THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CARROLL, SS. **JUNE TERM, 2024**

State of New Hampshire

v.

William Kelly
212-2023-CR-0337

STATE'S REQUEST TO CHARGE: KNOWLEDGE OF PREGNANCY

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General ("the State"), and submits a request for inclusion in the final jury charge in the case an instruction to the effect that the State does not have to prove that the defendant knew that his adult victim was pregnant to be guilty of murder of the fetus victim. In support of this request, the State says as follows:

1. The defendant has been indicted for two counts of reckless second-degree murder, arising out of the beating dead of his girlfriend Christine Falzone and the resulting death of her unborn child on about December 17, 2023, in Ossipee, New Hampshire. The defendant's trial is scheduled to begin in June, 2025.

2. The present request to charge relates to the murder count with respect to the unborn child. That indictment alleges in pertinent part as follows:

> [The defendant] 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.[1]

[1] Although the subject of this pleading is mens rea, the State notes that the indictment as charged properly alleges that the defendant caused the fetus victim's death not through direct infliction of injuries upon the fetus, but through cessation of life-sustaining maternal blood flow through trauma inflicted upon the mother. See, e.g., Commonwealth v. Ronchi, 202 N.E.3d 499, 513-14 (Mass. 2023).

3. As to this particular murder count, the State seeks a jury instruction to the effect that the State does not have to prove that the defendant knew that Christine Falzone was pregnant, in order to establish his guilt of the charged murder of her fetus.

4. In support of this requested jury instruction, the State begins by noting that the defendant has not been charged with a criminal offense that requires the State to prove that he acted knowingly. Compare RSA 630:1-b, 1(a). Rather, the defendant is charged with murder counts that require that the State establish that he acted recklessly—that is, that he was aware of and consciously disregarded a substantial and unjustifiable risk that death would result from his conduct, see RSA 626:2, II(c)—with extreme indifference to the value of human life. See RSA 630:1-b, I(b). As to the extreme reckless component of the applicable mens rea:

> Circumstances manifesting an extreme indifference to the value of human life means something more than merely being aware of and consciously disregarding a substantial and unjustifiable risk. If the advertence [to the risks involved] and the disregard are so blatant as to manifest extreme indifference to life, then the offense is murder . . . Thus where the accused's behavior constitutes a gross deviation from law-abiding conduct, but does not manifest an extreme indifference to the value of human life, the jury may properly find only manslaughter. Where, however, the evidence supports the additional element of "extreme indifference," the jury may find murder in the second degree. The existence and extent of disregard manifested is a factual determination to be made by the jury.

State v. Howland, 119 N.H. 413, 416 (1979) (internal quotation marks and citations omitted).

5. The actor's actual knowledge of resulting deadly consequences of his charged homicidal conduct is not a part of the pertinent mens rea of either of the charged second-degree murders against the defendant. Although the State must prove for each

offense in substance that the defendant blatantly disregarded an unjustifiable risk of which he was aware, that awareness does not require knowledge that the person who he was assaulting was pregnant. Indeed, as the New Hampshire Supreme Court has explained with respect to the requisite reckless mental state:

> It 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.

State v. Hull, 149 N.H. 706, 713 (2003) (emphasis added; internal citations omitted); see State v. Belleville, 166 N.H. 58, 63 (2014)(same).

6. From these analytical underpinnings, it logically and reasonably follows that the State does not have to prove that the defendant knew that Christine Falzone was pregnant when he assaulted and killed her, in order to be liable for reckless murder for the death of her fetus.[2] This conclusion is supported not only by the aforementioned jurisprudence on reckless mens rea in New Hampshire, but by a factually similar case from another jurisdiction, People v. Pool, 83 Cal. Rptr. 3d 186 (Cal. App. 3d Dist. 2008).

7. The defendant in Pool was convicted of first-degree murder for strangling his girlfriend and second-degree murder in connection with the death of her unborn fetus. Id. at 187. The latter charge required the prosecution to establish that the defendant "willfully, unlawfully, and with malice aforethought" killed the fetus. Id. The girlfriend "was in the early stages of pregnancy and was obese, [and so] her pregnancy was not

[2] This is not to say that the defendant's knowledge of Christine Falzone's pregnancy is not relevant and admissible at trial. To the contrary, such knowledge is relevant, and the State will introduce evidence of such, including photos of Ms. Falzone's outward physical appearance through which such knowledge can be readily inferred. The defendant's knowledge of Ms. Falzone's pregnant state bears directly upon his culpable criminal mental state with respect to her charged murder. That is, evidence that the defendant knew that the person who he was assaulting was pregnant and thus in a potentially more vulnerable state physically, makes it more probable than without such evidence, see N.H. R. Evid. 401, that when the defendant assaulted her he did so recklessly with the requisite extreme indifference to the value of human life.

something obvious externally," and the defendant "claimed not to have known [that she] was pregnant" until after he committed the charged crimes. Id.

8. The trial court in Pool agreed with the prosecution that the defendant's knowledge of the fetus's existence was not necessary in order for him to be guilty of that charged murder. Id. Consistent therewith, the trial court gave the following special instruction for the murder charged with respect to the fetus victim:

> Malice is a separate element that must be proved for each of the two murders charged. When a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no requirement that the defendant specifically know of the existence of each victim [i.e., the fetus].

Id. at 188. (emphasis added).

9. On appeal, the defendant argued that the trial court erred by instructing the jury in substance that his knowledge of the fetus's existence was not a prerequisite to a murder conviction. See id. Specifically, the defendant argued the following:

> A reasonable person with no knowledge, or even suspicion, that his victim is pregnant, should not be expected to know that strangling the victim might result in the death of another victim. . . . [T]he act of strangling a person is not inherently dangerous to anyone other than the person being strangled . . . [S]trangling an intended victim indicates only a conscious disregard for that life in particular.

Id. at 189 (emphasis in original).

10. The California Court of Appeal rejected the defendant's argument and agreed with the trial court that the State did not have to establish that he knew of the fetus's existence in order to be guilty of that murder. The appellate relied upon an earlier state supreme court precedent, People v. Taylor, 86 P.3d 881 (Cal. 2004), in explaining why knowledge was not required to prove guilt:

> The facts in Taylor are remarkably similar to the facts here. In Taylor, the defendant engaged in a physical struggle with his ex-girlfriend, eventually shooting her in the head and killing her. She died of a single gunshot wound to the head. The autopsy revealed she was pregnant, and the fetus was between 11 and 13 weeks old. The examining pathologist could not discern that the victim, who weighed approximately 200 pounds, was pregnant just by observing her on the examination table. The prosecution proceeded on a theory of second degree implied malice murder as to the fetus, and the defendant was convicted of two counts of second degree murder. Noting that the "[defendant] did not know [the victim] was pregnant," [an appellate court] reversed the conviction for fetal murder. Specifically, the court asked, "[w]here is the evidence that [defendant] acted with knowledge of the danger to, and conscious disregard for, fetal life?" and answered "t]here is none. This is dispositive."
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> Our Supreme Court reversed [], holding that [w]hen a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no requirement the defendant specifically know of the existence of each victim. [B]y engaging in the conduct he did, defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct.
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> . . . .
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> We find no basis in law or reason for distinguishing between murdering a pregnant woman by gunshot or by strangulation. Our Supreme Court in Taylor could hardly have been more clear: In battering and shooting [the victim], defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered. Here, in strangling [his girlfriend], defendant likewise acted with knowledge of the danger to and conscious disregard for life.

Id. at 188-89 (internal citations, quotation marks, and footnote omitted); see also, e.g., Commonwealth v. Crawford, 722 N.E.2d 960, 967 (Mass. 2000) ("The defendant's contention that the Commonwealth should be required to show that he knew of the fetus's existence and viability is without merit. The defendant was convicted of involuntary manslaughter, a crime which does not require proof of awareness of a particular victim. The Commonwealth need only prove wanton and reckless conduct

resulting in the death of a person. Wantonness and recklessness are determined by the conduct involved, not the resulting harm.") (internal citation omitted); People v. Hall, 557 N.Y.S.2d 879, 885 (N.Y. App. 1st Dept. 1990) ("It is axiomatic that a perpetrator of illegal conduct takes his victims as he finds them, so it is entirely irrelevant whether defendant actually knew or should have known that a pregnant woman was in the vicinity and that her fetus could be wounded as a result of his actions. Clearly, it is the nature of defendant's behavior which is at issue, not the identity of the victim(s) . . . .").

11. Consistent with the above legal principles and caselaw, the Court should include in its jury instructions, with respect to the charged murder count with the fetus listed as victim, direction to the effect that the State does not have to prove that the defendant knew that Ms. Falzone was pregnant for him to be found guilty of that charged murder.

12. Lastly, as a procedural matter that State has filed this request to charge well before the actual trial date and any applicable deadlines. The State consents to any request by the defense to extend the time by which to respond to this pleading.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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June 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was provided to Brett W. Newkirk, Esq., and Katherine Canny, Esq., counsel of record for the defendant.

Peter Hinckley