

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS.

MARCH 2021

State of New Hampshire

v.

Volodymyr Zhukovskyy
214-2019-CR-78

STATE'S PARTIAL OBJECTION TO DEFENDANT'S MOTION *IN LIMINE*
REGARDING WITNESSES BAYE, ASTUTO, AND CORRIGAN, AND MOTION TO
ADMIT THE TESTIMONY OF CORRIGAN

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, and respectfully objects to the defendant's motion *in limine* regarding witness Daniel Corrigan, and requests that the Honorable Court admit the testimony of Corrigan as admissible intrinsic evidence, or if the Court finds that it is extrinsic, alternatively under Rule 404(b). In support thereof, the State submits the following:

I. Background

1. On June 21, 2019, the defendant caused a motor vehicle crash that resulted in the deaths of seven people and serious bodily injury to another, and also endangered the lives of other oncoming motorcyclists. The defendant was subsequently indicted on seven counts of manslaughter, see RSA 630:2, I(B); seven counts of negligent homicide (DUI), see RSA 630:3, II; seven counts of negligent homicide, see RSA 630:3, I; and one count each of

aggravated driving while intoxicated (seriously bodily injury), see RSA 265-A:3,I(b), and reckless conduct, see RSA 631:3.¹ See State’s Ex. A (indictments).

2. On May 29, 2020, the State filed motion *in limine* #2, requesting the admission of testimony regarding the defendant’s hazardous driving on the day of the crash, as observed by motorist Sally Hull; Littleton firefighters Thomas Hartwell, Paul Ingersoll, and Quintin Ross (hereinafter “Littleton firefighters”); and Berlin City Auto Group employees Anthony Plant and Nicholas Belanger (hereinafter “Berlin City Auto Group employees). Specifically, the State requested the admission of Hull’s observations from approximately 4:30 p.m.; the three Littleton firefighters’ observations from approximately 4:56 p.m.; and the observations of the Berlin City Auto Group employees’ just prior to 6:00 p.m. The State argued that evidence of the defendant’s hazardous operation on the day of the crash was intrinsic evidence, admissible under Rules of Evidence 401 & 403, being highly relevant evidence inextricably intertwined with the charged conduct; and, alternatively, under Rule of Evidence 404(b).

3. Over the defendant’s objection, this Court granted the State’s motion, on the condition that the State establishes “clear proof” at a future hearing that the defendant was the hazardous operator. See June 26, 2020 Order, at 10 (*Bornstein, J.*). This Court did not reach the State’s argument that the evidence of the defendant’s hazardous operation leading up to the fatal crash was inextricably intertwined with the charged conduct. Id. at 8. Rather, this Court found that the evidence of the defendant’s hazardous operation was admissible pursuant to Rule 404(b). Id.

¹ The defendant was initially indicted on these charges on October 19, 2019. On March 10, 2021, the defendant was re-indicted on the seven counts of manslaughter; seven counts of negligent homicide (DUI);

4. On March, 2, 2021, the defendant filed a motion *in limine*, seeking to exclude similar testimony from Kathleen Baye, James Astuto, and Daniel Corrigan. The State does not object to the defendant's request to exclude the testimony of Kathleen Baye or James Astuto, absent any new evidence relevant to their anticipated testimony, either before, or during, trial. The State does not waive its ability to call either Baye or Astuto for any potential impeachment testimony. The State does, however, object to the defendant's request to exclude Daniel Corrigan's testimony.

II. Relevant Factual Summary

5. On June 26, 2019, New Hampshire State Police Trooper First Class Jonathan Stephens interviewed Daniel Corrigan, who had reported that he had "information about the fatal crash in Randolph, NH." State's Ex. A (TFC Stephens' Report). TFC Stephens' documented the following:

Corrigan stated on June 21, 2019 (the day of the crash) he was on Route 2 near the Jefferson/Randolph Town line about 5:15-5:20 PM. Corrigan was headed west going towards Jefferson. Corrigan said he passed the *black truck loaded with a white small SUV on the trailer headed the opposite way towards Gorham*. Corrigan said the vehicle was *halfway over the center lines and then went back into the lane*. He described the vehicle as a *black Dodge pick-up with a black trailer*. The *bed of the trailer was narrower than the ramp* which he felt was odd and unsafe. This occurred in the vicinity of the passing lane near the town line but he was not sure if it was in the actual passing area. This occurred as the truck was about 100 feet in front of him. He did not see the driver or get a license plate. Corrigan recalled there were other potential witnesses as there was one car in front and two vehicles behind him.

State's Ex. A (emphasis added).

6. On the day of the crash, the defendant was driving a four-door crew cab diesel 2016 Ram 2500 truck.² State’s Ex. B, at 7 (Relevant portions of The Crash Lab’s June 21, 2019 report). The truck was a large truck three-quarter ton truck, with an “overall length [of] 19.75 feet, [a] wheelbase length [of] 12.42 feet, [a] maximum width [of] 6.58 feet, and [a] curb weight [of] approximately 6,326 pounds.” Id. The truck was a dark, charcoal grey, color. The following photograph was taken by investigators on the day of the accident and reflects the color of the defendant’s truck.



Image 1 (CD #5, Image P6211207 (emphasis added and cropped for relevancy))

² The term “Dodge Ram” and “Ram” are synonymous; any differentiation between the two names are merely technical. See Jason Fogelson, Which One Is It: Dodge Ram or RAM?, Autotrader, <https://www.autotrader.com/car-shopping/which-one-is-it-dodge-ram-or-ram-268628> (last visited March 15, 2021).

7. Prior to and during the crash, the defendant was pulling a large black trailer that was notably larger than his truck. The trailer was over twice the length of the defendant's truck, 42.6 feet long, and was about two feet wider than the truck, 8.5 feet wide. See Id., at 10. The following photographs of the trailer were taken during the post-crash inspection of the defendant's truck and trailer.



Image 2 (CD #20, Image P6262269)

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Image 3 (CD# 75, Image DSCN1305)



Image 4 (CD# 20, Image P6262274)

8. On the day of the crash, the defendant was delivering a white Toyota Rav4 from Mechanicville, New York to the Berlin City Auto Group in Gorham. The following picture is of the white Rav4 the defendant was transporting on the attached trailer prior to the crash.



Image 5 (CD# 7, Image IMG_0225 (cropped for relevancy))

III. Argument³

9. Corrigan’s testimony is admissible pursuant to New Hampshire Rules of Evidence 401 and 403, because the defendant’s consistently erratic and dangerous driving leading up to the fatal crash is intrinsic to the charged conduct, as it is evidence of a single criminal episode demonstrating a continuous course of conduct prior to the collision, which was “inextricably intertwined” with the charged crimes, and was a necessary prelude to the charged conduct. Moreover, just like the evidence this Court has already conditionally admitted, if the Court finds the evidence is extrinsic, Corrigan’s observations of the

defendant's dangerous driving is admissible under New Hampshire Rule of Evidence 404(b), because it is highly probative of the defendant's recklessness⁴ and his impairment at the time of the charged conduct.

A. Evidence of the defendant's erratic driving leading up to the defendant causing the fatal collision is admissible evidence intrinsic to the charged conduct.

10. "'Other act' evidence is 'intrinsic,' and therefore not subject to Rule 404(b), 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" charged conduct. State v. Wells, 166 N.H. 73, 77 (2014) (quotation omitted). "'Intrinsic' or 'inextricably intertwined' evidence will have a causal, temporal, or spatial connection with the charged crime." Id. (citing United States v. Hardy, 228 F.3d 745, 748 (6th Cir.2000) (describing "inextricably intertwined" evidence" as "background evidence")). "Typically, such 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." Id. at 77-78 (quotation omitted).

11. Such intrinsic 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.'" Id. at 78 (quotation and brackets omitted). Here, evidence of the defendant's

³ The State incorporates the factual assertions and legal arguments of State's motion *in limine* #2, dated May 29, 2020, into the instant objection.

⁴ For purposes of this pleading, the defendant's charged conduct of negligence encompassed into the State's references to the defendant's recklessness.

reckless driving leading up to the fatal crash is not evidence governed by 404(b), but is intrinsic evidence that has “a causal, temporal, or spatial connection with the charged crime[s].” Id. at 77.

12. The defendant, among other things, is charged with recklessness and negligence. These charges require an assessment of the defendant’s conduct beyond just the moment of impact. The State’s burden in establishing criminal recklessness and negligence is enhanced, in comparison to civil claims. See State v. Littlefield, 152 N.H. 331, 351 (2005) (“the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence” (citation omitted)). The State is expected to present evidence demonstrative of a defendant’s recklessness and negligence prior to the impact. See, e.g., State v. Shepard, 158 N.H. 743, 749 (2009) (reversing the defendant’s conviction where the State only presented evidence that the defendant’s violation of a traffic law [was] due to momentary inattention); Littlefield, 152 N.H. at 352–53 (noting, in addition to evidence of the defendant’s impairment and speed leading up to the crash, the “significant evidence presented concerning the defendant’s . . . attention level that evening” in assessing the culpability of the defendant boat operator convicted of negligent homicide). Evidence of the defendant’s driving in the seconds, minutes, and hours, leading up to the charged conduct is intrinsic evidence that forms the backdrop of the charged conduct. It is the type of evidence that differentiates his charged criminal conduct from that of ordinary civil charges and establishes that his conduct was not a momentary lapse in judgment or of inattention, but was reckless and negligent. Thus, this type of evidence is intrinsic evidence that is essential to prove the charged conduct in these cases that is inextricably intertwined evidence under Rules 401 and 403, and is not within the purview of Rule 404(b).

13. For example, the State refers the Court to State v. Dion, 164 N.H. 544 (2013), where “evidence of defendant’s cell phone use during a *thirty-seven minute car ride prior to a fatal collision* with a pedestrian was intrinsic to the charged offense of negligent homicide.” State v. Papillon, 173 N.H. 13, 26 (2020) (emphasis added). Likewise, in State v. Nightingale, the New Hampshire Supreme Court found that Rule 404(b) did not apply to evidence of the defendant’s conversations in arranging a cocaine sale nearly 12 hours prior to the charged conduct of selling Oxycontin. See Nightingale, 160 N.H. 569, 574 (2010). Rather, the Court found that the conduct was “not other crimes, wrongs or acts, but rather [was] inextricably intertwined with evidence of the crime charged in the indictment,” that was “part of a *single* criminal episode.” Id. (quotations omitted and emphasis in original).

14. New Hampshire precedent demonstrates the Court’s recognition that criminal conduct does not occur in a vacuum. It also demonstrates the Court’s demand for evidence indicative of negligence or recklessness prior to the moment of charged conduct in these types of cases. As with Corrigan’s testimony, evidence leading up to an event gives the event necessary context, and provides the jury the requisite facts to assess the criminal nature of the charged recklessness and negligence. Testimony of the defendant’s demonstrated failure to keep his truck within his own lane—which ultimately was the cause of the fatal crash and charged conduct—is also highly probative of the charged conduct of impaired driving. Similar to needing more than a “momentary inattention” to establish criminal negligence, a single traffic violation may not establish impairment. See State v. Lorton, 149 N.H. 732, 735 (2003) overruled on other grounds by State v. Kelley, 159 N.H. 449, 986 A.2d 620 (2009) (in reversing defendant’s conviction for impaired driving, the Court found that the defendant’s single traffic violation of failing to use a turn signal was not corroborative of his alleged

impairment). Corrigan's testimony provides a critical fact for the jury to draw the reasonable inference that the defendant's failure to maintain control of his vehicle was, in part, because of his impairment.

15. The defendant's reliance on State v. Papillon, 173 N.H. 13 (2020) is in error. Unlike Papillon, where the testimony at issue was in reference to a separate crime regarding a separate matter, Corrigan's testimony is directly tied to the defendant's recklessness and impaired driving at the time of the charged conduct. The defendant in Papillon was, *inter alia*, convicted of conspiracy to commit murder for his role and facilitation of the murder of M.P., who he believed was a police informant. See id. at 17–19. At trial, the State was allowed to introduce statements by the defendant that demonstrated his willingness to arrange the murder of “another suspected police informant in a separate matter.” Id. at 25. In finding that “any connection between the challenged statements and the charged offenses is too attenuated,” the Court said, “Importantly, the defendant's apparent willingness to facilitate the murder of another, unrelated, suspected ‘snitch’ was not ‘part of the same criminal episode’ or at all part of a sequence of events leading to the charged conspiracy to murder M.P. or his subsequent murder.” Id. at 25–26. The same cannot be said here.

16. Corrigan's anticipated testimony is that he saw—just over an hour before the defendant caused the crash—a distinct vehicle that matched the description of the defendant's vehicle; in appearance, time, location, and direction of travel; driving in the same reckless and erratic manner as he was at the time of the crash. Unlike the testimony in Papillon, Corrigan's testimony does “complete the story” of the defendant's driving; it was a “prelude” to him causing a deadly crash shortly thereafter. Corrigan's testimony, as detailed above, dispels any concern that his reckless driving that day was a momentary error, or

isolated incident. The temporal nature of Corrigan’s testimony will also “enable[] the jury to realistically evaluate [the victims’ and eye witnesses’] testimony.” State v. Wells, 166 N.H. 73, 78 (2014). The conduct viewed by Corrigan is akin to the conduct detailed by several other witnesses, both motorists and motorcyclists, that day.

17. The defendant’s attempt to marry the introduction of the two “completely separate and distinct offenses” entered into evidence in United States v. Clay, 667 F.3d 689 (6th Cir. 2012), to Corrigan’s observations are also without merit. “In Clay, the [trial] court permitted the government to introduce evidence relating to an uncharged theft of a handgun from the car of an uninvolved person. United States v. Adams, 722 F.3d 788, 816 (6th Cir. 2013). In finding the admission was in error, the Sixth Circuit explained that:

[The defendant] was charged with carjacking and brandishing a firearm during and in relation to [a] carjacking. In order to convict on both counts, the government had to establish that [the defendant] did in fact brandish a firearm. Eyewitness testimony established that the carjacker used a silver semi-automatic handgun during the incident. Another witness, Abernathy, testified that she saw [the defendant] with a semi-automatic handgun either the day of or the day before the carjacking. The government argue[d] that the evidence of the uncharged theft was necessary to complete the story of the offense and explain how [the defendant] obtained the handgun.

Id. at 698. Ultimately, the Court found that “*nothing* confirm[ed] that [the] stolen weapon was the gun . . . [the defendant was seen with], or the gun used during the carjacking.” Id. (emphasis added).

18. Unlike Papillon or Clay, there is a sufficient factual nexus and reliable basis for the jury to draw the reasonable and permissible inference that Corrigan observed the defendant recklessly and dangerously driving in a time, place, and manner that elucidates his criminal responsibility for the charged conduct. His testimony is both reliable and competent evidence that will be further corroborated by, and will further corroborate, evidence of the

defendant's reckless, dangerous, and impaired driving. Further, the defendant's theories about the unreliability of Corrigan's observations are confuted when analyzed in context and in their totality.

19. The defendant's postulation that Corrigan saw a "different color" truck, "with a different configuration," Def.'s Mot. at ¶ 28, is made without any recognition of the greater context. The defendant takes issue with three aspects of Corrigan's observations, addressed in turn below:

- a. First, the defendant argues that Corrigan must be wrong because he said he saw a "black truck," and the defendant's "truck was *medium* gray, not black." Def.'s Mot. at ¶17 (emphasis added). As demonstrated by Images 1 & 2 above, the defendant was driving a notably dark grey colored truck, generally referred to as a charcoal grey. There is no credible basis to conclude that an inference by a jury that Corrigan saw the defendant's truck is unreasonable because he characterized the defendant's truck as black, rather than dark charcoal grey or "medium gray."
- b. The defendant also takes issue with Mr. Corrigan's observation that the "bed of the trailer" appeared "wider than the ramp," because the defendant claims the "back of the trailer was in fact narrower than the bed of the trailer." Def.'s Mot. at ¶17. It is clear from Images 3 & 4 above, that there is a section of the trailer that is distinctly wider than the "ramp." As highlighted below in Image 5, there is clearly a section of the trailer, at the merge of the "ramp" and "bed" area, that is notably wider than the "ramp" or back of the trailer. Corrigan's observation is even more reliable, given that when he saw the defendant, he was driving down the road and witnessing a large truck and trailer swerve halfway into the opposite lane of travel.

(Intentionally left blank)



Image 6 (CD# 20, Image P6262274 (emphasis added and cropped for relevancy))

- c. The defendant also posits that Corrigan’s timing is inconsistent with other evidence. Corrigan estimated that he saw the defendant’s dangerous driving “near Jefferson/Randolph Town line” at “about 5:15–5:20 p.m.” He saw the defendant traveling east, towards Gorham. Contrary to the defendant’s claim that the “place and time” of Corrigan’s observations are inconsistent with where he would have been, Def.’s Mot. at ¶ 28, he fails to understand that Corrigan’s estimations were just that, they were estimations. The defendant claims that the “38 miles” the defendant would have traveled from where he almost struck the Littleton firefighters, to Corrigan “could not have been covered in 24 minutes without averaging 95 miles per hour.” Def.’s Mot. at ¶ 18. However, it only takes minimal deviations from the estimated times to drastically alter the defendant’s average speed. For example, if Corrigan was off by only 10 minutes, and actually saw the defendant at 5:30, his average speed drops nearly a full third, from 95 MPH to 67 mph. Add in a mere 5 minute window of error for the firefighters estimated time and the defendant’s average speed drops to 58 MPH. If, Corrigan’s estimated location was off by even just a few miles, the defendant’s average speed drops to 53.8 MPH. Notably, the defendant traveled along Interstate 93 in this time frame, and several higher paced main road. Viewing these numbers for what they are, estimations, and recognizing the traffic speeds on the corridors the defendant

likely traveled, Corrigan's estimations are reasonably aligned with the other estimations in this case.

20. In addition to the above-described observations by Corrigan, he also clearly identified that the defendant was driving east, the direction the defendant was traveling to deliver a vehicle to Berlin City Auto Group in Gorham. Moreover, Mr. Corrigan, reported that the truck he saw driving recklessly was pulling a trailer that was "loaded with a white small SUV." It is clear that when Corrigan would have seen the defendant's truck driving east, the defendant would have had one vehicle on his trailer, a small white Toyota Rav4 compact SUV. Corrigan even correctly identified the manufacturer of the defendant's truck. Furthermore, Corrigan's observation of the truck driving into the oncoming lane is corroborative in and of itself. His observation was consistent with repeated other observations of the defendant failing to keep his truck in his lane of travel in the moments leading up to the crash. While the assertions made by the defendant may be fodder for cross examination, there is sufficient and reliable basis for a reasonable jury to draw the permissible inference that Corrigan observed the defendant driving before the charged conduct.

21. By way of example, in State v. Flanders, the defendant argued that the trial court erred by admitting the sexual assault victim's testimony about observing the defendant "shooting up with a needle" before the charged assault. No. 2017-0541, 2019 WL 2305166, at *1 (N.H. May 30, 2019) (unpublished, non-precedential). "The defendant argue[d] that this evidence was not probative of any fact in dispute because it was *unclear what the defendant may have injected*, and because the *victim made no connection between the injection and the charged assault*," and because the victim was "a child between the age of

eight and thirteen, [and] may not have understood what he was observing.” *Id.* (emphasis added). The New Hampshire Supreme Court upheld the trial court’s finding that the testimony was admissible and “was intrinsically related to the crime and, therefore, not subject to Rule 404(b) analysis.” *Id.* Even over the defendant’s arguments that there was no way to substantiate the victim’s observations or determine what exactly the defendant was “shooting up” with, the Court concluded that “the jury could have reasonably inferred that the defendant sought to attain “an altered mental state” before committing the assault.” *Id.*

22. Corrigan’s testimony “is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense[s], forms an integral part of [the other] witness[es’] testimony, [specifically the other bystanders’ and motorcyclists’ testimony,] [and] completes the story of the charged offense[s].” *Id.* at 77–78 (quotation omitted). Therefore, the State respectfully requests that the Court deny the defendant’s motion and admit his testimony as intrinsic evidence.⁵

B. The State respectfully requests that the Court rule on whether the proffered testimony of Corrigan, and the anticipated witness testimony detailed in the State’s motion *in limine* #2 and corresponding Court order, is intrinsic evidence.

23. In granting the State’s motion *in limine* #2, the Court did not reach whether the proffered testimony was admissible intrinsic evidence that was not governed by Rule 404(b). Instead, the Court ruled that the evidence was admissible subject to certain conditions. *See* Order, at 13 (*Borstein, J.*) (“Regardless of whether the proffered evidence is intrinsic, and therefore not subject to Rule 404(b), the Court finds that the evidence is admissible under

⁵ For the reasons articulated in the State’s motion *in limine* #2, regarding the testimony of Ms. Hull, the Littleton firefighters, and the Berlin City Auto Group employees, Corrigan’s testimony is admissible under Rules 401 and 403.

Rule 404(b) as it satisfies all three prongs of the Rule 404(b) test.”). The State respectfully requests that the Court rule on whether the proffered testimony by Daniel Corrigan is intrinsic evidence. In doing so, out of the interests of judicial economy and consistency, the State requests that the Court also rule on whether the testimony of Sally Hull, the Littleton firefighters, and Berlin City Auto Group employees is intrinsic evidence.

24. Any silence by the Court on whether the evidence is intrinsic will be considered on appeal as a ruling that the evidence is extrinsic. See State v. Thomas, 168 N.H. 589, 598 (2016) (assuming the challenged evidence was extrinsic to the charged crime and analyzing its admissibility under Rule 404(b), because “[a]lthough the trial court stated that the events the State sought to admit were ‘inextricably related to one another,’ the court nonetheless engaged in a Rule 404(b) analysis,” which the Court concluded “demonstrate[d] that the court did not consider the evidence to be intrinsic.”).

25. Accordingly, in order to preserve the appellate issue, the State respectfully requests that the Court rule on whether the testimony of Corrigan, Sally Hull, the Littleton firefighters, and Berlin City Auto Group employees is intrinsic evidence.

C. If the Court finds Corrigan’s testimony is not intrinsic evidence, and is governed by Rule 404(b), his testimony should be admissible for the reasons previously articulated by both the State and the Court in reference to the State’s Motion *in Limine* #2.

26. Corrigan’s testimony is the same form of witness testimony the Court has previously ruled admissible. In its previous motion, motion *in limine* #2, the State submitted that three separate accounts (by several distinct witnesses) of the defendant’s erratic operation in the hours preceding the fatal collision were admissible pursuant to New Hampshire Rules of Evidence 401 & 403. The State further argued that the evidence is

further admissible pursuant to Rule 404(b). The defendant objected, and on June 26, 2020, the Court issued an order granting the State's Motions in Limine #2, subject to the State's satisfying the clear proof prong of the Rule 404(b) test at an evidentiary hearing conducted outside of the jury's presence at trial. See Order, at 13 (*Borstein, J.*). In its order, the Court agreed with the State's 404(b) argument, ruling:

[T]he evidence is admissible under Rule 404(b) as it satisfies all three prongs of the Rule 404(b) test. First, the evidence is relevant for the purpose of proving an element of each of the charged offenses. At trial, the State will bear the burden of proving that the defendant acted recklessly, see RSA 630:2, I(b) and RSA 631:3, I. that he acted negligently, RSA 630:3, I-II, and that he was operating vehicle while under the influence of an intoxicating liquor, controlled or illegal drug, or combination thereof. RSA 265- A:3, I. A person acts "recklessly" when he "is aware of and consciously disregards substantial and unjustifiable risk" when such risk is "of such nature and degree that, considering the circumstances known to him, its disregard constitutes gross deviation from the conduct that a law-abiding person would observe in the situation." RSA 626:2, II(c). A person acts "negligently" when he "fails to become aware of substantial and unjustifiable risk" when such risk is "of such nature and degree that his failure to become aware of it constitutes gross deviation from the conduct that reasonable person would observe in the situation." RSA 626:2, II(d).

Id. at 8.

27. The testimony of Corrigan is the same type of evidence the Court has already held admissible pursuant to New Hampshire Rule of Evidence 404(b), and would be offered for consideration by the fact-finder under an identical rationale, previously recognized by the Court as admissible pursuant to Rule 404(b). Additionally, the testimony of Corrigan shares the same time-nexus to the fatal crash as does the prior three instances of conduct held admissible by the Court, as detailed above. Thus, Corrigan's testimony fits squarely within the timeframe of observations of the defendant's erratic driving in the seconds, minutes, and

hours preceding the fatal crash already held admissible by the Court, and offered under an identical rationale pursuant to Rule 404(b).

28. Accordingly, should the Court find that such testimony is governed by Rule 404(b), the Court, as it did in the June 26, 2020 order, rule that Corrigan's testimony is admissible pursuant to Rule 404(B), subject to the State satisfying the "clear proof" burden following an evidentiary hearing.

IV. Conclusion

29. Based upon the foregoing, Corrigan's testimony is admissible intrinsic evidence. If, however, the Court finds Corrigan's testimony is extrinsic, the Court should conditionally admit the testimony pursuant to Rule 404(b).

WHEREFORE, the State respectfully requests this Honorable Court:

- A. DENY the defendant's motion to exclude Daniel Corrigan's testimony;
- B. RULE on whether the testimony of Daniel Corrigan, Sally Hull, the Littleton firefighters, and Berlin City Auto Group employees is intrinsic evidence, not governed by Rule 404(b);
- C. GRANT the State's motion to admit the testimony of Daniel Corrigan, Sally Hull, the Littleton firefighters, and Berlin City Auto Group employees as intrinsic evidence, or, in the alternative, under Rule 404(b); or
- D. SCHEDULE a hearing in this matter; and
- E. GRANT such other relief as this Court deems just and equitable

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

The Office of the Attorney General

and

The Office of the Coös County Attorney

March 15, 2021

/s/ John G. McCormick

John G. McCormick, Esq.

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/s/ Shane B. Goudas

Shane B. Goudas, NH Bar #269581

Attorney

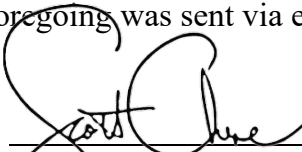
Office of the Attorney General

33 Capitol Street

Concord, New Hampshire 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via e-file to counsel of record.


Scott D. Chase

State's Exhibit A

**NEW HAMPSHIRE STATE POLICE
CONTINUATION OF INVESTIGATION REPORT**

1. CASE NO. CAR19-09674	2. INVESTIGATING TROOPER Jonathan H. Stephens	3. I.D. NO. 906	4. TOWN OF CRIME Randolph	5. TN. CD.	6. DATE OF REPORT 6/21/2019
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June 26, 2019

Approximately 1251 hours

On the above mentioned date and time, I spoke on the telephone with a male whom identified himself as:


**Daniel CORRIGAN
4 Water Street
Gorham, NH 03581
(603) 466-2529
DOB: 3/19/1955**

I was tasked with calling back **CORRIGAN** after he called NH State Police Troop F with information about the fatal crash in Randolph, NH in which seven motorcyclists were killed. **CORRIGAN** provided the following information during the unrecorded phone call:

CORRIGAN stated on June 21, 2019 (the day of the crash) he was on Route 2 near the Jefferson/Randolph Town line about 5:15-5:20 PM. **CORRIGAN** was headed west going towards Jefferson. **CORRIGAN** said he passed the black truck loaded with a white small SUV on the trailer headed the opposite way towards Gorham. **CORRIGAN** said the vehicle was half way over the center lines and then went back into the lane. He described the vehicle as a black Dodge pick-up with a black trailer. The bed of the trailer was narrower than the ramp which he felt was odd and unsafe. This occurred in the vicinity of the passing lane near the town line but he was not sure if it was in the actual passing area. This occurred as the truck was about 100 feet in front of him. He did not see the driver or get a license plate. **CORRIGAN** recalled there were other potential witnesses as there was one car in front and two vehicles behind him.

The conversation was not recorded.

END OF REPORT

	Page 1 of 1	SIGNED TFC Jonathan H. Stephens 	DATE 7-17-19
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State's Exhibit B



THE CRASH LAB[®]

Serving the Nation's Insurance & Legal Communities Since 1990

State of New Hampshire
v.
Volodymyr V. Zhukovskyy

Incident Date: June 21, 2019

**ANALYSIS REPORT, PHOTOGRAPHS, &
FORENSIC DIAGRAM**

BY THE CRASH LAB, INC.

The Crash Lab, Inc.
Post Office Box 850
Hampton, New Hampshire 03843-0850

VEHICLES-DAMAGE

10. Our analysis of this event is limited to the initial collision between the 2016 Ram 2500 Tradesman/2015 Quality Trailer operated by Zhukovskyy and the 1998 Harley-Davidson Electra Glide (FLHT) Motorcycle operated by Mazza.

THE 2016 RAM 2500

11. The 2016 Ram 2500 Tradesman is a four-wheel drive, four-door crew cab pickup truck with a Cummins diesel engine and a short bed. According to Expert AutoStats, Version 5.9.1, the Ram's overall length is 19.75 feet, the wheelbase length is 12.42 feet, the maximum width is 6.58 feet, and the curb weight is approximately 6326 pounds.

12. There is significant collision damage to the front of the Ram and fire damage to the entire vehicle. **(NHSP Photographs P6211207, P6211219, & P6262263)**



NHSP Photograph P6211207



NHSP Photograph P6211219



NHSP Photograph P6262263



Photograph D3-210 (lightened)



Photograph D3-213 (lightened)



NHSP Photograph P6262305

THE 2015 QUALITY TRAILER

16. This Quality Trailers of North Carolina trailer is a two-axle, 14,000 pound GVWR, diamond steel floor Car Hauler with a gooseneck hitch that attaches to the Ram's rear axle via the cargo bed. The trailer is approximately 42.6 feet long, including the gooseneck, and 8.5 feet wide. It appears to have electric brakes. There are tie down hooks along each side, and there appear to be sliding ramps concealed at each side. Retro-reflective tape is mounted along each side of the trailer. The trailer was empty when the collision occurred. During our examination, we weighed the trailer with a set of Intercomp E-Z WEIGH Scales and a Load Master Trailer Tongue scale. The total empty weight was approximately 4365 pounds. (See NHSP Photograph P6211207 on Page 7 and NHSP Photographs P6211224, P6211225, & P6211226)