

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS.

MAY TERM, 2020

THE STATE OF NEW HAMPSHIRE

V.

VOLODYMYR ZHUKOVSKYY

214-2019-CR-78

**STATE’S MOTION #2: ADMISSION OF THREE PRIOR INSTANCES OF THE
DEFENDANT’S CONDUCT WHILE DRIVING ON JUNE 21, 2019, PURSUANT TO
RULES 401 & 403, AND ALTERNATIVELY RULE 404(b)**

NOW COMES, the State of New Hampshire, by and through its attorneys, the Office of the Coös County Attorney and the Office of the Attorney General, who respectfully requests that this Honorable Court admit evidence of specific instances of the defendant’s hazardous driving observed by witnesses on the day of the fatal collision at issue, June 21, 2019. These instances are admissible intrinsic evidence pursuant to New Hampshire Rules of Evidence 401 and 403, because they are “inextricably intertwined” with the charged crimes. The proffered evidence is similarly admissible under New Hampshire Rule of Evidence 404(b). In support of its request, the State says as follows:

PROCEDURAL HISTORY

1. On June 21, 2019 at approximately 6:24 p.m. the defendant was involved in a motor vehicle crash resulting in the deaths of seven people, serious bodily injury to another, and placing additional oncoming motorcyclists in danger. The defendant was driving a dark grey Dodge Ram 2500 with “Westfield Transportation” in tan lettering on the side. Attached to the truck was an unladen flatbed trailer the defendant had used to deliver a white Toyota Rav-4 to

Berlin City Auto Group shortly before the crash. The defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He waived arraignment on the charges on June 25, 2019, and entered pleas of not guilty. On October 18, 2019, the defendant was indicted on seven charges of manslaughter, seven charges of impaired negligent homicide, seven charges of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. The State now seeks to admit evidence of three specified instances of the defendant's erratic driving earlier in the day on June 21, 2019.

FACTS

Factual Summary of First Instance

2. On June 21, 2019, around 4:30 p.m., Sally Hull observed a black truck that was trailering a white car and driving erratically on Route 302. Ms. Hull was driving toward Lisbon, NH behind the vehicle when she saw it have lane control issues. She watched as the truck and trailer swerved back and forth and crossed into the opposing lane of travel several times, enough so that if there were any oncoming vehicles, it would likely have caused a collision. After about two or three miles, the truck pulled over on the side of the road. As Ms. Hull Drove past the truck she saw that it was a dark colored truck that had "Westfield Transportation" written on it in tan lettering.

Factual Summary of Second Instance

3. On June 21, 2019, at approximately 4:56 p.m. three Littleton, NH Fire Department fire fighters, Thomas Hartwell, Paul Ingersoll, and Quintin Ross, were returning from a call near the Vermont boarder. The fire fighters were in their fire truck, waiting in a cross-over on Interstate 93 to enter southbound traffic. The fire truck's emergency lights were still flashing when the three fire fighters observed a black truck hauling a trailer with a white car on it

traveling toward their location. The truck was traveling in the high-speed lane. As the truck and trailer approached them, each fire fighter observed it begin to cross the white fog line by two or three feet on the median side of the road and head straight toward their fire truck. The truck came onto the shoulder of the interstate, Fire Fighter Ross was convinced they were going to be hit by the oncoming truck and trailer. The truck corrected itself back into the travel lane before it impacted with the fire truck.

Factual Summary of Third Instance

4. On June 21, 2019 just prior to 6:00 p.m. Anthony Plant, an employee at Berlin City Auto Group, observed a 2016 Ram 2500 black Cummins diesel with an attached car hauler and Massachusetts plates enter the top lot of the dealer's lot, even though they have a sign stating no trucks in the top lot. Mr. Plant watched as the driver drove between the front of the dealership and the first row of cars at approximately 25 mph and missing the building by approximately three feet. After dropping off a Toyota Rav-4, the driver left the same way he entered the lot. As he was leaving the driver almost hit Nicholas Belanger, another Berlin City employee, and a customer. Mr. Plant described the driving as erratic and unusual. On his way home, Mr. Plant came across the crash scene and had no doubt the truck and car hauler at the crash was the same he saw driving erratically in the dealership parking lot.

5. Nicholas Belanger was also working at the Berlin City Auto Group lot when he observed a truck drop off a white Toyota Rav-4. Mr. Belanger said that, as the truck and trailer left the lot, the driver "whipped the corner pretty quickly with that trailer." The driving was so erratic that Mr. Belanger and a customer he was with were both startled enough to make comments to each other about the operation of the vehicle. After seeing a press release about the

crash, Mr. Belanger identified the truck and trailer involved in the deaths of the motorcyclists as the same he watch leaving the dealership like “a bat out of hell.”

LEGAL ANALYSIS

I. All of the Defendant’s Erratic Driving on June 21, 2019 is Admissible Intrinsic Evidence Pursuant to Rules of Evidence 401 & 403 Because it is Inextricably Intertwined with the Evidence In the Underlying Criminal Case.

6. The evidence the State seeks to admit by way of this motion is properly analyzed under Rules 401 and 403 because testimony concerning the defendant’s driving earlier in the day prior to the charged conduct here is intrinsic evidence inextricably intertwined with the charged acts. As discussed in State v. Nightingale, 160 N.H. 569, 574 (2010):

The proper test to apply in deciding the admissibility of ‘similar acts’ or ‘other acts’ evidence depends upon whether the evidence in question is ‘intrinsic’ or extrinsic’ evidence. ‘Other act’ evidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.

State v. Dion, 164 N.H. 544, 551 (2013) (citing United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990)). Inextricably intertwined evidence is “a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness’s testimony, or completes the story of the charged offense.” State v. Wells, 166 N.H. 73, 77-78 (2014). The rationale for the admissibility of inextricably intertwined evidence is that “events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence.” Id. at 78.

7. “‘Intrinsic’ or ‘inextricably intertwined’ evidence will have a causal, temporal, or spatial connection with the crime charged.” Dion, 164 N.H. at 551 (citing United States v.

Hardy, 228 F.2d 745, 748 (6th Cir. 2000) (characterizing evidence of “other acts that are inextricably intertwined with the charged offense” as “background evidence.”); see also United States v. Redding, 422 Fed. Appx. 192, 194-95 (4th Cir. 2011) (witness testimony about crack cocaine purchases from the defendant prior to the two incidents with which the defendant was charged did not constitute Rule 404(b) evidence because it was intrinsic evidence of the witness’s prior relationship with the defendant which provided relevant context for the charged drug transactions). “Typically, such evidence is a prelude to the charged offenses, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness’s testimony, or completes the story of the charged offense.” Hardy, 228 F.3d at 748. “This type of evidence is admissible under the rationale that ‘events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of [the charged] act so that it may realistically evaluate the evidence.’” Wells (quoting Westbrook v. State, 29 S.W. 3d 103, 115 (Tex. Crim. App. 2000) (explaining “same transactions contextual evidence”).

8. In Dion, the defendant was charged with negligent homicide. The indictment charged that the defendant was so distracted by her cell phone use while driving that she failed to pay due attention and failed to avoid striking a pedestrian in a crosswalk. Id. at 551. The defendant moved to exclude records of her cell phone calls during the thirty-seven minutes prior to the collision. Id. at 550. The New Hampshire Supreme Court concluded that the phone records were inextricably intertwined with the evidence of the charged crime because they were “evidence of acts intrinsic to the conduct charged in the indictment, and, consequently, Rule 404(b) is not applicable.” Id. at 551.

9. In Nightingale, a drug informant relayed a conversation between the defendant and an undercover detective to arrange a purchase of cocaine. Nightingale, 160 N.H at 572. The informant and the defendant traveled to Concord to buy cocaine around 10:30 a.m. and purchased cocaine. Later that day, around 10:15 p.m., the informant relayed to the detective that the defendant would not sell the cocaine until the next day, but would sell Oxycontin to him that night. Id. The detective then purchased Oxycontin from the defendant that night around 10:37 p.m. Id. at 573. The defendant was charged and convicted for the sale of Oxycontin. On appeal the defendant argued that the trial court erred when it denied her motion to excluded evidence of the conversation regarding cocaine because it was inadmissible under Rule 404(b). Id. The New Hampshire Supreme Court held, “The challenged conversations are not ‘other crimes, wrongs or acts,’ but rather are ‘inextricably intertwined with evidence of the crime charged in the indictment.’ The conversation at issue and the crime charged in the indictment are part of a single criminal episode. Therefore, Rule 404(b) does not apply, and the applicable test for admissibility is found in New Hampshire Rule of Evidence 403.” Id. at 574.

10. Evidence that the defendant was impaired to any degree is competent evidence of an element of each of the charged crimes. State v. Dushame, 136 N.H. 309, 316-17 (1992) (driving while impaired is reckless if the defendant is aware of and consciously disregards the risk of impaired driving); State v. Wong, 125 N.H. 610, 619 (1999) (driving impaired is *per se* negligent); State v. Demond-Surace, 162 N.H. 17, 29-30 (2011) (evidence of alcohol consumption is proper evidence for the jury to consider in determining criminal negligence); RSA 265-A:3 (A person is guilty of aggravated DWI if, while under the influence, drives a vehicle and causes a collision resulting in serious bodily injury). Unsafe driving is evidence of impairment. State v. Kelley, 159 N.H. 449, 454 (2009) (crossing yellow line, brining vehicle to

sudden stop, slow and unsteady movement, and admission to drinking alcohol, taken together constitute direct evidence of impairment). Additionally, any evidence of the defendant's poor driving is relevant to the mental states of recklessness or criminal negligence. State v. Bellville, 166 N.H. 58, 64 (2014) (inattention sufficient to establish the element of recklessness.); Dion, 164 N.H. at 550 (defendant's distraction by "legal" activity sufficient to establish the element of negligence.).

11. Here, as discussed supra, several witnesses made observations of the defendant's erratic driving in the roughly two hour period before the crash in Randolph. The defendant's erratic driving is inextricably intertwined with the crimes charged because it shows that the defendant was not fit to be operating a commercial motor vehicle on the afternoon of June 21, 2019, and that his inattention and erratic operation at the time of the fatal collision was not an isolated incident that day. Similar to the defendant's phone record for the thirty-seven minutes leading up to the crash in Dion—which were inextricably intertwined with the conduct charged to show the defendant's pattern of distraction by her phone—the erratic driving of the defendant in this case is inextricably intertwined with the charged crimes. As such, this evidence completes the story of the charged conduct by demonstrating that the defendant's driving was consistently erratic from nearly the time he entered New Hampshire to the time he crashed. This erratic driving is competent evidence of the defendant's culpable mental state while he was behind the wheel of his commercial motor vehicle on June 21, 2019, because it is probative of the defendant's impairment and also shows that the defendant had disregarded the substantial and unjustifiable risk he was taking by continuing to drive.

12. The evidence of the defendant's dangerous driving is inextricably intertwined with the charged crimes because it is a prelude to the charged offense, is directly probative to the

defendant's culpable mental state, occurred within mere hours of the defendant's crash, and completes the story of the charged crimes. Like the cocaine conversation in Nightingale was not "other crimes, wrongs or acts" evidence because it was part of a single criminal episode and was therefore inextricably intertwined with the crime charged, the defendant's driving in this case is also part of a single criminal episode. The Nightingale cocaine conversation was a prelude to the defendant's sale of Oxycontin to the detective, because it was the reason the defendant and detective agreed to meet. Similarly, the evidence of this defendant's driving in the hours before the crash is a prelude to the crash, showing the defendant's driving was consistently dangerous from the time he entered New Hampshire to the time he crashed and killed the victims. The evidence of the defendant's erratic driving is directly probative of the charged offense because it demonstrates he was acting either recklessly or negligently, and shows that he was either impaired or had multiple opportunities to become aware of the substantial and unjustifiable risk of continuing to drive his commercial vehicle, while his ability to maintain lane control was compromised. The defendant's dangerous driving also completes the story of the charged offenses because it shows the defendant was not in a proper state to drive on the afternoon of June 21, 2019, either because he was acutely impaired by the drugs in his system the whole time, or he was in withdrawal. State v. Dilboy, 160 N.H. 135, 165 (2010) (holding "the element of being 'under the influence' of a controlled drug may be proved by evidence that the defendant was suffering symptoms of withdrawal from drug usage."). Therefore, the evidence of his dangerous driving is inextricably intertwined evidence because it is "a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense,...[and] completes the story of the charged offense." Wells, 166 N.H. at 77-78. Thus, admission of the proffered evidence will provide the jury with the opportunity to hear what had

occurred prior to the charged conduct and realistically evaluate the evidence not in a vacuum but in the context of the defendant's behavior that day.

II. These Three Instances of the Defendant's Prior Erratic Operation are Relevant to the Underlying Charged Criminal Conduct, and Therefore Admissible Pursuant to Rule of New Hampshire Evidence 401.

13. New Hampshire Rule of Evidence 401 provides: "Evidence is relevant if it (a) 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." The evidence of the defendant's dangerous driving is relevant because it is probative of the defendant's impairment on June 21, 2019, and also demonstrates that the defendant had multiple opportunities that day to become aware of a substantial and unjustifiable risk of continuing to drive but disregarded the risk. The evidence of the defendant's erratic driving is directly relevant of the charged offenses, because it demonstrates he was acting both recklessly and negligently, demonstrating that the defendant was impaired to some degree by the heroin and cocaine he admittedly consumed on the day of the crash, or was having other consistent issues with driving his commercial vehicle from the time he entered New Hampshire to the time he crashed. These specific instances of the defendant's erratic operation occurred within about two or less hours before the fatal collision, and show the defendant's continued inability to maintain control of his commercial motor vehicle. Therefore, this evidence is relevant because, taken together, each instance make the defendant's impairment or awareness of the risk of continued driving under the circumstances more probable.

III. The Probative Value of These Three Instances of the Defendant's Prior Erratic Operation are Sufficiently Probative, and Outweigh Any Potential Prejudice to the Defendant Pursuant to New Hampshire Rule of Evidence 403.

14. New Hampshire Rule of Evidence 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” In this instance, the probative value of these three witnessed instances of the defendant’s erratic operation greatly outweigh their prejudicial value, and should be admitted by the Court.

15. Each of these three instances of the defendant’s prior observed erratic operation have a high degree of probative value given their close nexus in time with the fatal collision at issue. Two of the instances occurred just two hours before the fatal collision, and the instance of the defendant’s observed driving at the Berlin City Auto Group occurred just thirty minutes before the fatal collision. This close time nexus holds a high level of probative value, as it provides insight into the defendant’s manner of operation of his vehicle in the time preceding the crash, and not the way in which he operated his vehicle generally.

16. The State bears the burden of proving beyond a reasonable doubt that the defendant acted with a reckless mens rea, and thereby that the defendant subjectively was aware of, and ignored, a known risk:

Consequently, the State [has] to prove that the defendant, subjectively, was aware of a known risk, and that he, again subjectively, knew of circumstances, the disregard of which objectively, would be determined to be a ‘gross deviation from the conduct that a law-abiding person would observe in the situation. This is a difficult standard to meet, as well it should be. The unlikelihood of developing direct testimony on the defendant’s state of mind calls for consideration of all proper proof that can be proffered by the prosecution.

Dushame, 136 N.H. at 317. The three instances the State seeks to admit are highly probative as to this point, as there is evidence that the in the hours proceeding the crash, the defendant

operated his commercial vehicle in an erratic manner consistently, and tend to show that the defendant's erratic operation in the fatal collision was not part of a momentary lapse, but part of a larger channel of conduct observed by several witnesses within hours of the fatal collision. In State v. Howe, a defendant was convicted of six counts of possession of child pornography, and argued on appeal to the New Hampshire Supreme Court that the trial court had erred in admitting additional images of child pornography that the defendant had not been charged with possessing, arguing that the prejudicial effect of the images exceeded the probative value. State v. Howe, 159 N.H. 366, 377, (2009). The Supreme Court upheld the admission of the images, stating: "While evidence of a prior offense or bad act is always prejudicial, the prejudice is frequently outweighed by the probative value of the evidence when the defendant's knowledge or intent is a contested issue in the case." See id. at 378 (quoting State v. Kim, 153 N.H. 322, 331 (2006)). As in Howe, in the present case, the defendant's knowledge that he had ignored a substantial and known risk is a contested issue. Id. These three instances of the defendant's driving on the day in question have a high degree of probative value to show that the defendant possessed, or should have possessed, advanced knowledge of his inability to safely drive his vehicle on June 21, 2019. After each of these described instances of dangerous driving conduct, the defendant could have made a decision to cease operation of his commercial truck and attached trailer, and either rested until he regained sobriety or called his employer or another person for assistance. Instead, the defendant disregarded these risks and made a conscious decision to continue operating his commercial vehicle, despite these present warning signs of erratic operation that made the defendant aware, or should have made the defendant aware, that he was not capable of driving his commercial truck in a safe manner. While it is true that prior instances of the defendant's erratic operation of his vehicle hold some measure of prejudicial value, the great weight of the

balancing test tends toward admission in this case. As the State has previously submitted, the New Hampshire Supreme Court offered this holding, in a capital murder case, “[e]ven when the nature of prior crimes evidence gives rise to a significant potential for prejudice, however, that potential ‘is frequently outweighed by the relevance of the evidence when a defendant’s knowledge or intent is a contested issue in the case.’” Addison, 165 N.H. 469 (quoting Smalley, 151 N.H. at 200). These same issues are present in the following case, and these three proffered instances speak directly to that issue, and thus should be admitted.

IV. The Proffered Evidence is Similarly Admissible Under New Hampshire Rule of Evidence 404(b).

17. Should this Court hold that the evidence the State seeks to admit by way of this motion constitutes extrinsic other acts evidence that is more properly analyzed under Rule 404(b), the evidence is nevertheless relevant and admissible at the defendant’s trial in this matter.

Rule 404(b) provides:

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. Ev. 404(b). The possible bases for admission of evidence under Rule 404(b) are not restricted to the purposes expressly delineated in the Rule. See State v. Melcher, 140 N.H. 823, 829 (1996); see also United States v. Figueroa, 976 F.2d 1446, 1454 (1st Cir. 1992) (noting “[I]t is clear from the language of Rule 404(b), however, that ‘other acts’ evidence is admissible for relevant purposes beyond those recited in the rule.”).

18. Here, the proffered evidence is admissible for a relevant and probative non-propensity purpose. Although evidence of the defendant's erratic driving on June 21, 2019 in the hours leading up to the fatal crash in Randolph is inextricably intertwined with the charged event, and the State does not concede it is "other crimes, wrongs or acts" subject to Rule 404(b), if this honorable court finds it is such, the defendant's erratic driving is still admissible when analyzed under Rule 404(b). Other crimes, wrongs, or acts are admissible for "purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." N.H. R. Ev. 404(b). To meet this standard, the crime, wrong, or act must: 1) be relevant for a purpose other than proving the person's character or disposition; 2) there must be clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or act occurred, and that the person committed them; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

19. The evidence of the defendant's driving on June 21, 2019, is relevant for a purpose other than to show propensity to drive badly. This evidence demonstrates that on June 21, 2019, the defendant had consistent problems with his ability to maintain safe control over his truck and trailer. The defendant has been indicted on seven charges of manslaughter, seven charges of impaired negligent homicide, seven charges of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon.

20. The evidence of the defendant's erratic driving is relevant for a purpose other than to show a propensity for bad driving because it demonstrates the defendant was impaired to any degree on June 21, 2019 either by acute symptoms of, or withdrawal from, the use of controlled drugs. Evidence that the defendant was impaired to any degree is competent evidence of an

element of each of the charged crimes. Dushame, 136 N.H. at 316-17 (driving while impaired is reckless if the defendant is aware of and consciously disregards the risk of impaired driving); Wong, 125 N.H. at 619 (driving impaired is *per se* negligent); Demond-Surace, 162 N.H. at 29-30 (evidence of alcohol consumption is proper evidence for the jury to consider in determining criminal negligence); RSA 265-A:3 (A person is guilty of aggravated DWI if, while under the influence, drives a vehicle and causes a collision resulting in serious bodily injury). Unsafe driving is, in and of itself, evidence of impairment. Kelley, 159 N.H. at 454 (crossing yellow line, bringing vehicle to sudden stop, slow and unsteady movement, and admission to drinking alcohol, taken together constitute direct evidence of impairment); Bellville, 166 N.H. at 64 (inattention sufficient to establish the element of recklessness.); Dion, 164 N.H. at 550 (defendant's distraction by "legal" activity sufficient to establish the element of negligence.). Each of these instances are also probative of the defendant's culpable mental state and intent because it shows the defendant had specific instances of unsafe driving, which would have made him aware, or should have made him become aware, that he was taking an substantial and unjustifiable risk to continue driving that day, and nevertheless disregarded that risk. Because the evidence of the defendants erratic driving on June 21, 2019 tends to make the fact of the defendant's impairment, intent, and culpable mental state more probable, it is relevant for a purpose other than propensity.

21. There is clear proof the defendant was the person operating the truck on the day in question. The clear proof requirement of Rule 404(b) is satisfied when "there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them." N.H. R. Ev. 404 (b)(2)(B). When determining the admissibility of this evidence, the trial court is not bound by the rules of evidence. State v.

Ericson, 159 N.H. 379, 388 (2009). In this case, there is clear proof the defendant was the one erratically driving the truck. The Littleton fire fighters observed a dark truck with a trailer hauling a white car driving on Route 2, in the direction of Berlin City Auto Group. A dark truck operated by the defendant, with a trailer, hauling a white Rav-4 arrived at Berlin City Auto Group, and dropped off the car approximately 90 minutes after the fire fighters were almost hit by a truck closely matching the description of the truck and trailer being operated by the defendant.

22. There is also clear proof that Sally Hull observed the defendant driving erratically on Route 302. Hull observed a dark truck with a trailer hauling a car. Once the truck pulled to the side of the road and Hull began to pass it, she saw that the truck was a dark truck with “Westfield Transportation” written on the side in tan lettering. The defendant was driving for Westfield Transportation on June 21, 2019, in a truck bearing the company’s name.

23. There is clear proof that the defendant, and not another person, was driving the defendant’s truck on June 21, 2019. The truck the defendant crashed was a dark truck with an attached flatbed trailer and “Westfield Transportation” lettered on the side. When the defendant arrived at Berlin City Auto Group, he was the only person seen by the employees working there. The defendant also admitted to authorities in subsequent interviews that he was in New Hampshire for the specific purpose of delivering a vehicle to Berlin City Auto Group in his capacity as a commercial truck driver. For these reasons, there is clear proof the defendant was the person who was seen driving erratically on June 21, 2019 at Berlin City Auto Group.

24. For the same reasons set forth supra ¶¶14-16, the probative value of the defendant’s erratic driving on June 21, 2019 is not substantially outweighed by the danger of unfair prejudice. The evidence of the defendant’s June 21, 2019, driving is highly probative of

his impairment as well as his culpable mental state at the time of the crash. “While evidence of a prior offense or bad act is always prejudicial, the prejudice is frequently outweighed by the relevancy of the evidence when the defendant’s knowledge or intent is a contested issue in the case.” State v. Dukette, 145 N.H. 226, 232 (2000) (internal quotations omitted). The evidence of the defendant’s erratic driving shows that the defendant was impaired on June 21, 2019. The defendant admitted to police that he had ingested heroin and cocaine before he began driving on the date of the crash. Because the evidence shows the defendant was unable to safely operate his truck throughout his time driving in New Hampshire, evidence of his erratic operation in the time he was driving preceding the fatal collision at about 6:30 p.m. is highly probative of his impairment. Further, the defendant’s continued erratic driving is probative of his culpable mental state at the time of the crash because it shows that he was aware that he was unable to maintain safe control over his truck and trailer. On several occasions, the defendant was observed driving substantially outside his lane of travel before correcting back. By correcting back, the defendant demonstrated that he was aware his truck was not where it should have been on several occasions. These events, taken together, show that the defendant was having consistent issues operating his vehicle in a safe manner. The defendant decided to continue driving instead of stopping to rest, recover, or otherwise address the issue causing his erratic operation. Therefore the evidence of the defendant’s erratic driving on June 21, 2019, is highly probative to show the defendant’s recklessness, negligence, and impairment.

25. Any risk of unfair prejudice does not substantially outweigh the probative value of the evidence of the defendant’s erratic driving on June 21, 2019. “Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to the jury’s sympathies, arouse its sense of horror, or provoke its instinct to punish, or trigger the mainsprings of human action that may

cause a jury to base its decision upon something other than the established propositions in the case. It is not, however, evidence that is merely detrimental to the defendant because it tends to prove his guilt.” Ericson, 159 N.H. at 389. The evidence of the defendant’s inability to safely drive his truck and trailer will not arouse a sense of horror or provoke an instinct to punish. When weighed against evidence that is probative of a defendant’s culpable mental state, even highly inflammatory prior acts do not substantially outweigh its probative value. State v. Thomas, 168 N.H. 589, 603 (2016). In Thomas, the State presented evidence of the defendant’s prior acts of child abuse against the victim to show the defendant acted with the culpable mental state of knowingly. The New Hampshire Supreme Court held that although the evidence of prior acts of child abuse “would have an emotional impact on the jury” the risk of unfair prejudice did not outweigh the evidence because it was “highly probative of matters actually in dispute.” Id. The evidence of the defendant’s erratic driving is substantially less prejudicial than evidence of acts of child abuse. Further, the probative weight of the defendant’s erratic driving is high. Finally, to the extent there is concern that the defendant would be unfairly punished for any conduct related to his erratic operation prior to the fatal crash, and if the defense deems limiting instructions necessary, the Court can construct appropriate instructions. Such judicial directives will properly and unambiguously channel the jury’s permissible use of the proffered evidence and thereby allay any possible unfair prejudice. See Milton, 169 N.H. at 436; Pepin, 156 N.H. at 279; State v. Newcomb, 140 N.H. 72, 76-77 (1995). So too can counsel voir dire potential jurors on any or all of the matters addressed in this motion, should they choose to do so. See, e.g., State v. Roberts, 136 N.H. 731, 747 (1993). For these reasons, the three prior instances of the defendant’s erratic operation on June 21, 2019, should be admitted by the court.

WHEREFORE, the State respectfully requests this Honorable Court:

- A. Order that the above stated evidence is admissible for the stated purposes; or
- B. Schedule a hearing in this matter; and
- C. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin Maki, do hereby certify that I have forwarded this a true copy of the within motion to counsel for the defendant on this 29th day of May, 2020.

/S/ Benjamin W. Maki