mental state, and statement for medical treatment. Id.

In its brief on appeal, the State argues that the statement did not fit the exception for then-existing mental state because it followed the incident in question. SB 24-25. The State also argues that the statement was impermissible character evidence. SB 25-26, 31-32. Perez files this reply brief to respond to those arguments.

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.

A. The statement was relevant to Forlizzi's mental state on the date of the incident

The State cites Ibey v. Ibey, 93 N.H. 434 (1945), for the proposition that a subsequent statement is not admissible to prove a prior mental state. SB 24-25. On the contrary, Ibey supports Perez's argument here.

As the Ibey Court held, "there are many instances in which a prior or subsequent state of mind is relevant to show that state of mind at a specified time; and wherever this state of mind is an intent, prior or subsequent declarations of an existing intent would properly be admissible." Id. at 437 (cleaned up). The Ibey court then went on to distinguish between two different scenarios. Id. To paraphrase, the Court found that a statement made on Friday about the declarant's mental state on Friday is relevant to prove she or he had the same mental state the preceding Monday. However, a statement made on Friday about the declarant's mental state on Monday would be a "[d]eclaration as to past mental state" and would be inadmissible hearsay. Id. The Court found that the declarant's statements, if describing his then-existing mental state, would be relevant to prove his

mental state during an incident as many as six months prior. Id.

Forlizzi's statement at issue here was described his mental state at the time he made the statement. It was not a declaration about his mental state two days prior. Thus, it fit the hearsay exception for then-existing mental state and was relevant to prove his mental state two days prior.

B. The statement was not character evidence

The State argues that Forlizzi's statement at the hospital as to his then-existing suicidal intent was evidence of his character, inadmissible under Rule of Evidence 404(a). SB 45-26. This Court should reject that argument.

First, Rule 404(a) was not the basis upon which the trial court relied in reaching its decision. A24-A27. "When . . . a discretionary decision is at issue and the trial court has not exercised that discretion, [this Court] may sustain the trial court's ruling on a ground upon which it did not rely only if there is only one way the trial court could have ruled as a matter of law." State v. Cavanaugh, 174 N.H. 1; 259 A.3d 805, 815 (2020) (cleaned up). A finding that suicidal intention is a trait of character is not the only way the trial court could have ruled.

Suicidal intention is not a trait of character governed by Rule 404(a). See, e.g., State v. Buelow, 951 N.W.2d 879, 887-89 (Iowa 2020) ("evidence of a person's suicidal disposition is

not character evidence"); State v. Stanley, 37 P.3d 85, 92-93 (N.M. 2001) ("evidence of suicidal tendencies of a [declarant] should not be considered character evidence"). The State makes no argument to support its theory that suicidal intention is a trait of character as opposed to an often-transient symptom of mental illness. SB 25-26, 31-32. For these reasons, this Court should reject the State's character evidence argument.

## CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in his opening brief and those to be offered at oral argument, Mr. Perez requests that this Court reverse and remand for a new trial.

This brief complies with the applicable word limitation and contains fewer than 1000 words.

Respectfully submitted,

*/s/ Stephanie Hausman*

By_____

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Attorney Sam Gonyea Esq. of the Attorney General's Office, through the electronic filing system's electronic service.

*/s/ Stephanie Hausman*

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Stephanie Hausman

DATED: May 19, 2022