THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

WILLIAM KELLY

212-2023-CR-337

DEFENDANT'S OBJECTION TO STATE'S REQUEST TO CHARGE

NOW COMES the accused, William Kelly, by and through counsel, Brett Newkirk and Katherine Canny, and respectfully objects to the State's request to instruct the jury that the State does not have to prove that he knew Christine Falzone was pregnant in order to obtain a conviction for the murder of her fetus. In support thereof, Mr. Kelly states as follows:

1. The State has charged Mr. Kelly with two counts of Second-Degree Murder, arising out of the death of Christine Falzone and the resulting death of her fetus on December 17, 2023, in Ossipee.

2. The indictment relating to the fetus alleges that Mr. Kelly recklessly caused the death of Christine Falzone's fetus under circumstances manifesting an extreme indifference to the value of human life, to wit, by means of multiple blunt force injuries causing Christine Falzone's death.

3. The State has filed a request to instruct the jury that the State does not have to prove that Mr. Kelly knew that Ms. Falzone was pregnant in order to establish his guilt of the murder of her fetus. Mr. Kelly objects to this request.

4. Under the subsection charged in this case, a person is guilty of Second-Degree Murder if he causes the death of another "recklessly under circumstances manifesting an extreme indifference to the value of human life." RSA 630:1-b, I(b).

5. In State v. Howland, the New Hampshire Supreme Court interpreted this statute to require both proof of a reckless mental state, as defined in RSA 626:2, II(c), *and* proof of circumstances manifesting an extreme indifference to the value of human life. 119 N.H. 413, 416 (1979). The latter, which the State labels the "extreme recklessness" component, is a separate and additional element of the offense that elevates a killing from manslaughter to murder. Id. at 415–16 (concluding that manslaughter is a lesser included offense to second-degree murder).

6. Therefore, even in a second-degree murder prosecution of this variant, the State still must prove the common element of recklessness beyond a reasonable doubt.

7. RSA 626:2, II(c) defines recklessness as follows:

> A person acts recklessly with respect to a material element of an offense when he is *aware of* and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances *known to him*, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in the situation.

(Emphasis added.)

8. It is well established that the test for recklessness—awareness and conscious disregard of a known risk—is a "subjective inquiry," which may be proven by surrounding facts and circumstances from which the defendant's awareness may be inferred. State v. Hull, 149 N.H. 706, 713 (2003); see also State v. Evans, 134 N.H. 378, 385–87 (1991).

9. It is true, as the State argues, that the subjective inquiry "does not depend upon the actual harm resulting from the defendant's conduct. Nor does it depend upon whether the defendant anticipated the precise risk or injury that resulted." Hull, 149 N.H. at 713 (citations omitted); see also State v. Belleville, 166 N.H. 58, 63 (2014).

10. But this does not mean that the defendant need not be aware of any risk at all, or of the existence of a potential victim. Indeed, the operative word in this analysis is "precise"—the *precise* risk or injury that resulted. In State v. Saintil-Brown, for example, the Court rejected

the defendant's argument that she was unaware of the risk that her elderly mother would develop necrotizing fasciitis and other specific medical issues when the defendant failed to call for medical help, noting that the evidence was sufficient to establish her awareness "that there was something wrong with the victim." 172 N.H. 110, 123 (2019) (emphasis in original). Likewise, in State v. Evans, the Court found sufficient evidence to prove recklessness where the jury could find that the defendant was aware that shaking a newborn baby involved a substantial and unjustifiable risk of "*any* serious bodily injury" to the baby. 134 N.H. 378, 385–86 (1991). Like in Saintil-Brown, Evans concluded that the State did not have to prove that the defendant was aware of the specific severe consequences of "shaken baby syndrome," which was, at that time, a relatively recent medical diagnosis. Id.

11. This line of cases stands for the proposition that, as long as the defendant is aware of a substantial and unjustifiable risk that *some* harm or injury of the type sought to be prevented by the statute will occur, the State need not prove that he anticipated the precise nature of the risk or injury—i.e., the mechanism or degree of the injury or the specific medical diagnosis that resulted. However, these cases do not go so far as to support the State's argument that he need not be aware of the existence of the victim of his reckless act, let alone the risk of harm to that potential victim.

12. This distinction can be demonstrated with a hypothetical scenario. Had the State alleged that Mr. Kelly recklessly caused *Ms. Falzone's* death by assaulting her, thereby triggering a complication from her pregnancy that led to her death, Mr. Kelly could be found guilty of second-degree murder without proof that he knew she was pregnant. This would be an example of the "precise risk"—specific medical complications or susceptibility to injury—he need not have anticipated to have acted recklessly in causing her death.

13. Contrary to the hypothetical, the charge at issue here is not the second-degree murder of Ms. Falzone; it is the second-degree murder of her fetus. The question is then whether Mr. Kelly was subjectively aware of, and consciously disregarded, a substantial and unjustifiable risk of death to the *fetus*. His knowledge of the pregnancy is a prerequisite to that inquiry.

14. While the New Hampshire Supreme Court has not had occasion to consider this specific issue, two other state courts have done so and have reached opposite conclusions.

15. In People v. Taylor, 86 P.3d 881 (Cal. 2004), and People v. Pool, 83 Cal. Rptr. 3d 186 (Cal. App. 3d Dist. 2008), on which the State relies, California courts held that the defendant's knowledge of the existence of the fetus was not required to convict the defendant of the murder of the fetus. Notably, the California Supreme Court interpreted the "implied malice" *mens rea* of the state's second-degree murder statute to require only a "conscious disregard for life *in general*," Taylor, 86 P.3d at 884 (emphasis added), citing a long line of California cases addressing that very issue. Our Supreme Court, by contrast, has never interpreted New Hampshire's definition of recklessness so broadly; to the contrary, as cited above, the jurisprudence requires a conscious disregard of a *known* risk.

16. The Delaware Supreme Court disagreed with the California analysis in a very similar case to Mr. Kelly's. In Hamilton v. State, 816 A.2d 770 (Del. 2003), three defendants were charged with second-degree murder for recklessly causing the death of a fetus by striking and beating his pregnant mother. Analyzing Delaware's definition of recklessness (which mirrors New Hampshire's), the Court held that the defendants' awareness of the pregnancy was required for the State to prove that they were "aware of and consciously disregarded a substantial and unjustifiable risk of death to [the fetus] through their conduct." Id. at 774 (quotations and alterations omitted). If the defendants did not know about the pregnancy, "they could not have been aware of and consciously disregarded a risk to the unborn fetus or child." Id. (same).

17. While neither state's case law is binding on this court, Delaware's analysis is more consistent with New Hampshire's jurisprudence on the reckless *mens rea* and is therefore more persuasive on the question at hand than the analysis in Taylor and Pool.

18. For all of the reasons stated in this objection, Mr. Kelly respectfully requests that the Court deny the State's request to instruct the jury that the State does not have to prove that he knew Ms. Falzone was pregnant for him to be found guilty of the murder of her fetus.

WHEREFORE, William Kelly respectfully requests that this Honorable Court:

a. Deny the State's request to charge; OR

b. Hear arguments on the motion; AND

c. Grant such other relief as is fair and just.

Respectfully submitted,
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By his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been forwarded to the Office of the Attorney General on April 28, 2025.

/s/ Katherine Canny
Katherine Canny, Esq.