THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
Case No. 2024-0304
Citation: State v. Montgomery, 2026 N.H. 24

THE STATE OF NEW HAMPSHIRE

v.

ADAM MONTGOMERY

Argued: October 15, 2025
Opinion Issued: June 11, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Sam M. Gonyea, assistant attorney general, on the brief and orally), for the State.

Pamela E. Phelan, senior assistant appellate defender, of Concord, on the brief and orally, for the defendant.

GOULD, J.

[¶1] The defendant, Adam Montgomery, appeals his convictions, following a jury trial in Superior Court (Messer, J.), of second degree murder, see RSA 630:1-b, I(b) (2016), second degree assault, see RSA 631:2, I(d) (2016),

falsifying physical evidence, see RSA 641:6, I (2016), witness tampering, see RSA 641:5, I(a) (2016), and abuse of a corpse, see RSA 644:7 (2016) (amended 2023). We affirm in part, reverse in part, and remand.

I. Statement of Facts

[¶2] The jury could have found the following facts. The defendant was the biological father of the victim, Harmony Montgomery. In February 2019, the victim went to live with the defendant and his wife, Kayla Montgomery, at the defendant's grandmother's home in Manchester. In July 2019, when the first charged offense occurred, the victim was five years old. The other occupants of the home at that time included the defendant's uncle and the two biological children of the defendant and Kayla; both of those children were younger than the victim.

[¶3] The defendant's uncle returned home in July from a three-week trip and saw the victim in the kitchen with a black eye. The uncle asked the victim what she had done and the defendant answered, "She didn't do anything. I bashed her around the f**king house." The uncle testified that the defendant said "he put [the victim] in charge to watch" her five-month-old brother while the defendant used the bathroom and when the defendant returned, he found the victim with her hands over the baby's mouth and "his lips were supposedly blue."

[¶4] On November 27, 2019, the defendant's family was evicted from the home in Manchester. The defendant, Kayla, and the three children began living in their car, which they parked at a friend's apartment complex in Manchester. Although the victim was toilet trained before she was three years old, she started to have accidents once the family began living in the car. When the victim had an accident, the defendant became angry and would hit her in the face or on her leg or hand. The defendant became angrier the more accidents the victim had and would then hit her repeatedly.

[¶5] On December 7, 2019, the victim had an accident early in the morning and the defendant repeatedly punched her in the head. Later that morning, the family drove to a methadone clinic where Kayla and the defendant took turns going inside while the other stayed in the car with the children. When the defendant returned to the car, he realized the victim had had another accident and started yelling at her and hitting her in the head repeatedly.

[¶6] From the methadone clinic, the defendant drove the family to Burger King. While they were driving, the victim was in the back seat crying and making a strange, moaning-like noise. The defendant told the victim to shut up, and at each red light at which they stopped, the defendant reached back and repeatedly punched the victim in the head. The defendant stopped hitting

the victim when they got to Burger King. With the final punch, he said in a scared voice that he felt something and thought he really hurt her this time.

[¶7] Later that day, the family's car broke down at a traffic light and they had to abandon it. As the defendant and Kayla were getting the children out of the car, the victim did not respond and they realized she had died. The defendant got a duffel bag from the trunk, put the victim's body in it, and brought it back to the friend's apartment complex, where the defendant put it in a snow bank.

[¶8] Following the loss of their car, the family stayed in a friend's car, then with Kayla's mother, and then, from December 30 through February 20, at the Families in Transition (FIT) shelter in Manchester. The defendant brought the duffel bag containing the victim's body to each place where they stayed. At FIT, the defendant put the duffel bag in the ceiling vent in their room. When the victim's body began to smell and leak fluid, the defendant put the body into garbage bags which he then stuffed into a diaper bag. The defendant worked at a restaurant at that time and would store the bag in the restaurant's freezer while he was there.

[¶9] The family moved from FIT to an apartment in Manchester. There, the defendant kept the victim's body in the apartment's freezer. The defendant began discussing getting rid of the victim's body and devised a plan to dismember her and use lime, which he believed would hasten decomposition of the body.

[¶10] On February 26, the defendant withdrew cash from an ATM and purchased lime, an angle grinder, a blade, and a battery. At some point thereafter, the defendant thawed the victim's body in the bathtub at the apartment and had Kayla help remove the victim's clothing. The defendant had a large bag of lime and spent several hours in the bathroom with the victim's body. When the defendant was finished, he put the victim's body back in the diaper bag and put the bag back in the freezer.

[¶11] On March 3, the defendant and Kayla stayed at an Econo Lodge with a friend of the defendant and the friend's girlfriend. The defendant had asked the friend to rent a U-Haul for him because "he needed to move stuff." That evening, the friend arranged the rental. Back at the hotel, the friend and the defendant went outside to smoke a cigarette and the defendant began pacing back and forth, repeating "I f**ked up."

[¶12] The defendant left the hotel in the U-Haul in the middle of the night. He took the diaper bag containing the victim's body with him and returned without it, telling Kayla he "got rid of her."

[¶13] After the defendant killed the victim, he began telling people that he had returned the victim to her mother in Massachusetts after Thanksgiving in 2019. The victim's mother, however, had not seen the victim since April 2019. Thereafter, the victim's mother tried to contact the defendant and Kayla but was unsuccessful. By December 2021, the victim's mother had reached out to state and local agencies and officials to try to find her daughter. At that point, law enforcement became involved in the search for the victim.

[¶14] The defendant was indicted on one count of each of the following offenses: second degree murder, second degree assault for having struck the victim in July of 2019, falsifying physical evidence, and witness tampering. He was also charged by criminal complaint with abuse of a corpse. The defendant filed an assented-to motion to join the charges for trial, which the court granted. Subsequently, however, the defendant moved to sever the second degree assault charge from the other charges after receiving a Zwicker letter[1] from the State "imparting information from Kayla Montgomery that marks a substantial departure from her prior statements." The trial court denied the motion.

[¶15] The defendant also filed a number of motions in limine which, as relevant to this appeal, included motions to exclude: (1) evidence that he prevented the victim's mother from seeing the victim; (2) evidence of his abuse and neglect of the victim other than the charged conduct; and (3) evidence of his encounter with the police on December 31, 2021. The trial court denied the defendant's motion with respect to interference with the victim's mother's attempts to see the victim. With respect to the remaining two categories of challenged evidence, each motion was granted in part and denied in part; while the court limited what the State could introduce, it declined to exclude all of the evidence in each challenged category.

[¶16] The defendant was tried before a jury in February 2024. In his opening statement, the defendant's counsel told the jury that it "can and should find [the defendant] guilty" of falsifying physical evidence and abuse of a corpse. He asserted, however, that the defendant committed those crimes to protect Kayla, who "was the last person to see [the victim] alive and know how [she] died." He contended that the victim did not die during the day on December 7 but during the previous night while the defendant "was running around trying to make money to get them out of their situation" and Kayla was alone in the car with the children. He told the jury that it would not hear truthful testimony from Kayla and that "[t]he only reason she has to lie and

[1] While based loosely on State v. Zwicker, 151 N.H. 179 (2004), the term "Zwicker letter" has come to have a colloquial meaning in New Hampshire criminal practice. It refers in this instance to the State's written disclosure of newly discovered evidence that was not included in the State's disclosures under New Hampshire Rule of Criminal Procedure 12(b)(1).

point the finger at [the defendant] is because the truth points the finger at her." The jury returned guilty verdicts on all charges. This appeal followed.

II. Analysis

A. Severance

[¶17] The defendant first argues that the trial court erred in denying his request to sever the second degree assault charge from the other charges. "The trial court's decision to join or sever charges is discretionary; we will affirm its ruling unless the decision constitutes an unsustainable exercise of discretion." State v. Girard, 173 N.H. 619, 623 (2020). "To succeed on appeal, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of his case." Id.

[¶18] New Hampshire Rule of Criminal Procedure 20 governs the joinder of criminal offenses and distinguishes between related and unrelated charges. See N.H. R. Crim. P. 20. It provides that "[i]f a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges 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). By contrast, unrelated charges may be joined "only upon written motion of the defendant or with the defendant's written consent, and 'upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties.'" State v. Brown, 159 N.H. 544, 549 (2009) (quoting identically-worded prior Superior Court Rule 97-A(I)(C)); see N.H. R. Crim. P. 20(a)(3).

[¶19] The defendant argues that the trial court erred in finding that the charges were "related" for purposes of Rule 20. Alternatively, he argues that even if the charges were related, "the court should have severed them in the interests of justice." We need not address the defendant's first argument because we conclude that the best interests of justice required severance of the charges. As a threshold matter we note that neither party argues that the best interests of justice prong of the joinder analysis must be based on the evidence before the trial court at the time of its pretrial ruling. Accordingly, we do not confine our best interests inquiry to the pretrial record. Cf. Brown, 159 N.H. at 556 (considering the defendant's arguments that were based, in part, on trial events where the State did "not contest whether trial events may be relevant to our review of the trial court's pretrial decision on joinder").

[¶20] Under the best interests of justice standard, "charges should be tried separately whenever it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence — in essence, when

conducting a single trial would jeopardize the defendant's right to a fair trial." State v. Rivera, 175 N.H. 496, 502 (2022) (quotations and brackets omitted). "In making a best interests of justice determination, trial courts must evaluate whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense." Id. (quotations omitted). The best interests of justice determination may also entail consideration of other factors, including whether:

> some charges are likely to unusually inflame the jury against the defendant; the evidence in support of some offenses is weak while the proof of others is strong; the defendant's available defenses for different crimes are inconsistent; or the defendant wishes to testify as to one offense but not as to others.

Id.

[¶21] The defendant argues that joining the charges gave rise to a risk that the jury would use evidence of the July assault "for an improper propensity purpose" when considering the second degree murder charge. He notes that Kayla's testimony provided the only direct evidence that he fatally struck the victim and asserts that Kayla had significant credibility deficits. Specifically, he contends that evidence undermining Kayla's credibility "included her felony perjury convictions for lying to the grand jury, her prior criminal history, . . . her other criminal conduct that the State agreed not to prosecute her for in exchange for her testimony," as well as "numerous self-serving and inconsistent statements about what happened in December 2019 and thereafter."

[¶22] By contrast, the defendant argues, "the State's case on the July 2019 charge was strong and rested on testimony from several witnesses without such credibility issues." The defendant contends:

> Because the charges involved the allegations that [the defendant] struck [the victim] with his fist at different times, places, and contexts, there was a substantial risk that a jury hearing the strength of the State's case on the July 2019 charge would draw the improper inference that he similarly struck her in December and thus dismiss any doubts it might have had as to his guilt on the homicide charge.

[¶23] We agree that the State's case on the second degree assault charge was strong. Three witnesses testified to observing the victim with a black eye in July 2019. Four witnesses, including two who observed the victim's black eye, testified that the defendant admitted striking the victim. Although two of the admissions were made near the time of the assault and two were made

years later, each witness testified to a consistent explanation given by the defendant: that he hit the victim because he saw her with her hand over the baby's mouth, suffocating him.

[¶24] As to the homicide charge, only Kayla's testimony directly implicated the defendant in the victim's death. The State disputes, however, that the evidence on that charge was weak, arguing that "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." Specifically, the State contends: (1) Kayla's testimony that the defendant stored the victim's body in the ceiling of their room at FIT was corroborated by DNA and fingerprint evidence taken from that ceiling; (2) Kayla's testimony that the defendant stored the bag containing the victim's body in the freezer at work was corroborated by two of the defendant's coworkers who testified that they saw the defendant entering or leaving the restaurant's walk-in cooler with a bag; (3) Kayla's testimony that the defendant planned to dismember the victim's body and accelerate its decay with lime was corroborated by evidence that a $500 cash withdrawal was made from Kayla's joint bank account 22 minutes before a nearly $400 cash purchase of items including a bag of lime and an angle grinder was made at a nearby Home Depot; and (4) Kayla's testimony that on the night she, the defendant, the defendant's friend, and the friend's girlfriend stayed at an Econo Lodge, the defendant used a U-Haul to dispose of the victim's body was corroborated by testimony of the friend, his girlfriend, and the person who rented the U-Haul. This evidence, however, supports only Kayla's testimony about the defendant's actions after the victim's death; it does not corroborate Kayla's testimony that the defendant killed the victim on December 7 by repeatedly punching her in the head. It is also not inconsistent with the defendant's theory of defense — namely that Kayla caused the victim's death and the defendant helped her cover up her crime.

[¶25] As additional evidence supporting Kayla's testimony that the defendant, rather than she, killed the victim, the State cites the defendant's friend's testimony that the defendant paced outside the Econo Lodge repeating "I f**ked up" and another friend's testimony that in 2021, the defendant told her that he hated the victim "right to his core" because she reminded him of her mother. This evidence does support the proposition that the defendant displayed a consciousness of guilt for something he had done and that more than a year after the victim's death the defendant had profound animus toward the victim. It does not, however, corroborate Kayla's account of the victim's death. As compared to the evidence of multiple disinterested witnesses substantiating the July assault, the evidence of the December 7, 2019 fatal attack is substantially weaker. We therefore conclude that this disparity created a significant risk that the jury would rely on the strength of the evidence that the defendant struck the victim in anger in July to conclude that, as Kayla testified, he similarly — and fatally — struck the victim in December.

See Brown, 159 N.H. at 555 (noting that "the State may gain an unfair advantage if a weak case is joined with a strong case: the joint trial of offenses creates a significant risk that the jury will convict [a] defendant upon the weight of the accusations or upon the accumulated effect of the evidence" (quotation omitted)).

[¶26] The State contends that there was no such risk because evidence of the July assault was presented separately, the offenses were discussed separately in the State's closing, and the jury was instructed to consider each indictment separately and not let a verdict of guilty or not guilty on one of the indictments influence its verdict on the other indictments. The State argues that "[t]hese cautionary statements are significant, since juries are presumed to follow the instructions of the trial court." State v. Manna, 130 N.H. 306, 310 (1988). This argument is predicated on a more sanguine view of the efficacy of instructions to overcome prejudice than our decisional law supports. It also overlooks the misalignment of the instruction with the specific risk created by the denial of the motion to sever.

[¶27] It is true that "[w]e generally presume that jurors follow the trial court's instructions." State v. Mason, 150 N.H. 53, 63 (2003). Nevertheless, we have recognized that there are circumstances in which that presumption is outweighed by the "likelihood of prejudice in that the jury could have found the defendant guilty of one . . . charge[] based at least in part upon the evidence regarding the other . . . charge[]." Id. at 62-63 (concluding that error in joining charges was not harmless). Here, as the case was presented at trial, the jury was asked to determine which of the two adults who were with the victim on December 6 and 7, 2019 — the defendant or Kayla — killed her. While the jury heard no evidence that Kayla had ever physically assaulted the victim, it heard evidence from multiple witnesses that the defendant physically assaulted the victim in July 2019. Thus, there was a significant risk that the jury would draw the impermissible inference that because the defendant assaulted the victim before by striking her in the head, he must be the one who fatally assaulted her in December by again striking her in the head. See Bean v. Calderon, 163 F.3d 1073, 1083 (9th Cir. 1998) (concluding that joinder of charges arising from separate incidents allowed the jury to draw an impermissible inference of criminal propensity which "in turn, allowed the jury to rely upon" evidence in the stronger case "to strengthen the otherwise weak case" on other offenses). We conclude that, under these circumstances, trying the second degree assault and second degree murder charges in a single trial jeopardized the defendant's right to a fair trial. See Rivera, 175 N.H. at 502.

[¶28] We do not agree with the State's contention that the trial court's instruction was sufficient to counteract the risk of prejudice to the defendant arising from trying the two charges jointly. The instruction said only that the jury must consider each indictment separately and that its verdict on one indictment could not influence its verdict on another. Nothing in the

instruction, however, told the jurors that they were prohibited from considering the evidence admitted on one charge when reaching their verdict on another. The instruction, then, left the jury free to consider evidence of the defendant's assault on the victim in July when deliberating on the second degree murder charge.

[¶29] The State asks that we attribute significance to the defendant's initial motion for joinder. The State asserts that the argument the defendant advances now was available to him when he made that motion and argues that the defendant "does not explain on appeal how any of the items in the State's Zwicker letter altered the analysis of that issue." The State contends that if the defendant's trial counsel "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 [the defendant's] case," and therefore an unsustainable exercise of discretion. Whatever the persuasive force of these arguments in the abstract, the State conceded before the trial court that even if the Zwicker letter provided no new information, the defendant had the right to withdraw his assent to joinder prior to trial and was entitled to a fresh consideration of whether joinder was in the best interests of justice. Accordingly, the State disclaimed in the trial court the very argument it makes on appeal. We will not consider on appeal an argument waived in the trial court. See Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 669-70 (2006). Having determined that joinder of the charges jeopardized the defendant's right to a fair trial, we conclude that the trial court unsustainably exercised its discretion in failing to sever them. See Rivera, 175 N.H. at 502.

[¶30] The State nevertheless argues that even if the trial court erred by failing to sever the charges, the error was harmless. "To establish harmless error, the State must prove beyond a reasonable doubt that the error did not affect the verdict." State v. Rouleau, 176 N.H. 400, 407, 2024 N.H. 2, ¶20; see Mason, 150 N.H. at 62 (applying harmless error standard to erroneous joinder of offenses). "To determine whether the State has proven beyond a reasonable doubt that an error did not affect the verdict, we must evaluate the totality of the circumstances at trial." Rouleau, 176 N.H. at 407, 2024 N.H. 2, ¶20.

> The factors that we consider in assessing whether an error did not affect the verdict include, but are not limited to: (1) the strength of the State's case; (2) whether the admitted or excluded 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 of an overwhelming nature.

Id. at 407-08, 2024 N.H. ¶21. "No one factor is dispositive." Id. at 408, 2024 N.H. ¶21. "We may consider factors not listed above, and not all factors may be implicated in a given case." Id.

[¶31] The parties agree that the State's case on the July 2019 assault charge was strong and rested on testimony from several witnesses without the credibility deficits that Kayla had. We conclude that the failure to sever the second degree murder charge from the second degree assault charge did not affect the verdict on the latter charge. Cf. Tabish v. State, 72 P.3d 584, 592, 594 (Nev. 2003) (concluding that joinder of charges was improper where "the State's weaker case on [some charges] was bolstered by combining it with the stronger case" on other, so-called "Casey counts," but concluding that "[g]iven the strong and more than substantial evidence presented" on the Casey counts, "improper joinder was harmless beyond a reasonable doubt as it relates to [the defendant's] conviction on those counts"). Because we conclude that any error with respect to the second degree assault charge was harmless beyond a reasonable doubt, we affirm the defendant's conviction on that charge.

[¶32] The State argues that any error with respect to joinder was also harmless as to the second degree murder charge because the "State's case and the evidence of the defendant's guilt [were] overwhelming." For the reasons discussed above, we disagree. The "overwhelming" evidence cited by the State — "eyewitness testimony, testimony corroborative of the eyewitness, DNA, fingerprints, receipts, and the list goes on" — related to the uncontested charges of falsifying physical evidence and abuse of a corpse. By contrast, only Kayla's testimony directly implicated the defendant in the victim's death, and evidence that the defendant stated that he hated the victim "right to his core" and that he "f**ked up" are far from overwhelming evidence that he killed the victim. Cf. Mason, 150 N.H. at 62 (concluding misjoinder was not harmless where "the evidence was not overwhelming as to any particular offense" and the case was "dependent upon witness credibility"). This is not a case, moreover, in which the jury found the defendant guilty on some counts and not guilty on others, which could have constituted "compelling evidence that the jury considered the charges separately and was not influenced by evidence of the other alleged [offenses]." State v. Cossette, 151 N.H. 355, 358 (2004). We conclude that the misjoinder of offenses was not harmless as to the homicide charge. Accordingly, we reverse the defendant's conviction of second degree murder.

B. Other Act Evidence

[¶33] We address the defendant's remaining arguments because they are likely to arise again on remand. The defendant next argues that the trial court

erred in admitting evidence of certain prior and subsequent bad acts as intrinsic to the charged offenses. Specifically, he challenges the admission of evidence that he "punched [the victim] in the two weeks prior to December 7, 2019,"[2] and that he prevented the victim's mother from having contact with the victim throughout the ten months preceding the victim's death. "We review 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. Papillon, 173 N.H. 13, 24 (2020).

[¶34] New Hampshire Rule of Evidence 404(b) prohibits the admission of evidence of a person's other bad acts for the purpose of establishing the person's propensity to act in accordance with character traits inferred from the other acts. N.H. R. Ev. 404(b). "We have distinguished between 'extrinsic' evidence of other crimes, wrongs, or acts, which is governed by Rule 404(b), and 'intrinsic' evidence, which is not." State v. Thomas, 168 N.H. 589, 598 (2016). "Other act evidence is 'intrinsic,' and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." Id. (quotation omitted). "Intrinsic or inextricably intertwined evidence will have a causal, temporal, or spatial connection with the charged crime." Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15 (quotations omitted). "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.

[¶35] The defendant argues that "[t]he December 7, 2019 homicide did not depend in any way on the alleged abuse and neglect that previously occurred or on whether [he] blocked [the victim's mother's] contact with [the victim] beginning in April 2019." Testimony on those matters, the defendant argues, "was not essential to providing an intelligent and coherent description of what occurred on December 7." The State counters, with respect to the prior

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[2] In its order on the defendant's motions in limine, the trial court ruled that the State could introduce "evidence of the defendant's conduct and [the victim's] condition in the two weeks leading up to, and including, November 29, 2019, and between November 29, 2019 and December 7, 2019" — a period of approximately three weeks. At trial, however, the only direct evidence introduced by the State of the defendant's striking the victim during this period was Kayla's testimony that after the family began living in their car on November 27, 2019, the defendant would hit the victim when she was incontinent in the car. On appeal, the defendant argues that the trial court "erred in admitting as 'intrinsic' evidence that [he] punched [the victim] in the two weeks prior to December 7, 2019." Given the difference between this time period and the three-week period referenced in the trial court's order, and in light of the evidence actually admitted at trial, we understand the defendant to be challenging only the admissibility of evidence that he struck the victim subsequent to the family's eviction on November 27, 2019. We express no opinion on the trial court's ruling with respect to any time before that date.

abuse and neglect evidence, that 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.'" It contends that the challenged evidence "completed the story of [the victim's] murder, which cannot be fully understood solely by recounting the events of December 7, 2019." In particular, the State argues that the 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."

[¶36] We conclude that the evidence of other assaults of the victim during the time the family was homeless was intrinsic to the second degree murder charge, in part because that conduct "was an essential part of the course of conduct leading to the charged" offense. State v. Wells, 166 N.H. 73, 78 (2014). The defendant concedes that this evidence "bore an arguable temporal and spatial connection to the charged act[]" but argues that "the requisite factual connection was lacking." See Papillon, 173 N.H. at 25 (noting that while challenged statements by the defendant bore "an arguable 'temporal connection' to the charged" offenses, "without a sufficient underlying factual nexus, these statements are merely coincidental to the charged offenses"). We disagree.

[¶37] In its objection to the defendant's motion to preclude this evidence, the State noted — albeit in the context of its Rule 404(b) analysis — that "the prior conduct involved the same victim, an identical mechanism of assault (i.e. the defendant['s] punching and/or striking [the victim's] face), and occurred under similar circumstances (i.e., in response to [the victim's] being incontinent in the defendant's vehicle)." The challenged evidence described events that were "a prelude to the charged offense" and "complete[d] the story of the charged offense." Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15. "This type of 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. Evidence of the prior assaults "gave the jury a more complete understanding of the alleged crime and better enabled the jurors to assess the likelihood that the charged [crime] occurred." Wells, 166 N.H. at 80 (discussing intrinsic evidence's probative value under a New Hampshire Rule of Evidence 403 analysis). Accordingly, the trial court did not unsustainably exercise its discretion in admitting this evidence as intrinsic to the second degree murder charge.

[¶38] With respect to evidence that the defendant prevented the victim's mother from having contact with the victim during the ten months preceding the victim's death, the State argues that the trial court reasonably concluded that the evidence was intrinsic to the second degree murder charge because it formed an integral part of the victim's mother's testimony and completed the

story of her contacting law enforcement and because it "directly undermines the defendant's assertion that he dropped [the victim] off with [her mother] in November 2019."

[¶39] We disagree that the evidence was intrinsic under either rationale. The evidence lacks "a causal, temporal, or spatial connection with the charged crime" of second degree murder and is not "inextricably intertwined" with that crime. Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15 (quotation omitted). While the evidence may have explained how the victim's mother came to contact law enforcement, it neither "completes the story of the charged offense" nor "forms an integral part of a witness's testimony about the charged offense[]." Id. at 406, 407, 2024 N.H. 2, ¶¶ 15, 18 (emphases added) (quotation omitted). In addition, we have never held that evidence undermining a defendant's asserted version of events that do not have a "a causal, temporal, or spatial connection with the charged crime" is intrinsic to that offense. Id. at 406, 2024 N.H. 2, ¶15 (quotation omitted). Rather, we have considered the admissibility of such evidence under the rubric of Rule 404(b). See, e.g., State v. Dukette, 145 N.H. 226, 230-31 (2000) (concluding that certain evidence was relevant for the non-propensity purpose of "undermin[ing] the defendant's argument that she reasonably believed the alleged victim was about to use unlawful, deadly force against her").[3] We conclude that this evidence was not intrinsic to the charged offense; therefore, the trial court unsustainably exercised its discretion in ruling to the contrary. This conclusion is limited to the determination that the challenged evidence is not intrinsic and does not preclude the State, in a retrial, from seeking to admit the evidence under Rule 404(b).

C. Video of Encounter with the Police

[¶40] The defendant next contends that the trial court unsustainably exercised its discretion in admitting a video of his encounter with the police on December 31, 2021. By motion the defendant succeeded in having his statements during that encounter excluded because he had invoked his right to remain silent. See State v. Remick, 149 N.H. 745, 747 (2003) (noting that under the Fifth Amendment, "use of pre-arrest silence in the [State's] case-in-chief, in which the defendant does not testify, is unconstitutional"). He then moved to exclude all evidence of the encounter pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, arguing that "[e]vidence that there was an encounter, with the substance of the encounter not admitted, merely raises questions and causes the jury to speculate and is therefore prejudicial." The trial court excluded only "questions posed to the defendant which resulted in

[3] The evidence was also of dubious relevance in light of defense counsel's remark in his opening statement that the victim died during the nighttime hours of December 6 and 7, 2019, while she was in the car with Kayla and the other children. This contention implicitly abandoned the assertion that the defendant had returned the victim to her mother in November.

his asserting his right to silence" and "any assessment of his demeanor based on his asserting his right to silence." At trial, a video of the encounter was played for the jury without audio.

[¶41] On appeal, the defendant argues that "the video was improper evidence of [his] pre-arrest silence." He asserts that in the video, the police officers "appear to pepper him with questions that [he] seems to answer" but that "[w]ithout the audio, the jury could only speculate about what was said." He then asserts that the jury could have understood from other evidence in the case that the police had located him that day to question him about the victim. He argues that because there was no evidence that he helped the police find the victim, the jury "could only have understood that [he] did not cooperate," which constitutes evidence of his pre-arrest silence.

[¶42] Having reviewed the video, we cannot conclude that it could lead the jury to speculate about the defendant's pre-arrest silence. The defendant acknowledges that, as depicted in the video, the defendant "seems to answer" the officers' questions. Nor is there anything in the video suggesting that the officers were antagonistic toward the defendant or that he was fending off accusations. We are not persuaded that the video, without audio, constituted impermissible evidence of the defendant's pre-arrest silence.

[¶43] The defendant also argues that the video "had no probative value on any issue of consequence." The State counters that the video "was relevant and probative of the investigative steps taken by the police" and "was probative of the defendant's whereabouts, who he was with, and his living situation when the police began looking for [the victim], who was supposed to be with him." Based upon our review of the video, we conclude that while its probative value was slight, it presented virtually no danger of unfair prejudice. Accordingly, we reject the defendant's arguments that the video was inadmissible under New Hampshire Rules of Evidence 402 and 403. See N.H. R. Ev. 402 (providing relevant evidence is generally admissible); N.H. R. Ev. 403 (providing relevant evidence is excludable "if its probative value is substantially outweighed by a danger of . . . unfair prejudice"). We conclude that the trial court did not unsustainably exercise its discretion in admitting the video.

III. Conclusion

[¶44] Although the defendant requests that we reverse all his convictions, his brief does not specifically address his convictions of falsifying physical evidence, witness tampering, and abuse of a corpse. To the extent the defendant does challenge those convictions on appeal, he has failed to demonstrate reversible error. See State v. Letarte, 169 N.H. 455, 469 (2016). Any issues the defendant raised in his notice of appeal but did not brief are deemed waived. See State v. Blackmer, 149 N.H. 47, 49 (2003).

[¶45] For the foregoing reasons, we reverse the defendant's conviction of second degree murder, affirm his convictions of second degree assault, falsifying physical evidence, witness tampering, and abuse of a corpse, and remand.

Affirmed in part; reversed in part; and remanded.

MACDONALD, C.J., and DONOVAN and COUNTWAY, JJ., concurred.