THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0270

State of New Hampshire

v.

Philip Perez

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Oral argument not requested)

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ISSUES PRESENTED

I. Whether the trial court engaged in an unsustainable exercise of discretion when it ruled that a statement made by the victim to a social worker at the hospital two days after the incident in question was inadmissible hearsay.

STATEMENT OF THE CASE

After hitting Dan Forlizzi ("victim") with his car and leaving him at the scene bleeding on the sidewalk, T1 39-41, 48-49, 55-58,[1] Philip Perez ("defendant") was charged with two counts of first-degree assault, two counts of second-degree assault, one count of reckless conduct, and one count of conduct after an accident. T1 at 20-21. The four assault charges and the reckless conduct charge were alternative theories of criminal responsibility for the conduct. T2 at 192.

At trial, despite testimony to the contrary from two independent witnesses, the defendant sought to defend against the charges by arguing that the victim jumped in front of his car. T1 at 39-41, 46-49, 126-27, 133. To support that defense, the defendant filed a motion *in limine* to admit a hearsay statement that the victim allegedly made to a social worker at the hospital two days after the defendant hit the victim with his car. DA at 28-31. According to the social worker's notes, the victim stated that if the hospital discharged him then he would throw himself in front of a car to kill himself. DA at 28-31. The defendant argued that the statement was relevant because it tended to corroborate the defendant's version of events, and that the statement qualified for an exception to the rule against hearsay

[1] Citations to the record are as follows:
"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 found at the top right corner of the transcript;
"S" refers to the transcript of the sentencing hearing, held on May 25, 2021;
"DB" refers to the defendant's brief; and
"DA" refers to the addendum to the defendant's brief.

either as an excited utterance, a then-existing condition, or a statement made for medical diagnosis and treatment. DA at 28-30.

The State filed its own motion *in limine* to exclude that statement and an objection to the defendant's motion. DA at 32-37. The State argued that the statement was hearsay without an exception as well as inadmissible evidence of the victim's character. DA at 32-37. The trial court (*Anderson*, J.) ruled that the victim's statement was hearsay without an exception, and the defendant's motion was denied. DA at 24-26.

Following a jury trial, the jury found the defendant guilty of one count of first-degree assault, one count of second-degree assault, reckless conduct, and conduct after an accident. T2 at 199-201. On the first-degree assault conviction, the court sentenced the defendant to a stand-committed sentence of one to three years in prison. S at 28-29. On the conviction for conduct after an accident, the defendant was sentenced to three to six years in prison, all suspended for five years upon release from custody for the first-degree assault conviction. S at 29.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

On July 18, 2019, the defendant picked the victim up in his car to take him to get something to eat. T1 at 121. Shortly thereafter, the defendant pulled over on Elm Street in Manchester and an argument between the two of them ensued loud enough for a nearby witness, Michael Warner, to hear from outside the car. T1 at 40, 43, 121, 124. The argument in the car ended with the victim punching the defendant in the face, getting out of the car, and walking up Elm Street. T1 at 39, 41.

Following that punch, Warner watched the defendant sit in the car and collect himself before pulling back onto Elm Street. T1 at 39-40, 45. Initially, Warner thought the defendant "was taking off," but then the defendant "veered in" and "hit the [victim] right on the crosswalk," sending the victim somersaulting off the hood and landing "like five feet in front" of the defendant's car. T1 at 39-40. After that, Warner observed the defendant sit "there for probably . . . like four seconds and then [he] backed up and then took off." T1 at 41.

Another witness, Dominic Petrillo, testified that he saw the defendant's car "hit somebody on the side of the street." T1 at 47. Petrillo testified that it appeared the defendant had "purposely hit" the victim because it "looked like [the defendant] sped up" when he saw the victim and drove right toward him. T1 at 48-49, 51. After the defendant hit the victim, Petrillo testified that he "sped off." T1 at 49.

At trial, the defendant testified that he knew "[he'd] broken the law and . . . was involved in an incident." T1 at 129. He further testified that

he "felt lousy about the incident" and "knew it was morally wrong what happened," but he could not "explain [his] reaction at the time because . . . [he] was in more or less like a panicked blackout." T1 at 129-30.

When emergency personnel arrived on the scene there was blood on the victim's face and pooled on the sidewalk. T1 at 57-59, 73. The victim was taken to the hospital where he was diagnosed with an acute comminuted nasal fracture, a deviated septum, a trabecular microfracture to his left wrist, and abrasions on his left ankle, right knee, and both arms. T1 at 92, 96, 107. The victim's treating physician testified that his injuries were consistent with being hit by a car. T1 at 108.

The police went to the defendant's home to speak to him about the incident. T1 at 59. The defendant admitted to being at the scene and told the police that, after being punched in the face, he wanted to talk to the victim to sort out what happened and why. T1 at 60. According to the defendant, as he approached the victim in his car, the victim jumped in front of his car and started punching the car after it hit him. T1 at 60-61. The defendant told police that he left the area after the victim fell off the car. T1 at 61.

On July 19, 2019, while the victim was still at the hospital, a registered nurse noted the following in the victim's records, "Problem: Discharge Planning. Goal: Discharge to home or other facility with appropriate resources." DA at 35.[2] On July 20, 2019, two days after the

[2] It is the State's understanding that the medical records containing the notes of hospital staff were not submitted to the trial court during the proceedings below. Thus, the extent to which these notes are contained in the record begins and ends with the motions and objection included in the Defendant's addendum. *See* DA at 28-37. No party appears to

incident in question, it appears from the record that the hospital was preparing to discharge the victim. DA at 28-29, 34-35. On that day, at 10:33 a.m., a certified physician's assistant noted in the victim's records that "[the victim] appears to claim that he wants to kill himself every time he is told he is ready for discharge. He appears to be malingering." DA at 35. A note from a doctor recorded at 11:59 a.m. that day states that, "The [victim] was requested to be seen prior to discharging." DA at 35.

Last, at 4:45 p.m. on July 20, the defendant spoke with a social worker at the hospital. DA at 28. The social worker's note[3] states:

> 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.'

DA at 24.

The victim died of causes unrelated to this incident and did not testify at trial. T1 at 34.

B. PROCEDURAL BACKGROUND

The defendant's position at trial and in his initial statement to police was that the victim jumped in front of his car during the incident in question. DA at 24, 29; T1 at 126-27, 133. In support of that position, the

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have disputed the accuracy of the quoted language from the notes as they appear in the underlying motions and objection.

[3] Although this issue was not raised in the trial court, the State notes that the victim's statement to the social worker would have been introduced through the social worker's note, which is itself hearsay, and thus the victim's statement presents an issue of hearsay within hearsay.

defendant filed a motion *in limine* seeking to admit the statement that the victim made to the social worker at the hospital on July 20, 2019, two days after the incident occurred. DA at 28-30. The defendant argued that the statement was relevant because it was "probative as to [the victim's] mental state at the time of the incident" and made "it more likely than not that [the victim] was suicidal at the time of the incident." DA at 29. The defendant also argued that the statement was admissible under certain exceptions to the rule against hearsay. DA at 29.

The defendant argued that the victim's statement to the social worker qualified as an excited utterance because the statement was made while the defendant was "extremely emotional and sobbing" at the prospect of leaving the hospital. DA at 29-30. Additionally, the defendant asserted that the victim's statement fell "squarely under [the] rule" creating a hearsay exception for statements of a declarant's then-existing emotional, sensory, or physical condition. DA at 30. Finally, the defendant argued that the victim's statement satisfied the exception for statements made for the purpose of medical diagnosis or treatment because the statement described the victim's medical and psychiatric symptoms, discussed the pain he was experiencing and difficulties he would have living in a shelter, and was made under circumstances indicating trustworthiness. DA at 30.

The State objected, arguing that the victim's statement was hearsay without an exception. DA at 34-36. The State argued that the statement did not qualify as an excited utterance because it was not made spontaneously in response to a startling event, and the note from the physician's assistant that the victim appeared to be malingering undermined the trustworthiness of the statement. DA at 35. The statement did not

qualify as a then-existing condition, the State argued, because the statement did not describe an emotional, sensory, or physical condition, and it was not a statement of motive, intent, or plan, but was rather an attempt by the victim to avoid discharge from the hospital. DA at 35. The State contended that the statement did not qualify as a statement for the purpose of obtaining medical diagnosis or treatment because it did not describe medical history, past or present symptoms, their inception, or their general cause. DA at 36.

The State also argued that the statement should be excluded as inadmissible propensity evidence. DA at 36. Specifically, the State asserted that the defendant sought to admit the victim's statement that he would throw himself in front of a car to prove that the victim acted in conformity with the sentiments of the statement during the incident in question. DA at 36.

The trial court ruled that the victim's statement to the social worker was hearsay without an exception and denied the defendant's motion on that basis. DA at 26. The court determined that the excited utterance exception was inapplicable because being discharged from the hospital was not a sufficiently startling event or condition to trigger the exception and the defendant had provided no analysis or case law to suggest otherwise. DA at 25-26. As to the other two exceptions invoked by the defendant, the court ruled that they did not apply because the statement was inherently unreliable in light of the circumstances in which it was made. DA at 26.

The court reasoned that all three of the exceptions relied upon by the defendant were premised upon circumstances that the rules of evidence have concluded imbue a statement with inherent reliability and render it

admissible — a spontaneous response to a sufficiently startling event, relaying information for medical diagnosis or treatment, and expressing a current mental, physical, or emotional condition. DA at 26. The court explained that the victim's statement was inherently unreliable in light of the physician assistant's note that the victim appeared to be malingering. DA at 26. The court also suggested that the victim having just been hit by a car might explain why the victim thought of jumping in front of a car when trying to convince hospital staff that he would kill himself if he were discharged from the hospital. DA at 26, n. 1. Ultimately, the court concluded that if hospital "staff did not believe [the victim's] statements . . . when they were in the same room with him," then the court would not "ask a jury to do so based on an assumption that the statements [were] inherently reliable." DA at 26.

The defendant was convicted on two charges after a jury trial, T2 at 199-201, and sentenced to one to three years in prison, stand committed, and three to six years in prison, suspended for five years upon release from custody. S at 28-29. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court's decision should be affirmed because the victim's statement to the social worker is hearsay and does not qualify for an exception to the rule against hearsay. *See N.H. R. Ev.* 802.

The victim's statement does not qualify as an excited utterance because the statement was not made while the victim was under the stress or nervous excitement of a startling event. *N.H. R. Ev.* 803(2). Rather, the statement was a self-serving one made twenty-four hours after the victim initially learned of his prospective discharge from the hospital, providing ample opportunity for reflective thought. *See State v. Dana* ___ N.H. ___, slip op. at 5-6 (decided March 10, 2022).

The victim's statement does not qualify under the exception for then-existing conditions because the statement was not offered to show a current or continuing state of mind, or an intention to do something in the future. *N.H. R. Ev.* 803(3). Instead, the statement was offered either as a declaration of a past mental condition, which is barred by the rule against hearsay, *see Ibey v. Ibey*, 93 N.H. 434, 437 (1945) (stating that "[d]eclarations as to past mental conditions are pure hearsay and are not within the exception"), or to show that the victim acted in conformity with the suicidal tendencies expressed in the statement two days earlier during the incident in question, which is barred by the general prohibition on character evidence. *N.H. R. Ev.* 404(a).

The victim's statement does not qualify under the exception for statements made to obtain a medical diagnosis or treatment because the victim did not intend to obtain a medical diagnosis or treatment when

making the statement; the statement does not describe symptoms or the cause of symptoms; and the statement was not made under circumstances indicating its trustworthiness. *N.H. R. Ev.* 803(4).

Alternatively, the trial court's decision should be affirmed because the statement should be excluded as improper character evidence. *N.H. R. Ev.* 404(a). Accordingly, the trial court did not unsustainably exercise its discretion in excluding the statement.

Finally, even if the trial court did err in excluding the victim's statement, the court's decision should be affirmed because the error was harmless beyond a reasonable doubt in light of the State's evidence of guilt. *See Dana*, ___ N.H. ___, slip op. at 6.

ARGUMENT

I. STANDARD OF REVIEW

This Court accords "the trial court considerable deference in determining the admissibility of evidence" and will not disturb its decision absent an unsustainable exercise of discretion. *State v. Munroe*, 173 N.H. 469, 479 (2020). To demonstrate an unsustainable exercise of discretion, the defendant must show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id*. In applying this standard, the Court determines "only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *State v. Colbath*, 171 N.H. 626, 633 (2019). The Court's "task is not to determine whether [it] would have found differently, but is only to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." *Id*. at 633-34.

II. THE TRIAL COURT DID NOT UNSUSTAINABLY EXERCISE ITS DISCRETION BY EXCLUDING THE VICTIM'S STATEMENT TO THE SOCIAL WORKER AS HEARSAY WITHOUT AN EXCEPTION.

Hearsay is generally defined as an out-of-court statement offered in court to prove the truth of the matter asserted. *Munroe,* 173 N.H. at 479; *N.H. R. Ev.* 801(c). Hearsay is typically inadmissible, subject to certain well-delineated exceptions. *Munroe*, 173 N.H. at 479. There is no dispute that the victim's statement to the social worker is hearsay. The defendant has only argued that the statement fits into certain exceptions to the rule against hearsay, namely, the exceptions for excited utterances, then-existing

conditions, and statements for medical diagnosis or treatment. *See* DA at 28-30; DB at 12-20.

The theory of each hearsay exception implicated in this case is rooted in a guarantee of the statement's truth and inherent reliability produced by the circumstances in which the statement was made. *See State v. Lynch*, 169 N.H. 689, 702 (2017) (statement made for medical diagnosis or treatment); *State v. Bonalumi*, 127 N.H. 485, 487 (1985) (excited utterance); 2 *McCormick on Evid.* § 274 (8th ed.) (then-existing condition). For the reasons that follow, the statement at issue does not qualify for any of these exceptions.

A. The Statement Does Not Qualify Under Rule 803(2) As An Excited Utterance.

The excited utterance exception to the rule against hearsay permits the admission of hearsay statements "relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused." *N.H. R. Ev.* 803(2). The theory underlying the excited utterance 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." *Bonalumi*, 127 N.H. at 487.

To qualify as an excited utterance "[i]t 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." *Id*. The admissibility depends upon a finding that the statement had its "source in

such continuing excitement that spontaneity exists." *Id*. Whether this test of spontaneity is met is for the trial court to determine in the exercise of its sound discretion. *Id*. at 487-88.

Accordingly, to admit the statement as an excited utterance, "the trial judge must be satisfied that (1) there was a sufficiently startling event or occurrence, and (2) the declarant's statements were a spontaneous reaction to the occurrence or event and not the result of reflective thought." *Id*. at 488.

The allegedly startling event upon which the defendant relied to invoke the excited utterance exception was the social worker's communication to the victim that he would be discharged from the hospital. DB at 14-15; DA at 25, 29-30. The trial court was not satisfied that this event was sufficiently startling to trigger the exception. DA at 25-26. This was not an unsustainable exercise of discretion because a reasonable person surely could have reached the same conclusion the trial court did based upon the evidence before it. *See Colbath*, 171 N.H. at 633.

One factor for the Court to consider in its analysis of this issue is the timing of the statement in relation to the startling event. *See State v. Pepin*, 156 N.H. 269, 274 (2007); *see also* 2 *McCormick on Evid.* § 272 (8th ed.) ("The most important of the many factors entering into this determination is the temporal element."). The passage of time between the startling event and the statement provides the declarant an opportunity for reflective thought and time to contrive or misrepresent.

Here, the record reflects that the victim first learned of his prospective discharge on July 19, 2019, at approximately 4:29 p.m., as evidenced by a note logged by a registered nurse stating the problem and

goal of discharge planning. DA at 35. The victim's statement to the social worker, made at approximately 4:45 p.m. on July 20, came a full twenty-four hours after the registered nurse's note was logged. DA at 34-35. That gap of time alone rendered the excited utterance exception inapplicable. *See Dana,* ___ N.H. ___, slip op. at 5-6 (stating that a "twenty-four-hour gap" between the startling event and the witnesses statement "extends well beyond the limits established by [this Court's] excited utterance precedents").

Additionally, the statement to the social worker was made approximately six hours after a physician's assistant logged a note stating that the victim "appear[ed] to claim that he want[ed] to kill himself every time he [was] told he [was] ready for discharge." DA at 34-35. A note logged by a physician nearly five hours before the victim made the statement to the social worker reflects that the doctor was requested to see the victim prior to discharging him, presumably to discuss the victim's discharge from the hospital. *See* DB at 16 (agreeing that the record indicates that a doctor saw the victim). Thus, a significant amount of time had passed — providing significant opportunity for reflective thought — between the multiple times that the victim was told he would be discharged from the hospital and his statement to the social worker.

The defendant contends that none of the notes logged by hospital staff reflects that any hospital personnel told the victim that he would be discharged from the hospital prior to the conversation the victim had with the social worker. DB at 14. However, the context of the notes and each of the notes specifically referring to discharge of the victim from the hospital undercuts the defendant's contention.

Statements that are deliberate, self-serving, or made in response to a question also militate against application of the excited utterance exception. *See State v. Demeritt*, 148 N.H. 435, 441 (2002) (statements not made in response to a question supports finding that the statement was spontaneous); *State v. Cole*, 139 N.H. 246, 249 (1994) (statements that are self-serving or clearly deliberate support finding that the statement was not spontaneous); 2 *McCormick on Evid.* § 272 (8th ed.) ("Although not grounds for automatic exclusion, evidence that the statement was made in response to an inquiry or was self-serving is an indication that the statement was the result of reflective thought.").

The record is silent as to whether the victim's statement was in response to a question posed by the social worker. However, it is undisputed that the victim was interested in staying at the hospital. *See* DB at 15 ("[T]here was no question that [the victim] was upset by the prospect of being discharged from the hospital."). Statements to convince hospital staff that he was suicidal and would act on suicidal ideations if discharged from the hospital would therefore have served the victim's self-interest. As alluded to by the trial court, it is conceivable that the victim thought claiming that he would commit suicide by throwing himself in front of a car would serve his interest more persuasively in light of his reason for being at the hospital in the first place. *See* DA at 26, n. 1. Thus, a reasonable person could conclude from the evidence that the victim's statement was not a spontaneous reaction to a startling event, but was rather an excuse to attempt to stay at the hospital. Indeed, the physician assistant's observation that the victim "appear[ed] to be malingering" suggests that she drew such a conclusion. DA at 35.

Nevertheless, the defendant argues that the trial court erred in concluding that being discharged from the hospital is not a startling event because the victim was clearly emotional and upset at the prospect of being discharged, and "[w]hether an event is 'startling' is a uniquely subjective inquiry." *Wilson v. Laney*, ___ P.3d ___, 317 Or. App. 324, 330 (2022).

In *Wilson*, the Court of Appeals of Oregon rejected the appellant's argument that statements made by his mother and nephew to a police officer responding to a domestic disturbance in which the appellant punched his nephew and stole items from the house were admissible as excited utterances. *Id*. at 326-27, 332-33. The Court explained that the statements did not qualify for the exception because the "startling event was less extreme in [that] case than in many involving excited utterances" and there was no evidence that the declarants were "under such 'stress of excitement' from the startling event that they lacked the 'capacity for reflection.'" *Id*. at 332-33. Although the responding officer described the declarants as "upset" and "extremely emotional," the Court held that "[e]vidence of someone being generally 'upset' or 'emotional' is slim proof of the type of emotional state necessary for a statement to qualify as an excited utterance." *Id*. at 333.

The same is true here. The victim may have been emotional and upset when speaking to the social worker, but there is no evidence that he was under such stress of excitement from the prospect of being discharged that he lacked the capacity for reflection. The victim had ample opportunity for reflection between the time he first learned of his prospective discharge and the time the statement in question was made. Further, the evidence in the record would permit a reasonable person to

conclude that the victim did in fact reflect on the prospect of being discharged and advanced a statement that would serve his interest of remaining at the hospital. These circumstances were proper considerations for the trial court. *See Bennett v. Bennett*, 92 N.H. 379, 380 (1943) ("As far as appears, the declarant had ample time for reflection, and the self-serving character of the declaration, even if not conclusive, was properly to be considered under the circumstances.")

Accordingly, the trial court did not unsustainably exercise its discretion when it concluded that the excited utterance exception does not apply to the victim's statement. *Colbath*, 171 N.H. at 633.

B. The Statement Does Not Qualify As A Then-Existing Condition Under Rule 803(3).

N.H. R. Ev. 803(3) provides an exception to the rule against hearsay for statements 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)." "The special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity." 2 *McCormick on Evid.* § 274 (8th ed.). This exception does not include "a statement of memory or belief to prove the fact remembered or believed." *N.H. R. Ev.* 803(3). To be admissible under this exception, "the declaration must concern the mental state of the declarant and have reference to the time at which the declaration was made." *State v. Hall*, 152 N.H. 374, 378 (2005).

The defendant argues that the victim's statement to the social worker fits the then-existing condition exception because the victim's statement

"was expressing his plan to kill himself by throwing himself in front of a car." DB at 16-17. Of course, the victim's statement of his future intent two days after the defendant hit the victim with his car is of no relevance to this case on its own. Accordingly, the defendant's purpose for admitting the statement was: (1) to establish the victim's mental state at the time of the incident; or (2) to show that the victim acted in conformity with his then-existing mental state on a prior occasion. *See* DA at 29 ("The statement is probative as to [the victim's] mental state at the time of the incident" and "makes it more likely than not that [the victim] was suicidal at the time of the incident"). Both of these purposes are impermissible uses of the victim's statement.

Although a statement must describe a state of mind or feeling existing at the time of the statement to qualify for the then-existing condition exception, the evidentiary effect of the statement is broadened by the notion of the continuity in time of states of mind. *See* 2 *McCormick on Evid.* § 274 (8th ed.). For example, if a declarant asserts on Tuesday his then-existing intention to go on a business trip the next day, this will be evidence not only of the intention at the time of the statement, but also of the same purpose the next day when the declarant is on the road. *Id*. "Continuity may also look backwards." *Id*. Thus, when there is evidence that a testator has mutilated a will, the testator's subsequent statements of a purpose inconsistent with the will may be admitted to show the testator's intent to revoke it at the time it was mutilated. *Id*. Whether a state of mind continues is a decision for the trial judge. *Id*.

Ibey is illustrative of the continuity concept at work in both directions. *See Ibey*, 93 N.H. at 437. In *Ibey*, the plaintiff-widow argued

on appeal that the trial court erroneously excluded statements made by her deceased husband both prior and subsequent to his purchase of certain bonds, which she alleged that he purchased for the purpose of defrauding her out of the share of his estate to which she was statutorily entitled. *Ibey*, 93 N.H. at 435-37. The statements "said in substance: 'I have' or 'I will fix it so that you, Maude, won't get any part of my estate.'" *Id*. at 437.

This Court held that the statements made prior to the purchase of the bonds "that show a present intention to deprive the wife of some of her distributive share were clearly admissible on the issue of fraud." *Id*. The Court also held that statements made "after the purchase of the bonds are competent evidence if they show a present intention to prevent the wife from having her statutory rights and are not merely historical of the state of mind" that existed at the time the bonds were purchased. *Id*. The Court recognized that "[d]eclarations as to past mental conditions are pure hearsay and are not within the exception." *Id*.

In this case, the defendant sought to admit the victim's forward-looking statement — that he would throw himself in front of a car to kill himself if he were discharged from the hospital — for a backward-looking purpose; to establish his state of mind at the time of the incident two days earlier. *See* DA at 29. Unlike the statement in *Ibey* that could be properly admitted to show a present mental state, the defendant in this case sought admission of the victim's statement to establish a past mental state. Such declarations "are pure hearsay and are not within the exception." *Ibey*, 93 N.H. at 437.

Admission of the victim's statement to permit the inference that the victim acted in conformity with his then-existing mental condition during

the incident in question two days earlier is equally impermissible. Statements of current state of mind offered for the inference that conduct by the declarant at the moment in question was in conformity therewith are generally excluded. *See* 7 *Handbook of Fed. Evid.* § 803:3 (9th ed.) n. 24. "A statement of current state of mind when offered to infer conduct in conformity therewith is in fact evidence of a trait of character." *Id*.

Here, the defendant sought admission of the statement to show that the victim was suicidal and that he acted in conformity with that character trait during the incident in question. Admission of the victim's statement for such purpose is not permitted by the Rules of Evidence. *See N.H. R. Ev.* 404(a) ("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. . .").

The defendant also argues that it was error for the trial court to rely on the physician assistant's note that the victim appeared to be malingering in concluding that the victim's statement was inherently unreliable. *See* DB at 15-16; DA at 26. The defendant asserts that whether or not the victim was malingering "was a question of fact not capable of resolution on the bare pleadings" and the court should have held an evidentiary hearing to determine that fact. DB at 16. However, whether the victim was in fact malingering is beside the point. The salient point of the court's reliance upon the physician assistant's note was that the physician's assistant did not take the victim's statement that he would kill himself if he were discharged at face value, which casts doubt on the truthfulness and reliability of the substantially similar statement that the victim subsequently made to the social worker. *See* DA at 26.

In a similar vein, the defendant contends that the court erred to the extent it held that "reliability was a requirement" for application of the then-existing condition exception because the exception is a firmly rooted one and neither *N.H. R. Ev.* 803(3) nor this Court "requires a separate finding of reliability" for the exception to apply. DB at 17.

Notwithstanding the defendant's contention, the court did not hold that a separate finding of reliability is required for application of the then-existing condition exception. The court merely observed that the same theory of truth and reliability underpinning the excited utterance exception is also the basis for the then-existing condition exception. *See* 2 *McCormick on Evid.* § 274 (8th ed.) ("The special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity."); DA at 26. Thus, the court's basis for not applying the exception was not that a required finding of reliability was absent, but that a finding of inherent unreliability undercutting the very premise upon which the exception exists in the first place was present. This was not an unsustainable exercise of discretion in light of the evidence in the record casting doubt on the truth and reliability of the victim's statement and the "considerable deference" this Court affords the trial court "in determining the admissibility of evidence." *Munroe*, 173 N.H. at 479.

In sum, the defendant sought to introduce the victim's statement to the social worker for purposes that are not permitted by the then-existing condition exception to hearsay contained in *N.H. R. Ev.* 803(3) nor the general prohibition against character evidence contained in *N.H. R. Ev.* 404(a). Additionally, the trial court did not err in concluding that the victim's statement was unreliable. Accordingly, the trial court did not

unsustainably exercise its discretion when it excluded the statement and ruled that the then-existing condition exception did not apply.

C. The Statement Does Not Qualify As A Statement Made For Medical Diagnosis Or Treatment Under Rule 803(4).

Rule 803(4) exempts statements made for purposes of medical diagnosis or treatment from the rule against hearsay. *See N.H. R. Ev.* 803(4). The rationale for this 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. *See Lynch*, 169 N.H. at 702.

"A three-part test must be met for evidence to be admissible under Rule 803(4)." *Id*. (citation omitted). "First, 'a court must find that the declarant intended to make the statements to obtain a medical diagnosis or treatment.'" *Id*. "Second, 'the statements must describe medical history, or symptoms, pain, sensations, or their cause or source to an extent reasonably pertinent to diagnosis or treatment.'" *Id*. "Third, the court must find that the circumstances surrounding the statements support their trustworthiness.'" *Id*. The statement must satisfy all three parts of this test to be admissible under Rule 803(4). *Munroe*, 173 N.H. at 479.

The defendant accurately observes that statements made to obtain mental health treatment qualify under this exception. *See State v. Roberts*, 136 N.H. 731, 740-41 (1993); DB at 19. However, there is no evidence in the record to suggest that the victim intended to make his statement to the social worker to obtain a medical diagnosis or treatment. In contrast, the

declarant in *Roberts* made the statements at issue in that case during a court-ordered therapy session that he attended "for diagnosis and treatment" and the declarant was "aware of the diagnostic and therapeutic purposes of his private dialogues." *Id*. at 740-41.

Here, the victim was speaking to a social worker in preparation for discharge from the hospital after recovering from injuries sustained as the result of being hit by a car. Nothing about the circumstances in which the statement was made, nor the contents of the statement itself, indicates that the victim made the statement for diagnostic or therapeutic purposes. According to the social worker's note, the victim's statement was that he has a "horrible life . . . no one in his life to help . . . [and] no reason to live" and that he would "kill himself" if discharged from the hospital. DA at 24. While one might reasonably interpret the victim's statement as a generalized plea for help, the statement cannot be reasonably interpreted as intending to obtain a medical diagnosis or treatment. However, based on the evidence in the record, one could reasonably conclude, as the trial court and physician's assistant did, that the victim made the statement simply to avoid being discharged from the hospital. DA at 26, 35.

The second part of the test is not met because the victim's statement did not describe "medical history; past or present symptoms or sensations; their inception; or their general cause." *N.H. R. Ev.* 803(4)(B). For example, in *Roberts*, this Court held that the declarant's statement identifying the defendant was descriptive of the "cause or source of [the declarant's] symptoms or pain" because the declarant struggled with drug addiction and identified the defendant as a person who provided cocaine and money in exchange for sex. *Roberts*, 136 N.H. at 742. The Court also

concluded that the statements identifying the defendant were descriptive of the cause or source of the declarant's symptoms of post-traumatic stress disorder because the declarant's sexual relationship with the defendant was the "central trauma precipitating [the declarant's] PTSD." *Id*. at 742-43.

Thus, because the defendant in *Roberts* provided the declarant with drugs in exchange for sex, and because the declarant's sexual relationship with the defendant was central to the declarant's PTSD, the declarant's statement identifying the defendant described a cause or source of the declarant's drug addiction and PTSD. *See id*. By contrast, the victim's statement to the social worker simply made general assertions as to how the victim felt about his life, but did not describe symptoms, or the cause or inception of symptoms, of a mental illness. *See* DA at 24. Accordingly, the victim's statement does not meet the second part of the test.

As to the third part of the test, the circumstances surrounding the victim's statement do not support its trustworthiness. DA at 26. As the trial court observed, the physician assistant's note that the victim appeared to be malingering indicated that the victim's statements were not believed by hospital staff to whom they were made. DA at 26. Further, as explained above, the victim's statements claiming that he would commit suicide if he were discharged served his self-interest of remaining at the hospital, and there is no evidence that the victim was aware that his statement would enable a medical professional to make a diagnosis or administer treatment related to the victim's mental health. *See State v. Wade*, 136 N.H. 750, 755 (1993) (stating that "if the declarant is unaware that the statement will enable the physician to make a diagnosis and administer treatment, the statement is not sufficiently trustworthy to qualify under the exception.").

Accordingly, the trial court reasonably concluded that the circumstances surrounding the victim's statement did not support its trustworthiness.

The defendant argues that the circumstances surrounding the victim's statement support its trustworthiness because there is no reason a person would object so vehemently to being discharged from a hospital aside from the desire to receive medical treatment. DB at 19. However, as recognized by the defendant, the victim was apparently homeless, DB at 15, and it is conceivable that another night at the hospital would have been more comfortable and safe than a night at the shelter or on the street.

This Court grants "the trial court considerable deference in determining the admissibility of evidence." *Munroe*, 173 N.H. at 479. The circumstances surrounding the victim's statement to the social worker provide no indication that the victim's motivation for making the statement was to obtain an accurate diagnosis or proper medical treatment, which is the basis for the inherent reliability of statements admitted under this exception. *See Lynch*, 169 N.H. at 702. Accordingly, the trial court did not unsustainably exercise its discretion when it concluded that the hearsay exception for statements made for medical diagnosis or treatment did not apply to the victim's statement to the social worker.

III. ALTERNATIVELY, THE VICTIM'S STATEMENT SHOULD BE EXCLUDED AS INADMISSIBLE PROPENSITY EVIDENCE UNDER RULE 404.

Even if this Court were to conclude that the victim's statement to the social worker does qualify for an exception to the rule against hearsay, the statement should still be excluded as impermissible character evidence.

Evidence of a person's character or a trait of character for the purpose of proving that the person acted in conformity therewith on a particular occasion is generally prohibited. *N.H. R. Ev.* 404(a); *State v. Newell*, 141 N.H. 199, 200 (1996).

As previously discussed, the victim's statement was offered to show that the victim acted in conformity with the suicidal tendencies expressed in the statement on a particular occasion. *See* DA at 29 ("The statement is probative as to [the victim's] mental state at the time of the incident" and "makes it more likely than not that [the victim] was suicidal at the time of the incident."); 7 *Handbook of Fed. Evid.* § 803:3 (9th ed.) n. 24 ("A statement of current state of mind when offered to infer conduct in conformity therewith is in fact evidence of a trait of character.") The State argued this ground for exclusion in its objection to the defendant's motion *in limine* to admit the victim's statement. *See* DA at 36.

Although the trial court did not rule on this ground, this Court may affirm a decision in which the trial court reaches the correct result on mistaken grounds "if valid alternative grounds support the decision." *State v. Dion*, 164 N.H. 544, 552 (2013). Therefore, even if this Court decides that the victim's statement qualifies for an exception to the rule against hearsay, the trial court's decision should still be affirmed because admission of the victim's statement for the purpose that the defendant intended to use it violates the general prohibition against character evidence.

IV. EVEN IF THE COURT ERRED IN EXCLUDING THE STATEMENT, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Even if the trial court erred in excluding the victim's statement, 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 the virtually inevitable presence of immaterial error.

Dana, ___ N.H. ___, slip op. at 6.

To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict. *Id*. An error may be harmless beyond a reasonable doubt if the other evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight and if the improperly excluded evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. *See id*. In making this determination, this Court considers the other evidence presented at trial as well as the character of the erroneously excluded evidence itself. *See id*.

In this case, the jury heard from two independent witnesses. One witness testified to seeing the defendant veer his car toward the crosswalk in which the victim was walking and hit the victim hard enough to have him somersault off the hood and land five feet in front of the car. The other witness testified to seeing the defendant speed up upon seeing the victim and drive right toward him, leading the witness to conclude that the defendant had hit the victim on purpose. Both of those witnesses testified

to seeing the defendant speed off after the incident, which is consistent with the behavior of someone who has purposely hit a person with their car, not of someone who accidently hit a person that jumped in front of their car on their own volition.

In addition, the jury heard from the defendant himself, who testified that he knew he had broken the law and knew that what he had done was morally wrong. *See State v. Tabaldi*, 165 N.H. 306, 314 (2013) (reviewing the entire trial record in sufficiency challenge because "[e]ven 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"). Neither of those sentiments is consistent with the defendant's later assertion that the victim jumped out in front of his car. Thus, testimony from three separate witnesses, including the defendant, supported the conclusion that the defendant intentionally hit the victim with his car.

The defendant sought to introduce the victim's statement to support his argument that the victim jumped in front of his car. However, the victim's statement to the social worker two days after the incident in question was of little, if any, probative value as to the victim's state of mind or emotional wellbeing at the time of the incident. At best, the victim's statement would have provided a weak link in a decidedly tenuous inferential chain.

Accordingly, in light of the nature, quantity, and weight of the State's evidence of guilt, the trial court's exclusion of the victim's statement 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 does not request oral argument in this matter. However, if this Court decides to hold oral argument, Sam Gonyea will present on behalf of the State.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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April 28, 2022

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CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,803 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.

April 28, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Stephanie Hausman, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 28, 2022 */s/ Sam M. Gonyea*
Sam M. Gonyea