

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2024-0304

State of New Hampshire

v.

Adam Montgomery

---

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH

---

---

**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

---

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA  
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI  
SOLICITOR GENERAL

Sam M. Gonyea, Bar No. 273264  
Assistant Attorney General  
New Hampshire Department of Justice  
Office of the Solicitor General  
1 Granite Place South  
Concord, NH 03301  
(603) 271-1241  
sam.m.gonyea@doj.nh.gov

(Fifteen-minute oral argument requested)

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
ISSUES PRESENTED .....	5
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS .....	8
A.    Facts.....	8
1.    July 2019 Assault.....	8
2.    Second-Degree Murder.....	10
B.    Procedural History of Issues on Appeal.....	15
1.    Joinder.....	15
2.    Admission of Intrinsic Evidence.....	17
3.    Admission of Video Evidence.....	19
SUMMARY OF THE ARGUMENT .....	22
ARGUMENT .....	24
I.    THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO SEVER.....	24
II.   THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ADMITTING INTRINSIC EVIDENCE. ....	28
A.    Evidence of Neglect and Abuse.....	29
B.    Evidence of the Defendant Ceasing Communication Between Crystal and H.M.....	31
III.  THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ADMITTING VIDEO OF AN ENCOUNTER BETWEEN THE DEFENDANT AND POLICE ON DECEMBER 31, 2021.....	33
IV.   HARMLESS ERROR. ....	36

A.    Second-Degree Assault.....	37
B.    Second-Degree Murder.....	37
CONCLUSION .....	41
CERTIFICATE OF COMPLIANCE.....	42
CERTIFICATE OF SERVICE.....	43

## **TABLE OF AUTHORITIES**

### **Cases**

<i>In re Omega Ent., LLC</i> , 156 N.H. 282 (2007).....	33
<i>State v. Brown</i> , 159 N.H. 544 (2010) .....	passim
<i>State v. Manna</i> , 130 N.H. 306 (1988).....	40
<i>State v. Mason</i> , 150 N.H. 53 (2003).....	36
<i>State v. Ramos</i> , 149 N.H. 118 (2003).....	24, 26
<i>State v. Remick</i> , 149 N.H. 745 (2003).....	36
<i>State v. Rouleau</i> , 176 N.H. 400 (2024).....	28, 31, 36
<i>State v. Wells</i> , 166 N.H. 73 (2014).....	29

### **Rules**

N.H. R. Crim. P. 20(a).....	15, 24
Rule of Evidence 404(b).....	17

## **ISSUES PRESENTED**

- I. Whether the trial court erred by denying the defendant's motion to sever the second-degree assault and second-degree murder charges.
- II. Whether the trial court erred by admitting certain evidence as intrinsic to the charged crimes.
- III. Whether the trial court erred by admitting video evidence depicting an encounter between the defendant and the police on December 31, 2021.

## STATEMENT OF THE CASE

The defendant, Adam Montgomery, was indicted on one count of second-degree murder under circumstances manifesting extreme indifference to the value of human life for murdering his five-year-old daughter, H.M., in December 2019 by repeatedly punching her in the head. AD 48.<sup>1</sup> He was indicted on one count of falsifying physical evidence and charged with abuse of a corpse for concealing, dismembering, and disposing of H.M.'s body. AD 51. He was indicted on one count of witness tampering for attempting to induce his then-wife, Kayla Montgomery, to testify or inform falsely regarding H.M.'s death and disappearance. AD 49. The defendant was also indicted on one count of second-degree assault for punching H.M. in the face in July 2019. AD 47.

The defendant filed an assented-to motion to join all the charges for trial, which the court (*Messer, J.*) granted. AD 67. Subsequently, he moved to sever the second-degree assault charge from the other charges, which the court denied. AD 67-80. The defendant was tried *in absentia* before a jury over the course of eleven days in February 2024. *See* T 1, 5-6. The jury returned guilty verdicts on all charges. T 2056-57.

The court sentenced the defendant as follows: (1) 45 years to life for second-degree murder; (2) 3½ to 7 years for falsifying physical evidence;

---

<sup>1</sup> Citations to the record are as follows:

“DB” refers to the defendant’s brief;

“AD” refers to the addendum to the defendant’s brief;

“App.” refers to the appendix to the defendant’s brief;

“T” refers to the consecutively paginated transcripts of the eleven-day jury trial beginning on February 7 and concluding on February 22, 2024;

“PTH” refers to the transcript of the pretrial hearing held on January 16, 2024; and

“S” refers to the transcript of the sentencing hearing held on May 9, 2024.

(3) 3½ to 7 years for witness tampering; (4) 4 to 8 years for second-degree assault. S 46-48. Those sentences were “consecutive to each other” and to a sentence the defendant was already serving. S 46. The defendant was also sentenced to 12 months for abusing H.M.’s corpse, which was suspended for 25 years, but would be served consecutively if it were imposed. S 48.

## **STATEMENT OF FACTS**

### **A. Facts**

The State's case at trial consisted of 47 witnesses and many more evidentiary exhibits. *See* T 172-73, 375-77, 573, 820-22, 1108-1112, 1339-40, 1582-83, 1794.

The jury heard extensively from the defendant's then-wife, Kayla, and many other witnesses who knew and/or interacted with the defendant between the time he obtained custody of H.M. and the time he was arrested for her murder. *See* T 267, 326, 331, 375, 573, 791, 801, 849, 866, 986, 1057, 1400, 1404, 1508, 1521, 1561, 1591, 1615, 1631, 1664, 1806, 1847.

The jury also heard from a nurse who examined H.M. shortly before her death, a DCYF case worker, forensic scientists, and several law enforcement officers who investigated this case. *See* T 260, 336, 347, 832, 890, 946, 1046, 1081, 1134, 1182, 1236, 1249, 1287, 1349, 1442, 1725, 1749, 1765.

The following facts are taken from the testimony at trial.

#### **1. July 2019 Assault**

H.M. was born to the defendant and Crystal Sorey on June 7, 2014. T 245, 249. The defendant also had two sons — Declan and Seamus — with Kayla, both of whom were younger than H.M. T 389, 392-93.

Custody of H.M. went back and forth between Crystal and H.M.'s foster mother, Michelle Raftery, and H.M. spent more than two and one-half years with Raftery between 2014 and 2019. T 229-231, 246-48. By both Crystal's and Raftery's accounts, H.M. was a happy, sweet, loving

child who was full of life, and who was potty trained around the age of three. T 231, 236, 247-48.

The defendant obtained custody of H.M. in February 2019. T 249-50, 386-88. At the time, the defendant lived at 77 Gilford Street in Manchester with Kayla, their son Seamus (Declan had not yet been born), and the defendant's uncle Kevin. T 388-89. Crystal testified that the last time she saw or spoke to H.M. was in April 2019 because the defendant blocked her subsequent attempts to contact H.M. T 250-53. Crystal messaged Kayla on Facebook, called DCYF, and wrote to the mayor trying to contact H.M., to no avail. T 253.

In July 2019, Kevin took a trip to Florida. T 275-76. When Kevin arrived back home, H.M. was "standing in the kitchen" with "a black eye" like "a racoon's eye, black and blue." T 278. Kevin asked H.M. what she had done and the defendant, who was standing "right behind her," said that "[s]he didn't do anything. I bashed her around the fucking house." T 278-79. He said it "like a cocky son of a bitch." T 279. The defendant said he hit H.M. because she blocked the mouth of his infant son, Declan, until his lips turned blue. T 279. Kayla also saw H.M.'s black eye and the defendant told her the same story. T 397-98.

Kevin moved out of the house the following morning. T 280. He told many people about the assault, including DCYF. T 280-81. A DCYF case worker visited 77 Gilford Street in July 2019 but saw the defendant and "a young girl" get into the car and leave as he arrived. T 348-51. The case worker followed up a week later and spoke to H.M., and he saw a small red mark and discoloration under one of her eyes. T 357. Similarly, the defendant's friend Nicholas testified that he saw H.M. in July 2019 and

observed her black eye. T 332-33. In 2021, the defendant told two other friends about the July 2019 assault. *See* T 329, 1854.

Kevin stopped paying the mortgage after he left. T 399. The Montgomery family (the defendant, Kayla, their two sons, and H.M.) was thereafter evicted from 77 Gilford Street the day before Thanksgiving in 2019. T 399. The Montgomery family began living in their Chrysler Sebring in the parking lot behind Colonial Village in Manchester, where their friend Anthony Boderio lived. T 400-401.

## **2. Second-Degree Murder**

Although H.M. had been potty trained for years, she began having accidents almost daily when the family started living in the car. T 401-402. This made the defendant angry, and he hit H.M. hard when it happened. T 402-03. “The more accidents she had, the more he would get angry, and he would hit her repetitively.” T 403. Before long, H.M. “started getting black eyes and bruises on her face, on her legs.” T 403-404.

Kayla said that the defendant covered H.M. with a comforter in the backseat whenever they encountered anybody so that nobody would notice H.M.’s bruises. T 404. For example, when the family was in an accident on November 29, 2019, the defendant covered H.M. so that responding police officers would not see her bruises. T 404-06. It worked, because the responding officer identified the people in the defendant’s car and did not see H.M. T 836-840.

H.M.’s accidents increased in frequency, and she had her last one on the morning of December 7, 2019. T 408. The defendant responded by “yelling and screaming at her and punching her in the head.” T 408.

Naturally, that made H.M. cry. T 408. The defendant then drove to the methadone clinic where he and Kayla received methadone doses around 7:00 a.m. T 408-410.

The defendant “smelled urine” when he came back to the car “and he started yelling at [H.M.] and kept hitting her in the head repetitively.” T 410. The defendant drove to Burger King at Kayla’s request, and H.M. “was crying a lot” and “making a weird [moaning] noise” but was not saying anything. T 411-12. The Montgomery family came to “[a]t least two or three” red lights en route to Burger King and at each one the defendant went “over the driver’s seat, like in between the passenger seat, and he was just punching [H.M.] repetitively in the head.” T 411-12. While H.M. cried helplessly and clung to life, the defendant, her father, “[t]old her to shut up -- shut the fuck up. Stop crying.” T 412.

Kayla put her “arm up and said to stop” but the defendant gave her “this look that was, like, evil,” and she “was scared.” T 412. The defendant finally stopped pummeling H.M. and told Kayla that he thought “he really hurt [H.M.]” because “he felt something.” T 414. The defendant put the comforter over H.M., who was no longer making any noise, and the family ordered from Burger King before returning to Colonial Village where the defendant and Kayla got high on heroin and crack. T 415-417. Nobody checked on H.M. T 417.

The family left the parking lot a short time later and the car abruptly “died” at an intersection. T 418. The defendant tried to wake H.M., but he had killed her, so he took a duffel bag from the trunk, “folded her in half and put her in the duffel bag.” T 418-19. H.M.’s “eyes were puffy” and her face “was all black and blue[.]” T 420.

The defendant, Kayla, and their two sons walked back to Colonial Village, and the defendant stashed H.M.'s body in a snowbank. T 420. The family slept in a friend's car that weekend. T 422-24. After that, they went to Kayla's mother's house, where the defendant stored the bag with H.M.'s body in a cooler for "a couple weeks." T 425-32. After leaving Kayla's mother's, the Montgomery family went to Families in Transition (FIT) in Manchester. T 432.

Kayla said that, at FIT, the defendant put the bag with H.M.'s body "in the ceiling, in the vent of the room that [they] stayed in." T 433. The police cut that section of the ceiling out during their investigation, and it was visibly stained inside. *See* T 1156-57. The stain tested positive for blood and the DNA matched H.M.'s profile, which was developed using her toothbrush. *See* T 1099-1102, 1262-64, 1359-1362. Additionally, the ceiling and vent were tested for fingerprints, and the only prints on them belonged to the defendant (including several fingerprints and a palm print) and the man who installed the ceiling. T 1246-47, 1310-29.

The defendant had to remove H.M. from the ceiling because of the leaking fluid and stench, so he contorted her into a "diaper bag," which took a couple of hours in the bathroom followed by a cleanup involving ammonia. T 437-39, 445, 448. Kayla brought the diaper bag to the defendant at Portland Pie Company, where he worked, and he put the bag in the walk-in freezer to control the smell and leaking of fluids. T 446-49. Two of the defendant's former coworkers testified that they saw him bring the bag into the freezer. T 1401-03, 1406-09.

On February 20, 2020, after a month and a half at FIT, the Montgomery family moved to an apartment on Union Street in Manchester.

T 435, 449. The defendant kept the diaper bag with H.M.'s body in the refrigerator and talked about dismembering and disposing of her using lime. T 441, 450-51. A few days later, the defendant spent hours in the bathroom of their Union Street apartment sawing apart H.M.'s body and putting her into a bag of lime. T 455-61. Kayla helped cut the clothes off H.M. but then left the bathroom because she "couldn't handle it." T 458. The defendant put H.M.'s remains back in the diaper bag and put the bag in the freezer. T 461.

The police investigation discovered that on February 26, 2020, at 11:20 a.m., \$503.50 was withdrawn from Kayla's bank account at the Citizens Bank on South Willow Street. T 1455-56. Records from a Home Depot less than a half mile away showed a purchase on the same day at 11:42 a.m. of a 40-pound bag of lime, an "M18 FUEL grinder," two saw blades, and a battery. T 1427-36, 1456-57, 1462-63. The total was \$396.35, and it was paid for with \$400 cash. T 1463.

The defendant contacted his friend, Travis, and asked him to procure a U-Haul that the defendant intended to use to dispose of H.M.'s body. T 464-67. Travis rented the U-Haul with the help of his friend, Brendan, though Travis thought the defendant was using the U-Haul to move. T 1595-99. A receipt from U-Haul showed that Brendan rented a van on March 3, 2020, and Brendan testified to the same. T 1549. Travis then gave the U-Haul to the defendant. T 1602.

That night, the Montgomery family, Travis and his girlfriend Brittany stayed in separate rooms at the EconoLodge in Manchester. T 467, 1509-10, 1599-1600. Travis testified that he was outside with the defendant smoking a cigarette and the defendant "was pacing back and

forth” saying “I fucked up” repeatedly. T 1602-03. Travis asked the defendant what he meant, but the defendant did not clarify. T 1602-03.

The defendant kept the bag with H.M.’s body in the hotel room fridge. T 468-69. Kayla testified that the defendant left in the middle of the night. T 469. Kayla knew that he was going to dispose of H.M.’s remains, but he did not tell her where so that she would not be able to tell the police. T 469. Kayla said the defendant returned right before the sun came up and told her that he “got rid of [H.M.]” T 470.

U-Haul records showed that the defendant traveled about 130 miles in the van, T 1551, and toll records from Massachusetts showed that he went south over the Tobin Bridge at 4:45 a.m. and north over the bridge at 5:25 a.m., T 1823. Searches in that vicinity of areas where the defendant may have dumped H.M.’s remains were unsuccessful, T 1827, and H.M. has never been found. According to the defendant, efforts to find H.M.’s body is “just a way to waste taxpayers’ money[.]” T 1902.

The police began searching for H.M. in December 2021, when Crystal went to the Manchester Police Department because she had not seen or heard from H.M. in over two years. T 252-254. If people asked about H.M., the defendant and Kayla said that the defendant dropped H.M. off with Crystal around Thanksgiving 2019. T 384, 496, 1622, 1637, 1852. Before he was arrested, the defendant told a close friend of his that he “hated [H.M.] right to his core” because she reminded him of Crystal. T 1856 (quotation modified).

## **B. Procedural History of Issues on Appeal**

### **1. Joinder**

In November 2022, the defendant filed an assented-to motion to join the second-degree assault charge with the second-degree murder and other related offenses. AD 67; App. 3. “In so filing,” the defense “was satisfied that joining the offenses would allow for fair and just verdicts on each individual charge” because, although the assault and murder occurred roughly five months apart, “[a] jury would heed the Court’s instructions to consider the charges separately.” App. 3.

In January 2024, the defendant moved to sever the assault charge. AD 67; App. 3-6. The motion asserted that “the state of the evidence ha[d] changed dramatically” after receiving a *Zwicker* letter from the State relaying disclosures made by Kayla. App. 3-4. Kayla disclosed that: (1) she witnessed the defendant hit H.M. before the family was evicted from their home; (2) the defendant cut off contact with H.M.’s mother out of fear that she would see bruises on H.M.; and (3) H.M. looked skinny and exhausted during the time the family lived in their car. App. 3-4. From these disclosures, the defense concluded that the State sought to “portray[] the second degree assault and second degree murder charges as mere parts of a larger, pervasive, and sustained pattern of abuse.” App. 3.

Accordingly, the defense argued that severance was “in the interests of justice.” App. 3 (quoting *N.H. R. Crim. P. 20(a)(5)*). The defense also asserted that the joinder factors articulated in *State v. Brown*, 159 N.H. 544 (2010), weighed against joinder. App. 5.

The State objected. App. 7-18. The State contended that the defense had been “on notice for well over a year about discovery documenting [H.M.’s] physical condition in the months and days leading up to her death, as well as the bruises she suffered during that time period.” App. 7. To the extent that Kayla had changed her statements, that was “fodder for cross-examin[ation], but the information and allegations [were] not new[.]” App. 11-14. Kayla’s statements “during witness preparation [did] not ‘dramatically’ change the state of any evidence.” App. 7.

The State argued that the *Brown* factors “in their totality” supported joinder. App. 15. The State acknowledged that the charges were spatially and temporally separate. *See* App. 5, 15. However, the charges involved a common defendant and victim, and both involved the defendant hitting H.M. in the head when he was angry with her. App. 16. Further, the “witnesses establishing both crimes [were] similar.” App. 16. Finally, a jury would have no difficulty considering the assault and murder charges separately after being properly instructed by the court. App. 16.

The trial court heard arguments during the final pre-trial hearing on January 16, 2024. *See* PTH at 1-47. Subsequently, the court denied the motion. AD 67-80. The court agreed that the assault and murder charges lacked a temporal and spatial relationship. AD 73. The court also found that the law of assault and murder did not overlap but gave that factor little weight because the “law to be applied on the charges [was] not particularly complex” and would not “create confusion amongst the jury[.]” App. 74-75. But the remaining factors supported joinder. *See* App. 73-76.

The charges involved a common victim and defendant, and the defendant’s mode of operation was the same — punching H.M. in the head

when he was angry at her. AD 73-74. Further, “underlying both cases” was testimony from the police officers who investigated H.M.’s disappearance and Kayla, and there “would be significant duplication of evidence regarding preliminary matters” since the assault charge was brought in connection with the police investigation into H.M.’s disappearance, which ultimately resulted in the murder charge. AD 75-76. Accordingly, the *Brown* factors weighed in favor of joinder. AD 76.

The court also found that the interest of justice did not require severance. AD 76-80. The court explained that the charges and evidence supporting them were not so complex that a jury could not intelligently apply the law to the charges separately, and any remaining concern could be “quelled through carefully crafted jury instructions.” AD 79. The court found that both parties stood to benefit from joinder, and Kayla’s disclosures gave the defendant fertile ground for cross-examination that he could use to undermine her credibility broadly. AD at 79-80.

## **2. Admission of Intrinsic Evidence**

Before trial, the defendant filed a motion *in limine* requesting the court to exclude any prior or subsequent bad act evidence that failed to satisfy Rule of Evidence 404(b). App. 40-44. Relevant to this appeal, the defendant’s motion identified: (1) evidence that the defendant neglected and abused H.M. in the months leading up to her death; and (2) evidence that the defendant prevented H.M.’s mother, Crystal, from contacting H.M. beginning in April 2019. App. At 40-44.

The State filed a partial objection. App. 44-61. The State argued that evidence that the defendant neglected and abused H.M. in the months

leading up to her death was intrinsic to the murder charge and not subject to Rule 404(b). App. 49-52. The State contended that the evidence explained why the defendant kept H.M. hidden under a blanket and combatted his claim that he returned H.M. to Crystal in November 2019. App. 50. Further, H.M.'s physical condition leading up to her death was "directly probative of the defendant's intent" and his "extreme indifference to the value of [H.M.'s] life," which was an element of the crime. App. 50.

The State argued that evidence of the defendant cutting off contact between H.M. and Crystal beginning in April 2019 was also intrinsic to the murder charge. App. 57-59. The State planned to call Crystal at trial and her testimony about the defendant denying her contact with H.M., and the efforts she made to contact H.M. before going to the police, formed an integral part of her testimony. App. 57-58.

The defendant's motion to exclude evidence of neglect and abuse was granted and denied in part. AD 85-88. The court admitted "evidence of the defendant's conduct and [H.M.'s] condition in the two weeks leading up to, and including, November 29, 2019, and between November 29, 2019, and December 7, 2019." AD 87. The court found that evidence intrinsic to the murder charge because it was "part and parcel of the events that took place during the days leading up to [H.M.'s]" death, was "related to the defendant's claim that he had taken [H.M.] to her mother[,]" and had a sufficiently close temporal and spatial connection to H.M.'s murder. AD 86. The court's ruling did not "give the State carte blanche" to enter evidence of "neglect or abuse outside this timeframe." AD 88.

The court denied the defendant's motion to exclude evidence that he ended contact between Crystal and H.M. AD 90-91. The court found that

evidence of the defendant preventing Crystal from contacting H.M. beginning in April 2019, and of the efforts Crystal made to contact H.M. before going to the police, was inextricably intertwined with the murder charge. AD 90-91.

The defendant filed a motion to reconsider, *inter alia*, the court's admission of the defendant's interference with Crystal's attempts to contact H.M. AD 96-101. The defendant contended that evidence of him ending communication between Crystal and H.M. "in April 2019 does not fill what would otherwise constitute a vacuum" in Crystal's testimony. AD 99.

The court denied his motion, noting that the defendant had "acknowledge[d] that evidence of the defendant's effort to block contact with Crystal on or after the time of [H.M.'s] death is admissible." AD 101. As to evidence prior to that time, the court disagreed with the defendant and ruled that Crystal's effort to contact H.M. "beginning in April 2019" formed an integral part of her testimony and helped to "complete the story" of her reporting to law enforcement." AD 101. Additionally, the evidence directly undermined the defendant's assertion that he returned H.M. to Crystal in November 2019. AD 101.

### **3. Admission of Video Evidence**

The police spoke to the defendant on December 31, 2021, in an effort to locate H.M., and that encounter was captured on the officers' bodycam videos. *See* AD 81-82; App. 161-63. In September 2022, the defendant successfully moved to suppress any statements he made to the police during that encounter. *See* App. 161-62; AD 82.

In December 2023, the defendant moved to suppress “*any* evidence of the encounter” on the ground that it would “cause the jury to engage in speculation regarding the encounter” and thereby “impinge[] on his right to remain silent.” AD 82; App. 158-60. The defendant also contended that the probative value of the video was substantially outweighed by the danger of unfair prejudice. AD 82; App. 158-60.

The State objected. App. 161-68. The State argued that the video — without the audio— did not implicate the defendant’s right to remain silent. App. 162-64. Further, the video was probative of the defendant’s demeanor, living situation, and who he was with while police were looking for H.M., who was supposed to be in his custody. App. 163-65.

The court granted and denied the motion in part. AD at 81-83. The court agreed with the State that much of the video involved “relevant information” that included “neither questioning of the defendant nor the defendant’s statements.” AD 82. The police contacted the defendant based on a report that H.M. was missing and made observations of the defendant, his living situation, and who he was with, “prior to interacting” with him. AD 82. Those observations were “relevant to the investigation” into H.M.’s disappearance. AD 82. The court also found that the video would “not cause the jury to speculate on excluded or otherwise inadmissible evidence.” AD 82-83. Accordingly, the court denied the defendant’s request to exclude the video entirely. AD 83.

However, the court granted the motion to “the extent that the State [sought] to admit evidence of the defendant’s ‘demeanor[.]’” AD 83. The court agreed with the defendant that evidence of the questions he was asked by police or how he reacted to them would cause the jury to speculate on

the defendant's answers to the questions, which implicated his right to remain silent. AD 83. Accordingly, evidence of the questions police asked the defendant or his demeanor during questioning was excluded. AD 83.

The defendant timely appealed the above-discussed rulings.

## SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motion to sever. The factors articulated in *Brown*, 159 N.H. at 551-52, weighed in favor of joinder because the crimes shared a common victim and defendant, the defendant's mode of operation was the same, and the cases involved a notable degree of overlap in witnesses. The interests of justice did not require severance because the law underlying the charges and the evidence supporting them was not complex, so the charges could be separately and intelligently considered by a jury.

The trial court correctly admitted evidence of the defendant's neglect and abuse of H.M. and his ending contact between Crystal and H.M. as intrinsic to the second-degree murder charge. The former was probative of the defendant's intent and disregard for the value of H.M.'s life, completed the story of the murder, and bore a temporal and spatial relationship to the crime. The latter completed the story of how law enforcement became involved in this case and was integral to Crystal's testimony.

The court committed no error in admitting a video depicting an encounter between the defendant and police on the day that police began searching for H.M. The video did not include audio and depicted officers asking the defendant questions that he "seem[ed] to answer." DB 41. Accordingly, the video did not implicate the defendant's right to remain silent and there was no risk of unfair prejudice that the jury would speculate about the video in a way that implicated that right. The video was probative of the police investigation and the defendant's circumstances when law enforcement became involved.

Even if the trial court erred in any or all of the ways the defendant argues, however, the errors were harmless beyond a reasonable doubt.

The defendant admits that the State's assault case was strong. *See* DB 31-32. Despite his argument to the contrary, the murder case was equally strong. In sum, the evidence of the defendant's guilt on both charges was overwhelming and the jury would have convicted him even if the trial court did not commit the errors alleged.

Further, any joinder error was harmless because the evidence of the two crimes was presented at trial and discussed in closing separately, and the trial court instructed the jury that it must consider each indictment separately. Any error the court made in admitting evidence as intrinsic was harmless because the evidence was not more emotionally inflammatory than the evidence of the charged conduct and did not impact the defendant's ability to argue that Kayla killed H.M.

Lastly, any error in admitting the video was harmless because it was inconsequential and presented briefly during a long trial. The jury was instructed that it could not draw adverse inferences from the defendant's silence or absence at trial. Further, the video did not go into the deliberation room and the jury did not ask to see it again, suggesting that the jury did not give the video much weight. *See* T 2043-44.

## ARGUMENT

### **I. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO SEVER.**

The trial court denied the defendant’s motion to sever the second-degree assault and second-degree murder charges because the *Brown* factors weighed in favor of joinder and the interests of justice did not require severance. *See* AD 67-80.

This Court “will uphold the trial court’s decision not to sever cases unless [it] conclude[s] that the decision constitutes an unsustainable exercise of discretion.” *State v. Ramos*, 149 N.H. 118, 120 (2003). “To show that the trial court’s decision is unsustainable, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of his case.” *Id.* “The focus of [this Court’s] inquiry is upon whether joinder jeopardized the defendant’s right to a fair trial.” *Id.*

On the motion of either party, the trial court “shall join” “two or more related offenses . . . for trial unless the trial judge determines that joinder is not in the best interests of justice.” *N.H. R. Crim. P.* 20(a)(2). Offenses are “related” if they: (1) “[a]re alleged to have occurred during a single criminal episode; or” (2) “[c]onstitute part of a common scheme or plan; or” (3) “[a]re alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.” *N.H. R. Crim. P.* 20(a)(1)(A)-(C).

In deciding whether charges arising from separate criminal episodes are related because they are logically and factually connected, this Court

considers: “(1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant’s mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony and other relevant evidence related to the offenses.” *Brown*, 159 N.H. at 551-52. No single factor is dispositive, and each must be “sensibly applied in accord with the purposes of joinder[.]” *Id.* at 552. Joinder is a tool of efficiency and economy that minimizes inconvenience and waste. *See id.*

It is undeniable that the two charges involved the same victim and defendant. *See AD 47-48.* Further, the defendant’s mode of operation was identical in both cases — punching H.M. in the face/head when he got angry with her. And, as the State argued and the trial court found, Kayla and several law enforcement officers who investigated H.M.’s disappearance would be necessary witnesses in both trials if the charges were severed. In addition to providing substantive testimony, these witnesses provided foundational testimony that was necessary in both cases. Accordingly, it was reasonable for the trial court to conclude that three of the five *Brown* factors weighed in favor of joinder.

The balance tipped further in favor of joinder with the court’s decision to give the fourth *Brown* factor little weight. The court was reasonable in doing so, concluding that the law and evidence surrounding each charge was not so complex as to confuse a jury, and the defendant does not challenge that decision on appeal. Therefore, this Court should also give the fourth *Brown* factor little weight.

With two factors weighing indisputably against him, one weighing in his favor, and one doing so only slightly, the defendant nakedly asserts that the trial court's ruling "rested principally on its finding that there would be significant duplication of evidence, the fifth factor in the *Brown* analysis." DB 28. But the defendant has no support for that. The trial court stated that the fifth factor weighed "strongly" in favor of joinder, but said the same thing about the third factor. *See* AD 74, 76. The court also announced that the fourth factor weighed only slightly in the defendant's favor. *See* AD 74-75. The trial court clearly considered the totality of the circumstances, and the defendant's argument seeks to have the analysis turn on outsized scrutiny of one factor in direct contravention of the holding in *Brown*, 159 N.H. at 552.

Even if the trial court's analysis did turn on the fifth factor, the defendant has not demonstrated reversible error. The defendant's argument amounts to a disagreement with the trial court over the degree to which evidence would overlap in both cases. *See* DB 30 (asserting that the court's finding that the fifth *Brown* factor weighed "strongly" in favor of joinder was mistaken). That is a far cry from demonstrating that the court's ruling was "clearly untenable or unreasonable." *Ramos*, 149 N.H. at 120.

The same goes for the court's finding that the interests of justice did not require severance. The court noted that the charges and the evidence supporting them were not so complex as to raise a concern of juror confusion that "carefully crafted jury instructions" could not quell. AD 79. Further, a joint trial would reduce inconvenience to witnesses, minimize the time it took to dispose of offenses, and achieve "a variety of other economies in connection with prosecutorial and judicial resources." AD.

79. Additionally, Kayla's new disclosures could be used to undermine her credibility broadly on cross-examination. AD 80. Thus, the court's decision rested upon a rationale objectively supported by the record.

The defendant argues that the interests of justice required severance because the risk that the jury would use the July 2019 assault as propensity evidence to convict the defendant of the December 2019 murder was too great. *See* DB 30-32. He asserts that the evidence of the assault was particularly strong and that of the murder especially weak, so there was a significant risk that the State could achieve a guilty verdict in a weak case on the strength of a case that should have been severed. DB 30-32.

But this, too, amounts to a mere disagreement with the trial court's finding that the jury would be able to consider each charge separately and not use evidence of one charge improperly in consideration of another. Moreover, the defendant fails to address the fact that defense counsel initially joined the charges below, even though the argument the defendant now advances was available at the time of that joinder. The defendant does not explain on appeal how any of the items in the State's *Zwicker* letter altered the analysis of that issue. Consequently, if defense counsel below could reasonably conclude that joinder under the circumstances was proper and in his client's strategic interest, it is difficult to see how a trial court's ruling one way or the other later in time could be clearly untenable or unreasonable to the prejudice of his case.

Further, as discussed in the "Harmless Error" section, *infra*, the trial court instructed the jury that it was required to consider each charge separately, and the strength of the State's evidence in the murder case was anything but weak. Accordingly, the defendant's argument fails.

## II. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ADMITTING INTRINSIC EVIDENCE.

The defendant asserts that the trial court erred in admitting evidence that he abused and neglected H.M. in the weeks leading up to her murder and that he ended communication between H.M. and Crystal beginning in April 2019, as intrinsic to the crimes charged. *See* DB 33-34.

This Court reviews the trial court’s ruling on the admissibility of evidence for an unsustainable exercise of discretion and will reverse only if it was clearly untenable or unreasonable to the prejudice of the defendant’s case. *State v. Rouleau*, 176 N.H. 400, 405 (2024). In applying this standard, this Court only determines whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. *Id.*

“‘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,’ both acts are part of a ‘single criminal episode,’ or the other acts were ‘necessary preliminaries’ to the crime charged.” *Id.* at 406. Intrinsic evidence often has “a causal, temporal, or spatial connection with the charged crime.” *Id.* “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.*

“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.* Although not subject

to Rule 404(b), intrinsic evidence must “nonetheless satisfy the balancing test set forth in Rule 403.” *State v. Wells*, 166 N.H. 73, 79 (2014).

#### **A. Evidence of Neglect and Abuse**

At the outset, the State notes that the court carefully balanced competing interests by denying the State’s request to admit evidence of abuse and neglect in the “months” leading up to H.M.’s murder, *see App. 49-50*, instead admitting evidence only from “the two weeks leading up to, and including, November 29, 2019, and between November 29, 2019 and December 7, 2019.” AD 87. In so doing, the court maintained a reasonable temporal proximity between the evidence and the murder charge. The court’s ruling also excluded evidence of abuse that might have caused the July 2019 assault case to bleed into the second-degree murder case, making it easier for the jury to evaluate the charges separately.

The admitted evidence included: (1) that Kayla had witnessed the defendant hit H.M. before they were evicted, *see App. 53; AD 87*; (2) H.M.’s “low weight” of 35 pounds, *see App. 50; AD 85*; (3) bruising on H.M., *see App. 50; AD 85*; and (4) that the defendant covered H.M. with a blanket to hide her bruises from anyone the family came into contact with, including police officers, *see App. 50; AD 85*.

The trial court correctly ruled that this evidence was “part and parcel” of the crimes charged, understanding that “events do not occur in a vacuum.” AD 86. The State was required to prove that the defendant recklessly caused H.M.’s death under circumstances manifesting extreme indifference to the value of human life. *App. 50; AD 48*. The evidence in question demonstrated that in the weeks leading up to H.M.’s death —

much like the moments that resulted in her death and the weeks following her death — the defendant treated her like an object of inconvenience, not the precious five-year-old child that she was.

That evidence allowed the fact finder to see the full picture and understand that this case was not the story of a loving father who unimaginably snapped under formidable circumstances. Rather, it was the story of an “evil” man, T 412, 728, who unleashed unspeakable violence upon an innocent five-year-old girl who he was supposed to love and protect, but instead “hated right to his core” and punched to death. T 1856 (quotation modified).

Simply put, the evidence was inextricably intertwined with the murder charge because it was powerful evidence of the defendant’s intent (*i.e.*, that he acted recklessly and with extreme indifference to the value of H.M.’s life) while he rained blows onto H.M.’s head. The evidence also completed the story of H.M.’s murder, which cannot be fully understood solely by recounting the events of December 7, 2019.

Further, the evidence had a temporal and spatial relationship with H.M.’s murder. AD 86. All the conduct occurred within a matter of three weeks and much of it occurred in the Montgomery family’s car. Finally, the evidence in question directly combatted “the defendant’s claim that he had taken [H.M.] to her mother” in November 2019. AD 86.

Therefore, the evidence was directly probative of an element of the crime, undermined the defendant’s claim, contextualized and completed the story of H.M.’s murder, and bore a spatial and temporal relationship with the crime. Accordingly, the trial court reasonably concluded that the evidence was inextricably intertwined with the murder charge.

The defendant's argument to the contrary falls flat. *See* DB 36-37. The defendant asserts that the trial court erred because there was no evidence that the abuse and neglect leading up to H.M.'s death contributed to her death. DB 36. But the State has not argued that the evidence in question was a "necessary preliminary" to the charged conduct. *See Rouleau*, 176 N.H. at 405-06 (stating, in the disjunctive, that intrinsic evidence is "inextricably intertwined," "part of a 'single criminal episode,' or . . . 'necessary preliminaries' to the crime charged." (emphasis added)).

The defendant is correct that the evidence is not intrinsic to the crime charged as a "necessary preliminary" because the former is not a necessary predicate of the latter. But that is of no consequence. The evidence is intrinsic because it is inextricably intertwined with the charged conduct, as it is directly probative of an element of the crime, rebuts one of the defendant's lines of defense, completes the story, and bears a temporal and spatial relationship to the crime.

**B. Evidence of the Defendant Ceasing Communication Between Crystal and H.M.**

In its initial order, the court admitted evidence that the defendant ceased communications between Crystal and H.M. as intrinsic with little explanation. *See* AD 90-91. However, in denying the defendant's motion to reconsider, the court explained that Crystal's efforts to contact H.M. beginning in April 2019 formed an "integral part of her testimony" and helped "complete the story" of her reporting H.M.'s disappearance to law enforcement. AD 101. Additionally, Crystal's testimony that she had not seen or spoken to H.M. since April 2019 "directly undermine[d] the

defendant's assertion that he dropped [H.M.] off with Crystal [ ] in November 2019." AD 101.

The trial court's ruling was reasonable. The defendant obtained custody of H.M. in February 2019 and ended communication between H.M. and Crystal in April 2019. Crystal's thwarted efforts to contact H.M. caused her to report H.M. missing in September 2021. And the purpose of Crystal's testimony was to establish her relationship to H.M. and explain how the police began investigating H.M.'s disappearance.

Thus, Crystal's testimony showed that the defendant severed contact between she and H.M. and that was the catalyst for the police investigation into H.M.'s whereabouts. Therefore, the defendant's decision to end that communication in April 2019 marks the beginning of the story from the perspective of law enforcement.

In sum, Crystal's testimony was centered on her inability to contact H.M. For the jury to evaluate her testimony intelligently and holistically, it was important for them to hear about the beginning of that inability. Finally, the fact that the defendant ended communication between Crystal and H.M. in April 2019 plainly refuted his claim that he dropped H.M. off with Crystal in November 2019. Accordingly, the trial court reasonably concluded that evidence of the defendant ending contact between H.M. and Crystal was inextricably intertwined with the crimes charged.

### **III. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ADMITTING VIDEO OF AN ENCOUNTER BETWEEN THE DEFENDANT AND POLICE ON DECEMBER 31, 2021.**

The defendant argues that the trial court erred in admitting video of an encounter between him and the police on December 31, 2021, when the police were investigating H.M. as a missing child. *See* DB 38-43. The court suppressed the audio component of the video and prohibited the State from eliciting testimony about the defendant’s demeanor in the video on the grounds that it would violate his right to remain silent. *See* AD 81-83.

As an initial matter, to the extent that the defendant means to make a constitutional argument on appeal rooted in the right to remain silent, his argument should not be addressed because it is not adequately developed. *See In re Omega Ent., LLC*, 156 N.H. 282, 287 (2007) (explaining that “neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration.”). The defendant’s argument is rather coy in asserting his right to remain silent, and he seems to argue not that the right was violated, but that the video carried a significant risk of prejudice because the jury might speculate about it in a way that could implicate the right. *See* DB 38-43.

The defendant does nothing to address the complexities of the right to remain silent in the prearrest context. Additionally, the State fails to understand how a video, with no audio, in which the defendant is depicted “seem[ing] to answer” questions from the police, DB 41, could violate his right to remain silent. Given the nuances of the right to remain silent in

circumstances like these, the defendant's timid reliance on the right on appeal does not warrant judicial review of a constitutional argument.

The defendant's evidentiary argument fares no better. The trial court observed that the police spoke to the defendant to try and locate H.M. because "family" had reported that they had not seen her in two years and the police were instructed to "be on the lookout" for her. AD 82. Before speaking to the defendant, one of the officers "made observations of the defendant, who he was with, and his living situation." AD 82. The court ruled that those observations were relevant to the police investigation and would not "cause the jury to speculate on excluded or otherwise inadmissible evidence." AD 82-83.

The trial court's ruling was manifestly reasonable. It is difficult to see how one could disagree with the assertion that the video was relevant to the police investigation — it was a video of the police's very first step into the investigation of H.M.'s disappearance. Accordingly, the evidence was relevant and probative of the investigative steps taken by the police. Additionally, the evidence was probative of the defendant's whereabouts, who he was with, and his living situation when the police began looking for H.M., who was supposed to be with him.

The defendant contends that the video had "no probative value" because there "was no dispute in December 2021" that H.M. "was missing[.]" DB 41-42. On the contrary, in December 2021, the defendant was maintaining the story that he dropped H.M. off with Crystal in November 2019. *See* T 384, 477. The action taken by the police when they first learned of H.M.'s disappearance, and whether the story that the defendant was telling people was true, was "of consequence" to

determining whether the defendant murdered H.M. The defendant's disagreement with the trial court on that point is unremarkable, and his argument does not demonstrate that the court's ruling was untenable.

As to prejudice, the defendant asserts only that the video was prejudicial because it invited the jury to speculate that the defendant did not assist the police in looking for H.M. DB 41-42. He contends that "inferences" about his "lack of cooperation carried a significant risk of arousing a sense of horror that he was not assisting in locating his daughter." DB 42. His argument should be rejected.

The defendant's argument is premised upon how the jury might have perceived the video considering all the evidence at trial. But the defendant also asks this Court to limit its review to the evidence that was before the trial court when it made this pretrial ruling. DB 39-40. The defendant cannot have it both ways and this Court should not consider how the evidence at trial may have impacted the jury's perception of the video because no such evidence was before the trial court when it made this pretrial ruling.

Further, the defendant asserts that the video appears to show him answering questions from the police. DB 41. Given that, and coupled with the presumption of innocence, there was no reason for the jury to speculate that the video depicted the defendant failing to cooperate with the police.

Simply stated, what the defendant put forth in the trial court and on appeal is a tenuous risk of prejudice premised on bare conjecture. The trial court reasonably concluded that such risk did not substantially outweigh the video's probative value.

#### IV. HARMLESS ERROR.

Each of the issues that the defendant has raised is subject to harmless error analysis. *See Rouleau*, 176 N.H. at 407 (intrinsic evidence); *State v. Mason*, 150 N.H. 53, 60-62 (2003) (joinder); *State v. Remick*, 149 N.H. 745, 748 (2003) (prearrest silence). Even assuming the trial court erred in any or every respect the defendant alleges, the errors were harmless beyond a reasonable doubt.

To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict. *Rouleau*, 176 N.H. at 407. To determine whether the State has met its burden, this Court evaluates the totality of the circumstances at trial. *Id.*

The factors this Court considers in assessing whether an error was harmless include, but are not limited to: (1) the strength of the State's case; (2) whether the evidence is cumulative or inconsequential in relation to the strength of the State's case; (3) the frequency of the error; (4) the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; (5) the nature of the defense; (6) the circumstances in which the evidence was introduced at trial; (7) whether the court took any curative steps; (8) whether the evidence is of an inflammatory nature; and (9) whether the other evidence of the defendant's guilt is overwhelming. *Id.* at 407-08. No one factor is dispositive, not all factors will be implicated in each case, and this Court may consider factors not listed above. *Id.*

### **A. Second-Degree Assault**

The defendant concedes that “the State’s case on the July 2019 charge was strong and rested on testimony from several witnesses without [ ] credibility issues[.]” DB 31. As the defendant asserts — and the record supports — the July 2019 assault was corroborated by the defendant’s uncle Kevin, a DCYF case worker, and three friends of the defendant. *See* DB 30-31. Each of those people either saw H.M.’s black eye, heard the defendant admit to hitting H.M., or both. *See* DB 30-31; T 277-79, 329, 332-33, 1854.

Further, neither the intrinsic evidence nor the video admitted by the trial court had any bearing on the second-degree assault charge. Thus, the only alleged error related to the assault charge was joinder, and the defendant argues that he was prejudiced by that decision because it allowed a weak case (second-degree murder) to be carried by a strong one (second-degree assault). *See* DB 31-32. Taking that position necessarily concedes that joinder did not impact the verdict on the second-degree assault charge.

As explained below, the State does not agree with the defendant’s assessment of the strength of the second-degree murder case. Nevertheless, the State agrees with the defendant that the second-degree assault case was strong, and any error committed by the trial court was harmless beyond a reasonable doubt with respect to it.

### **B. Second-Degree Murder**

The defendant made the strategic choice to open his case by telling the jury that they “can and should find him guilty” of falsifying physical evidence and abusing a corpse by manipulating and disposing of H.M.’s

body. T 209. Thus, the defendant admitted to the jury that he abused and disposed of his five-year-old daughter's dead body, but asked them to believe that Kayla murdered H.M. *See* T 208-09.

The defendant argues that the State's murder case was weak because its central witness, Kayla, had credibility issues. *See* DB 16-19, 31. But so much of what Kayla said was corroborated by physical evidence that it was easy to credit the parts of her testimony that lacked such corroboration.

For example, Kayla testified that the defendant stored H.M.'s body in the ceiling of the FIT shelter in Manchester. That was corroborated by a stain in the ceiling drywall created by blood, the DNA of which matched H.M.'s. It was further corroborated by the defendant's finger and palm prints found all over the ceiling vent. Kayla also testified that the defendant stored H.M.'s body in the walk-in freezer at Portland Pie. That was corroborated by two of the defendant's former coworkers who saw him carry the bag in and out of the freezer.

Kayla testified that the defendant purchased lime and a saw to dismember and decompose H.M.'s body while they were living on Union Street. Police investigation discovered that the defendant withdrew \$500 from a bank in Manchester close to Home Depot and, less than 30 minutes later, Home Depot sold a bag of lime and a saw totaling nearly \$400, which was paid for in cash.

Kayla testified that she stayed with the defendant at the EconoLodge on the night that he disposed of H.M.'s body. She said the defendant asked a friend to rent a U-Haul for him that he used to dispose of H.M.'s body. Testimony from Travis, Brittany, Brendan and records from U-Haul and Massachusetts tolls confirmed all of that. If Kayla was not lying about any

of that, the jury likely had little difficulty crediting her description of the defendant repeatedly punching H.M. in the head until he killed her.

But there was more. Before the defendant dumped H.M.'s body, he talked to his friend Travis while "pacing back and forth" and repeatedly said "I fucked up." T 1602-03. More than a year after the murder, the defendant told a friend that he "hated [H.M.] right to his core" because she reminded him of Crystal. T 1856 (quotation modified), 1858. By inference, these admissions lend credence to Kayla's account of the defendant punching H.M. in the head repetitiously, with evil in his eyes, until he finally stopped because he "felt something" and thought "that he really hurt her." T 414.

The State's case had everything — eyewitness testimony, testimony corroborative of the eyewitness, DNA, fingerprints, receipts, and the list goes on — much more than undersigned counsel can fit into 9,500 words. The State's case and the evidence of the defendant's guilt was overwhelming.

Accordingly, there is no risk that the jury convicted the defendant of second-degree murder on the strength of the second-degree assault case. Moreover, the evidence of the second-degree assault was presented separately, discussed separately in closing, and the trial court instructed the jury that it "must consider each indictment separately" and that finding "the Defendant guilty or not guilty on one of the indictments, should not influence [their] verdict with respect to the other indictments." T 2033. Those "cautionary statements [were] significant, since juries are presumed to follow the instructions of the trial court." *State v. Manna*, 130 N.H. 306,

311 (1988). Therefore, if the court erred by denying the defendant's motion to sever, it was harmless.

Any error the court made in admitting evidence as intrinsic was also harmless. Although evidence of Crystal's attempts to contact H.M. and of the defendant's neglect and abuse of H.M. were important pieces of evidence, the State's case was still overwhelmingly strong without them. Additionally, neither piece of evidence was more emotionally inflammatory than the evidence of the charged conduct and did not remove the defendant's ability to advance his defense that Kayla killed H.M.

Further, the trial court found that the defendant "acknowledge[d]" the admissibility of his efforts "to block contact with Crystal on or after the time of [H.M.'s] death" and he has not taken issue with that finding. AD 101. Accordingly, the jury was going to hear evidence of the defendant ceasing communication between Crystal and H.M. no matter what.

Finally, the video of the encounter between the defendant and police was inconsequential in relation to the rest of the State's evidence and was a minor piece of evidence briefly presented during a long trial. The jury was instructed that it was not to draw adverse inferences from the defendant's failure to appear for trial or his choice not to testify and therefore knew that it could not penalize him for his silence. T 2038-39. Further, the video did not go into the deliberation room and the jury did not ask to see it again, suggesting that they did not give the video much weight. *See* T 2043-44.

In summary, even if the trial court committed any or all the errors alleged by the defendant, there is no doubt that the jury's verdict would have been the same even if none of them had been committed.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA  
ATTORNEY GENERAL

ANTHONY J. GALDIERI  
SOLICITOR GENERAL

August 4, 2025

/s/ Sam M. Gonyea  
Sam M. Gonyea, Bar No. 273264  
Assistant Attorney General  
Office of the Solicitor General  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301

**CERTIFICATE OF COMPLIANCE**

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,396 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 4, 2025

/s/ Sam M. Gonyea  
Sam M. Gonyea

**CERTIFICATE OF SERVICE**

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Pamela Phalen, esq., counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 4, 2025

/s/ Sam M. Gonyea  
Sam M. Gonyea