THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CARROLL, SS. **OCTOBER TERM, 2025**

State of New Hampshire

v.

William Kelly
212-2023-CR-0337

STATE'S SUBMISSION: STATE TRIAL EXHIBIT 9

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General ("the State"), and respectfully presents this submission in connection with State's trial exhibit 9, which has been marked at this time for identification.

1. The defendant is charged with two counts of reckless second-degree murder, arising out of the beating death of his girlfriend Christine Falzone and the resulting death of her unborn child on about December 17, 2023, in Ossipee, New Hampshire. Trial evidence is scheduled to commence on November 6, 2025.

2. The exhibit at issue, State's Exhibit 9, is a screenshot of text messages that the defendant sent to one of the State's anticipated witnesses, Jeremiah Stout. The text messages were sent about three weeks before the charged crimes.

3. When premarking trial exhibits, the defense in substance noted that they would not consent to marking State Exhibit 9 as full, unless and until relevancy were established. In this submission, the State sets forth relevancy, in the hopes of avoiding unnecessary disruption of evidence presentation to the jurors by the parties addressing relevancy during the witness's testimony.

4. At the outset, the relevancy of States Exhibit 9 properly should be viewed in the context of the homicide charges against the defendant. The defendant has been charged with reckless second-degree murder. See RSA 630:1-b, I(b). The requisite mental state for that crime is recklessness "under circumstances manifesting extreme indifference to the value of human life." Id. That essential element of recklessness involves a subjective inquiry into what the defendant was thinking at and around the time of the charged crimes. See State v. Belleville, 166 N.H. 58, 63 (2014); State v. Hull, 149 N.H. 706, 713 (2003); State v. Evans, 134 N.H. 378, 385 (1991); State v. Glidden, 122 N.H. 41, 50 (1982). That subjective inquiry, in turn, properly can take into account all facts and circumstances that could have influenced the defendant's judgment at the time. Evans, 134 N.H. at 385 ("There is seldom direct evidence of subjective awareness. Proof of subjective criminal elements may be proved by any surrounding facts or circumstances from which such knowledge may be inferred.") (internal quotation marks omitted); see, e.g., State v. McCabe, 145 N.H. 686, 689 (2001) (defendant's intoxicated state could properly be considered in assessing whether he acted recklessly); Hull, 149 N.H. at 713 (in assessing whether defendant's conduct was reckless, jury could consider, among other facts and circumstances, "his testimony that he had been drinking"). Cf., e.g., State v. Soto, 162 N.H. 708, 715-16 (2011) (discussing partial defense of provocation, under which defendant's extreme mental or emotional disturbance at time of homicide can reduce mens rea required for murder).

5. It is in this correct legal framework that relevancy should be assessed. In New Hampshire, "[r]elevant evidence is admissible" unless precluded by constitution, statue, or evidentiary rule. N.H. R. Evid. 402. Evidence is relevant when it has "any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence." N.H. R. Evid. 401; State v. Watkins, 148 N.H. 760, 767 (2002) ("Relevant

evidence need only have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Once proffered evidence has met this low threshold of admissibility, a trial court may preclude it only when "its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." N.H. R. Evid. 403.

6. Here, the relevance of State's Exhibit 9 is readily-apparent. Namely, the evidence sheds pertinent light on the defendant's mental state at the time of the charged crimes. More particularly, the evidence demonstrates that the defendant was experiencing various stressors in his life and that those stressors were causing him emotional turmoil, as he himself directly admitted in the text messages at issue. For these reasons, the proffered evidence makes it "more probable" than it would be without the evidence, see N.H. R. Evid. 402, that when the defendant violently attacked the pregnant victim, his judgment was affected and impaired by those contemporaneous stressors in his life, and that such admitted mental turmoil attributed to the defendant's reckless disregard of the victims' well-being.

7. State v. Fandozzi, 159 N.H. 773 (2010), is on point. The defendant in Fandozzi was charged with felony reckless assault arising from injuries sustained by his infant son. Id. at 777. At trial, over the defendant's objection, the trial court allowed the prosecution to elicit evidence regarding the defendant's marital conflict and his strained relationship with in-laws. Id.

8. On appeal, the New Hampshire Supreme Court rejected the defendant's challenge that the evidence regarding his relationship and personal conflicts with people other than the victim was irrelevant and unduly prejudicial. As to the contention that the evidence was not relevant, the Supreme Court reasoned:

> All evidence must be relevant to be admissible. Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. As to the evidence of marital conflict, the court found that the evidence was probative of the defendant's state of mind and how he handled the pressures of caring for a newborn and is relevant to whether he acted recklessly at the time. The court found the evidence regarding the defendant's strained relationship with his in-laws to be similarly probative. We conclude that given the nature of the charges against the defendant, the court reasonably found that such evidence was relevant to prove that the defendant acted with a reckless state of mind.

Id. at 779 (internal citations and quotation marks omitted; emphasis added); see, e.g., Dague v. State, 81 P.3d 274, 280-84 (Alaska 2003) (in child abuse case, murder conviction reversed when lower court excluded expert testimony proffered by defense that, in a majority of child abuse cases, a combination of stress, isolation, and some triggering event can create loss of control; excluded evidence was relevant to issue of defendant's state of mind and whether her conduct was reckless rather than knowing).

9. The proffered evidence here is substantively indistinguishable—both in type and purpose—from the evidence determined to be relevant and admissible in Fandozzi. Like that evidence, the proffered evidence here accurately indicates a number of stressors actively occurring in the defendant's life that—by his own admission—affected his emotional state at the time of the charged offenses. Namely, given these various stressors, it was "more . . . probable than it would be without the evidence" that the defendant would act rashly, excessively, and precipitously.

10. Moreover, to the extent that the defendant argues that the stressors he identified were not directly linked to the victims, such an argument ignores the reality, recognized by the New Hampshire Supreme Court, that even tangential stressors can impact and motivate charged behavior against another person. See Fandozzi, 159 N.H. at 779; State v. Sawtell, 152 N.H. 177, 181 (2005) (in trial against defendant accused of murdering girlfriend, evidence concerning

defendant's "dislike of being parent and attempts to evict the victim and his son from the home . . . was relevant and highly probative of the defendant's motive to commit murder.").

11. Because State Exhibit 9 is relevant, the Court should admit it unless its probative value is substantially outweighed by unfair prejudice or other countervailing interest. See N.H. R. Evid. 403. The balance here squarely falls on the side of admission. As to probative value, the defendant's mental state when he inflicted injuries on the pregnant victim is a key issue at trial. Moreover, the State must prove a culpable mental state beyond a reasonable doubt for each of the crimes charged against him. These realities only underscore the exhibit's probative value. See State v. Addison, 165 N.H. 381, 464-65 (2013); State v. McGlew, 139 N.H. 505, 507 (1995). It is axiomatic that there often is no direct evidence of an actor's state of mind, and thus the ascertainment of such often requires examination of all of the relevant facts and circumstances surrounding the physical act. See N.H. Bar Ass'n, N.H. Criminal Jury Instructions (1985), Instr. 2.02. As the New Hampshire Supreme Court has recognized, "because persons rarely explain to others the inner workings of their minds or mental processes, a culpable mental state must, in most cases . . . be proven by circumstantial evidence. . . . [and t]he jury is entitled to infer the requisite intent from the defendant's conduct in light of all the circumstances in the case because conduct illuminates intent." State v. Craig, 167 N.H. 361, 379 (2015) (internal quotation marks omitted); Addison, 165 N.H. at 465 ("Because persons rarely explain to others the inner workings of their minds or mental processes, one's culpable mental state must, in most cases . . . be proven by circumstantial evidence.") (internal quotation marks omitted). This case is no different, and the exhibit sheds important—and indeed, necessary—light on the defendant's reckless mental state.

12. Indeed, given the evidence that likely would be placed before the jury, the evidence is necessary to place events in proper context. The jurors will hear that the pregnant victim was the defendant's girlfriend, who lived with him for several months leading up to the charged offenses. Without the proffered evidence, the jurors would inaccurately and unfairly be left without relevant circumstances that they legitimately can conclude affected the defendant's judgment and that provide some explanation for what otherwise may be inexplicable acts of violence by him.

13. For all of these reasons, the exhibit's probative value is particularly high. That is in stark contrast to prejudicial effect. In point of fact, there is no unfair prejudice to the defendant from the evidence, let alone unfair prejudice that "substantially outweighs" the established probative value and that would warrant the exhibit's preclusion at trial.

14. As an obvious starting point in the applicable weighing process, the proffered evidence is, by its nature, prejudicial in the simplistic sense that its purpose is to assist in establishing relevant and material trial issues, and therefore the defendant's guilt. All of the State's other evidence at trial will perform this same proper function to varying degrees. But that elementary evidentiary interaction far from suffices to establish undue prejudice warranting preclusion of relevant evidence such as proffered material that is the subject of this motion. The law requires more to establish the high degree of true unfair prejudice that may warrant preclusion:

> Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Unfair prejudice is not mere detriment to a defendant from the tendency of the evidence to prove guilt. Rather, the prejudice required . . . is an undue tendency to induce a decision against a defendant on some improper basis, commonly one that is emotionally charged.

Sawtell, 152 N.H. at 181 (citations omitted); see State v. Kim, 153 N.H. 322, 330 (2006); State v. Lesnick, 141 N.H. 121, 127 (1990). And again, to rebut the presumption of admissibility, the evidence's prejudicial effect must "substantially outweigh" its probative value. See Kim, 153 N.H. at 330; State v. Lamprey, 149 N.H. 364, 368-70 (2003).

15. Considered in this proper context, the exhibit is not unduly prejudicial, let alone prejudicial to the extent of outweighing its significant probative force. The stressors identified by the defendant in the text messages—financial concerns, and related concerns about ability to pay for basic living necessities—are neither unique nor unusual. And even if they were, such distress and discord certainly is not of a nature that would arouse a jury's sense of outrage or horror. Quite the opposite, reasonable people would understand such issues as relatively commonplace.

16. Returning to State v. Fandozzi, see supra, the New Hampshire Supreme Court rejected the defendant's prejudice argument, under reasoning that applies with equal force here:

> The defendant argues that, notwithstanding its relevance, the admission of all this evidence was unfairly prejudicial because it portrayed him as someone who is subject to "stressors" and is unable to control his emotions. . . . Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.

Id. at 780.

17. For all these reasons, State's Exhibit 9 is relevant, its probative value is not outweighed by countervailing considerations, and it should be admitted at trial. Furthermore, to

the extent that the defense makes an objection premised on New Hampshire Rule of Evidence 404(b), reliance on that provision is misplaced. That provision pertains to "[e]vidence of other crimes, wrongs, or acts." N.H. R. Evid. 404(b). The proffered evidence simply is not the sort of bad acts evidence that falls within the rubric of that provision. The text messages at issue here do not set forth any misconduct on the defendant's part. Instead, the evidence pertains to particular experiences that the defendant was going through and attitudes that he had at the time of the charged offenses, and how those contemporaneous circumstances in turn could have influenced his thinking and behavior. Further, the propensity concerns underlying Rule 404(b) simply are not in play here. The proffered evidence does not even intimate bad character, or a particular trait or proclivity. Nor is the evidence offered to show that the defendant was predisposed to commit violence against the pregnant victim, or even that he had a general anger problem. Quite the opposite, the evidence reflects that the defendant felt differently than he typically did as a result of a confluence of stressing circumstances. That simply is not Rule 404(b) evidence, either in form or in substance.

18. For all these reasons, State's Exhibit 9 is relevant and admissible at trial.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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October 27, 2025

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been provided to Brett W. Newkirk, Esq., and Katherine Canny, Esq., counsel for the defendant, via the electronic case filing system.

Peter Hinckley