THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0342

State of New Hampshire

v.

Kirkman J. Cassavaugh, III

Appeal Pursuant to Rule 7 from Judgment
of the Belkanp County Superior Court

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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QUESTIONS PRESENTED

1. Whether the trial court erred in admitting, through the testimony of Krystal Sanborn, evidence that Cassavaugh had previously threatened to kill Jennifer Huard.

Issue preserved by State's motion in limine to admit the evidence, App.* A1-13; Cassavaugh's objection, App. A14-23; hearings on motion, H2 4-18, H3 4-92; and trial court's order, App. A24-29.

2. Whether the trial court erred in admitting Cassavaugh's statements to the police from the moment that he first exercised his right to remain silent.

Issue preserved by motion to suppress, App. A30-35; State's objection, App. A36-65; hearing on the motion, H1 14-29; and trial court's ruling, App. A66-70; and raised, in part, as plain error. Supreme Court Rule 16-A.

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*Citations to the record are as follows:
"App." designates the appendix to this brief;
"H1" designates the transcript of the hearing on pending motions, held on October 25, 2007;
"H2" designates the transcript of the hearing on pending motions held on January 8, 2009 (the transcript erroneously indicates that this hearing was held on January 20, 2009);
"H3" designates the transcript of the hearing, including witness testimony, on the motion in limine held on January 20, 2009;
"NOA" designates Cassavaugh's Notice of Appeal;
"T" designates the consecutively-paginated transcripts of the eight-day jury trial held on February 5-17, 2009.

STATEMENT OF THE CASE

A Belknap County grand jury indicted Kirkman Cassavaugh, III on two counts of first degree murder of Jennifer Huard and Jeremy Huard. T1 4-6. Cassavaugh was also indicted on two alternate theories of second degree murder for each victim. Id. After an eight day jury trial, Cassavaugh was convicted of first degree murder of Jeremy and second degree murder of Jennifer. NOA. The trial court (Smukler, J.) sentenced Cassavaugh to life in prison without the possibility of parole for first degree murder and a consecutive term of 40 years to life for second degree murder. NOA.

STATEMENT OF THE FACTS

Kirkman Cassavaugh and Jennifer Huard ("Jennifer") were dating in September 2006. T 500. Jennifer was very close with her brother, Jeremiah ("Jeremy"), who was also friends with Cassavaugh. T 498-500. Cassavaugh, Jennifer, Jeremy, and most of the other civilian witnesses and people referred to during trial used drugs together. See, e.g., M2 5; T 528-29 (Krystal Sanborn knew Jennifer through use of drugs); T 529 (Sanborn and Jeffrey Tarallo used drugs together); T 976 (Tarallo knew Jennifer through use of drugs); T 1004-07, 1054 (Cecilia Columb, Jack Vincent, Cassavaugh used drugs together); T 1015 (Columb knew Mark Thomson through use of drugs); T 987-88, 1032, 1038-39 (Tammy Duve used drugs and partied with Jennifer, Tarallo, Columb); T 978, 987-88 (Armand Rouilliard used drugs and partied with Tarallo, Cassavaugh, Duve).

In September 2006, Mark Thomson had his recreational vehicle (RV) parked on the property at 230 Horne Road in Belmont. T 236-38. Cassavaugh lived in a trailer on this property which was owned by his grandparents, who lived across the street. T 61-62, 237-38.

The jury heard from three witnesses who testified about the activities at the trailer on the evening of September 19 into the early morning of September 20. T 235-306 (Thomson), 975-94

(Tarallo), 1001-70 (Columb). While overlapping on some events, the testimony also contained contradictions.

During the day on September 19, 2006, Jeffrey Tarallo and Armand Rouilliard went to Cassavaugh's trailer. T 977-78. Jack Vincent was there with Cassavaugh. T 978. The four men did cocaine together. Id.; T 981. Tarallo left around dusk and dropped Rouilliard off at his home in Laconia. T 980-81. Tarallo then picked Jeremy up at his father's home in Gilford and they went back to Cassavaugh's trailer. T 982. Cassavaugh and Vincent were still there, as was a woman identified as Vincent's girlfriend, "C.C." T 983; see also T 1003-05 (Cecilia Columb's testimony about her relationship with Vincent and presence at Cassavaugh's trailer that night). Tarallo did more cocaine with the others at Cassavaugh's trailer. T 984.

Thomson testified that at supper time, he returned to the property and went to Cassavaugh's trailer. T 239-40. Jeremy was there and the three men did cocaine. T 240-41. Thomson returned to his RV and went to sleep at about 10 p.m. T 242-45. As he was falling asleep, Thomson saw car headlights, which might have belonged to Vincent, who Thomson was expecting. T 267-68; see also, T 321 (April Hanks testified that Thomson told her that Vincent had been at the property that night).

Columb testified that she and Vincent went to Cassavaugh's trailer around midnight looking for drugs. T 1005, 1027.

Cassavaugh borrowed Columb's car and returned with crack cocaine, which the three of them smoked. T 1005-07. Columb testified that Cassavaugh showed Vincent a rifle, which she believed came from Cassavaugh's bedroom closet. T 1007-08; but see, T 282 (Thomson had not seen any guns at Cassavaugh's trailer).

Columb testified that when Tarallo and Jeremy arrived at the trailer, they indicated that they needed help recovering money from someone on a drug-related debt. T 1008-10, 1033; but see T 989-90 (Tarallo testified that he alone was owed money on drug-related debt). Vincent agreed to help. T 990, 1010. Columb testified that Tarallo, Vincent, and Jeremy left to find the person who owed Tarallo money. T 1010; but see T 989-90 (Tarallo cannot remember if Jeremy present). Tarallo testified that nothing happened while they were out and they did not talk to anyone. T 994.

While the three men were gone, Columb gave Cassavaugh a ride to the store. T 1010. Cassavaugh spoke about troubles in his relationship with Jennifer. T 1010-11. Cassavaugh seemed upset, sad, and agitated. T 1010, 1048-49. Columb and Cassavaugh returned to the trailer and shortly thereafter Vincent returned. T 1012-13, 1062. Columb and Vincent then immediately left. T 1013, 1036. Columb did not remember seeing Jeremy back at the trailer. T 1012-13, 1028.

Tarallo testified that he left Jeremy at Cassavaugh's trailer. T 984. Tarallo then went to Tammy Duve's ("Duve") house in Franklin, where other people were gathered, including Jennifer and Rouilliard. T 985-87. When Tarallo later left Duve's, Jennifer was still there. T 992.

Duve's son, Michael Duve ("Michael"), testified that he spent the night of September 19 at his mother's house. T 538-39. There were several people on the second floor with his mother, including Jennifer and an older man. T 540. Michael mostly stayed in the basement. T 539-40. At some point, Jennifer came down and borrowed Michael's phone to call for a ride. T 541. Phone records showed that Michael's phone called a phone registered to Cassavaugh's mother, Terri Chase, at 2:19 a.m. T 66, 541, 554. That night and early morning, there were numerous calls between Duve's home phone and Chase's phone, the last made at 4:12 a.m. T 538, 560-63.

Columb testified that she and Vincent left Cassavaugh's trailer and returned to Vincent's trailer in Franklin. T 1013. This trailer is slightly closer to Cassavaugh's trailer than Duve's home. T 1046. They arrived at Vincent's trailer at 4:30 a.m. T 1013, 1021-22, 1027, 1047.

Cassavaugh told the police that Jennifer called from Duve's house and asked for a ride. App. A72, A93-96. Cassavaugh and Jeremy went to Duve's house and picked Jennifer up. Id. He told

police that he argued with Jennifer and that she and Jeremy left his house on foot at 4 a.m. T 491-91; App. A72-73.

Thomson testified that he was awoken by the sound of Cassavaugh and Jennifer arguing. T 240, 245. He said that it was not uncommon for them to argue. T 245. Thomson looked out the window and then laid back down but did not go back to sleep. T 245-46. Thomson then heard some scuffling, looked out the window, and saw Cassavaugh and Jeremy fighting. T 246. Cassavaugh was punching Jeremy and then threw him down; Jeremy was not fighting back. T 246-48. Thomson yelled out the window, which was open, "Don't kill him, Kirk." T 247-48. Cassavaugh immediately got up, went to his trailer, and turned off the outside light. T 248. Thomson got up and began to put his clothes on. Id. He looked out the window and saw Cassavaugh dragging a woman by her feet out of the trailer. T 249-50. The woman's head bounced off the front steps. T 250.

Cassavaugh then knocked on Thomson's door, told Thomson that he had killed "them," and asked for help getting rid of the bodies. T 251. The two men discussed burning the bodies on piles of debris located on the property. T 252, 295, 1059. Thomson advised Cassavaugh that burning the piles while it was dark would attract attention. T 295. Thomson agreed to help Cassavaugh and said he was going to warm up the car. T 252. Once in the car, Thomson drove off. Id.

Thomson stopped at a store to get coffee and called April Hanks, his girlfriend, at 4:29 a.m. T 237, 253, 311; App. A138. He told Hanks he needed to talk to her and then went to her apartment. T 253-54. They spoke about what had happened and agreed that Thomson should go to the police. T 254, 313. Hanks' apartment is three-quarters of a mile from the Belmont police station, but Thomson neither went there nor called the police. T 67, 268, 276. Instead, they agreed that Thomson should wait until after he got his daily dose of methadone. T 257, 313. Thomson then took a nap at Hanks' apartment and took their daughter to school. T 254-55, 314-16, 323-24.

Cassavaugh called Thomson several times that morning, as did Vincent. T 66, 274, 304, 314-15, 550; App. A138-39. Thomson and Vincent discussed what had happened and then met, with Columb, to further discuss it. T 255-57, 1014-15. Because Vincent and Columb did not believe Thomson, Thomson called Cassavaugh and tried to get him to admit the murders. T 256, 1015-16. Cassavaugh said nothing incriminating. T 256, 1016. Columb testified that she called Thomson after their meeting to tell him that there was nothing in the news about any murders and Thomson told her it was just a joke. T 1050.

Thomson then went to the methadone clinic. T 257. He arrived at 8:19 a.m., although he usually got his dose earlier in the morning. T 285-86, 401. As he returned from the clinic,

Thomson again spoke to Vincent by phone. T 259. As a result of their conversation, Thomson feared that he may be implicated in the murders. T 277. He pulled into the Loudon police station, where he spoke to Loudon officer Krieger. T 50-52, 258-59.

Krieger brought Thomson to the Belmont police station and Thomson spoke to Belmont officer Mann shortly before 9 a.m. T 56-58, 259-60. Mann drove by Cassavaugh's property after 11 a.m., paying particular attention to the debris piles, but did not see any sign of the victims. T 69-77.

Belmont officer Bryant and Lieutenant Lewandowski drove by the scene in an unmarked car after noon. T 485, 493. As they drove up and down Horne Road, they observed a car that Lewandowski recognized to be owned by Cassavaugh's grandmother. T 487, 495. The officers turned around and followed the car. T 487. The car pulled into Cassavaugh's trailer and Cassavaugh got out. Id. The officers drove past the driveway, turned around, and stopped along Horne Road. T 488-89. The car then left the trailer and turned into Cassavaugh's grandparents' driveway. T 489. They saw Cassavaugh go to the mailbox and he appeared to notice the officers watching him. Id.

The officers approached Cassavaugh and advised him that Jennifer and Jeremy were missing. T 490-91. Cassavaugh told Bryant that he had last seen Jennifer and Jeremy about 4 a.m. when they left Cassavaugh's trailer on foot. Id. Cassavaugh

said that they had had an argument and that Jennifer wanted to leave and wanted Jeremy to go with her. T 491. Cassavaugh said that no one else was at the trailer when the Huards left. Id. The property at 230 Horne Road was secured with police tape while Cassavaugh was at his grandparents' house. T 433-34.

Two trash cans had been left at the end of the driveway of 230 Horne Road for pick-up. T 64, 332. The police brought them up from the road so that they would not be emptied. Id.; T 492. Cassavaugh told the police that he had brought the trash cans out for collection. App. A87.

Sergeant Hunt of the State Police Major Crimes Unit asked Cassavaugh to come to the station to speak with him. T 416. Cassavaugh agreed and he was driven to the old town hall building, adjacent to the police station. T 416-17. He spoke with Hunt and Sergeant Nolan for about 47 minutes. App. A71, A109. Cassavaugh again indicated that he had argued with Jennifer and that she and Jeremy had left his trailer on foot at about 4 a.m. App. A72-73. He denied any physical confrontation between himself and the victims. App. A74, A85-86, A103, A108.

Cassavaugh's grandparents gave the police permission to search the property for the Huards. T 62, 83, 327-28, 491-92. There was no visible sign of them, although the officers carefully observed the debris piles on the property. T 70, 76-77. Trooper Gould arrived at the scene with his cadaver dog that

afternoon. T 78-81, 90. The dog immediately alerted on one of the piles and, when Gould lifted a piece of black material on the pile, he saw a human leg. T 84-86.

Hunt then asked Cassavaugh to speak with him again. T 428. Cassavaugh agreed and they went to the police station. T 428-29. Cassavaugh was given his Miranda rights. T 433. At the conclusion of the interview, Cassavaugh was arrested. T 430. While he was in booking, Cassavaugh made two unsolicited statements. Nolan testified that Cassavaugh said, "I didn't kill them. They attacked me." and "This all stemmed from me being kicked in the balls and being pushed into my TV." T 454-56.

State Police Major Crimes Unit Sergeant Gilbert and Trooper Lulka arrived at the scene at about 7:40 p.m. T 92, 97, 325-27. They began dismantling the pile in which the leg had been seen. T 105-09. The body in that pile, identified as Jeremy's, was covered with various items. T 107, 109-10, 328-29. Jeremy was wearing only underwear, but the officers found a bloody t-shirt, jeans, a pair of shoes, and a pair of socks in the pile. T 111-13, 342. Jeremy had a piece of rope wrapped around his right ankle and his left wrist. T 114, 354, 512-14, 891.

There were two other debris piles on the property. T 63. The officers concluded that the next pile they looked at had not been recently disturbed. T 114-16, 343-44. In the third pile, covered by a piece of tar paper, a couple small pieces of

cardboard and trim molding, the officers found Jennifer's fully-clothed body. T 117-20, 329. Her right pant leg was torn up below the knee and there were marks on her lower leg that appeared to be finger marks, consistent with someone having grabbed her leg. T 120, 748-52. There were no signs that either body had been dragged to the piles. T 195, 353.

Gilbert processed Cassavaugh's trailer on September 21 and 22. T 123-24, 155-56. There was blood in nearly every room in the trailer, including on the ceiling of the kitchen, bathroom, master bedroom, and living room. T 139, 154, 209, 626-27. Blood was also found on the three steps leading to the front door. T 176-77. Gilbert seized a folding knife from outside the trailer, a kitchen knife from the kitchen floor, and a rifle that was in an unlocked gun cabinet in the living room. T 125, 128-29, 132, 139. He found a clear plastic floor mat in the kitchen closet that was covered in blood and had a clear shoe print on it. T 139-41. Gilbert seized several pairs of shoes from inside the trailer and the yard. T 129, 203. There were bullet holes in the front door and three more that went through a segment of wall and into the refrigerator. T 144-47, 155. Gilbert found two bullet fragments on the floor behind the fridge. T 149. The holes in the fridge had been filled in with a white caulking material. T 148. Gilbert also found and seized a shell casing from the living room floor. T 129.

The trash cans were searched. T 332. Inside, Lulka found women's clothing, a .22 shell casing, some hypodermic needles, and a tube of caulking material. T 333-34. The police conducted a search of the entire property, including several outbuildings, and Cassavaugh's grandmother's car, but found nothing significant. T 332, 337-38, 352, 496.

Thomson's RV was searched with his consent. T 362-63. There was no evidence of crime. T 374-75. After the police had cleared the scene, Thomson was allowed to go back to his RV. T 260. He also went into Cassavaugh's trailer to see what had happened there. Id. While there, Thomson found a pack of throwing stars and a knife and he stole them. T 261.

On the day after the murders, Krystal Sanborn was with Tarallo, who was acting weird, nervous, and scared. T 529-33. Tarallo said he knew something about what happened the night of the murders. T 533. Some of Jennifer's clothing was in Tarallo's car. T 531. Although Sanborn knew Tarallo pretty well, she felt nervous and was glad she had a knife to protect herself. T 530-32.

Dr. Thomas Andrew performed autopsies on Jennifer and Jeremy. T 871. Jennifer died within seconds of suffering a gunshot wound to her chest. T 886-87. Jennifer had another gunshot wound to her shoulder that was not fatal. T 875, 882-85. She had bleeding under the skin on the back of her head, which

could be consistent with being dragged down stairs. T 877-82. Andrew believed that this injury occurred before death, although it could have occurred around the time of her death. T 939-40.

Jeremy died from multiple stab wounds, with multiple gunshot wounds as a contributing factor. T 915. Jeremy had gunshot wounds to his face, buttocks, and back. T 891-93, 901-05. He had twelve stab wounds, which appeared to have been caused by the same weapon. T 891-94. Andrew saw photographs of three knives and throwing stars seized during the investigation and concluded that none were consistent with Jeremy's wounds. T 895-96, 933. On his neck, Jeremy had injuries consistent with having been strangled. T 906-07. Jeremy had an injury on his forehead which could be consistent with having been hit by the butt of a rifle. T 899-901. He also had abrasions that were likely caused after his death and could be consistent with having been dragged. T 891, 899.

Both Jeremy and Jennifer had drugs in their systems, but neither had track marks on their arms consistent with intravenous drug use. T 876-77, 892, 897, 927-31. Jennifer had alcohol, methadone, valium, and a metabolite of cocaine in her blood. T 877-78, 929-31. Jeremy had a blood alcohol content of .179 and significant quantities of both cocaine and its metabolite, which indicated both recent and more distant use. T 897, 927-29. The

time of death for both was estimated to have been early in the morning on September 19. T 923-25, 943-44.

The state lab worked on several aspects of this case. Serology testing revealed no blood on the knives or throwing stars. T 586-87, 676-77. DNA testing revealed Jennifer's blood on a cabinet in the kitchen of Cassavaugh's trailer and Jeremy's blood on the carpet by the front door, the plastic mat, and the wall adjacent to the refrigerator. T 620-21, 686-91, 710. Testing of the rope taken from Jeremy's body revealed DNA from two different sources. T 697-701. One source could have been Jeremy and, although very little could be said about the other source, Cassavaugh could not be excluded. T 700-02, 728. Mary Dawson and Kimberly Rumrill concluded that many of the spatter patterns in the trailer were consistent with cleaning blood out of used hypodermic needles. T 626-29, 659-60, 680-85. No conclusion could be reached about where Jeremy or Jennifer had been killed. T 718-20, 735.

Steven Ostrowski tested the rifle seized from Cassavaugh's trailer and found it to be operable. T 757. The two casings seized by the police came from that rifle. T 768-71, 811. Of the six bullets Ostrowski examined, two, one from the trailer and the other from Jennifer's body, were fired from the rifle and the other four could have been. T 772-95. Cassavaugh's finger and palm prints were on the rifle. T 833-35, 846-51.

Cassavaugh's foot print, which was not visible to the naked eye, was detected on the plastic mat. T 836-41, 857-59, 964. The print was left with blood determined to be Jeremy's. T 704-11. About a year after the murders, the police collected a pair of shoes from Thomson, that he said he had been wearing on the night of the murders, and another pair from Vincent. T 379, 402-07. A footwear impression, left in blood on the mat, did not match any of the shoes collected during the investigation. T 962-63, 969.

The State introduced evidence that Cassavaugh and Jennifer had been having problems in their relationship prior to the murders. During the summer of 2006, Sanborn called Jennifer and overheard a man, who she believed to be Cassavaugh, say "I will fucking kill you" in a tone filled with rage. T 527-28. On the Thursday before her death, Jennifer's father, Bernard Huard ("Bernard"), helped Jennifer move her things out of Cassavaugh's trailer and into his home. T 501-02. That Saturday night, Cassavaugh went to Bernard's home. T 502. Cassavaugh seemed angry and insistent on speaking with Jennifer. T 503-04. Jennifer went outside with Cassavaugh and Bernard heard her screaming at Cassavaugh. T 504. When she came back inside, she was crying. Id.

SUMMARY OF THE ARGUMENT

1. The trial court erred when it admitted evidence of Cassavaugh's threat to kill Jennifer. The threat was not significantly connected to the circumstances of the murder and the risk of unfair prejudice substantially outweighed its probative value.

2. The trial court erred in admitting Cassavaugh's statements after he first exercised his right to silence. The State is not permitted to use a defendant's pre-arrest silence in its case-in-chief. The redacted portion of the second interview was minimally relevant and created a risk that the jury would infer that Cassavaugh had invoked his right to remain silent and use that as evidence of his guilt.

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT CASSAVAUGH HAD PREVIOUSLY THREATENED TO KILL JENNIFER.

The State moved to admit evidence that Cassavaugh had threatened to kill Jennifer two to three months prior to her death. App. A1-13. The State argued that this evidence was relevant to prove Cassavaugh's intent on the day of the murder and his state of mind, particularly as to the element that Cassavaugh killed Jennifer purposely with premeditation and deliberation. App. A2-3. It also argued that the evidence was relevant to Cassavaugh's motive and would, therefore, help prove the killer's identity, since Cassavaugh's defense would be that someone else had committed the murders. H2 6.

Cassavaugh objected to introduction of the evidence of the prior threat under New Hampshire Rule of Evidence 404(b). App. A14-23. He argued that the evidence was irrelevant for any purpose other than to show his propensity, that there was not clear proof of the prior threat, and that the unfair prejudice of the evidence outweighed any probative value. Id. Cassavaugh made clear that his defense at trial would be that someone else committed the murders. App. A18.

The court held two hearings on the motion, including an evidentiary hearing, at which Sanborn testified about the threat. H2 4-18, H3 4-16. Sanborn testified that she called Jennifer in June or July 2006. H3 6-7, 14. At the time, Jennifer was at her father's house. H3 7. Sanborn heard a male voice but could not

identify the voice as Cassavaugh's; however, Jennifer told Sanborn that she was arguing with Cassavaugh. Id.; H3 15. Sanborn testified that the male voice was filled with rage and said "I'm going to fucking kill you." H3 7-8, 15. Sanborn asked Jennifer if she was okay and Jennifer replied that they were just fighting and that it happened all the time. H3 16. Sanborn testified that Jennifer quickly got off the phone. H3 7, 16; see also App. A13 (transcript of Sanborn's statement to the police in which she says that male voice said "I'm gonna fuckin' kill you. Get off the fuckin' phone.").

The court held the evidence admissible under Rule 404(b) as relevant to Cassavaugh's "state of mind toward the victim ... [and] the defendant's intent to act toward the victim in a physically threatening and intimidating manner." App. A27. The court found that there was clear proof of the threat because Jennifer had told Sanborn "that the defendant was the only other person at home with her." Id. Finally, the court found the threat not unfairly prejudicial and highly probative of Cassavaugh's intent, "especially in light of the defendant's claim that [someone else] committed the murders." Id. In so ruling, the trial court erred.

Rule 404(b) states that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be

> admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of the rule is to "ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs." State v. McGlew, 139 N.H. 505, 509 (1995) (quotation and citation omitted). The State bears the burden of demonstrating the admissibility of prior bad act evidence. Id. This Court will review the trial court's 404(b) decision for an unsustainable exercise of discretion. State v. Pepin, 156 N.H. 269, 276 (2007) (citation omitted). Evidence of other crimes or wrongs is inadmissible unless: "(1) it is relevant for a purpose other than to show the defendant's bad character or disposition; (2) there is clear proof that the defendant committed the other crimes or acts; and (3) prejudice to the defendant does not substantially outweigh the probative value of the evidence." Id. at 277 (quotation and citation omitted).

In order to show relevance for a proper purpose, the State "must state the specific purpose for which the evidence is offered and must articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." McGlew, 139 N.H. at 510 (citation omitted). The Court has "warned

against the mechanical recitation of intent, or other permissible Rule 404(b) grounds, as the password for admissibility," because such an automatic response "hints, ... if it does not demonstrate, that the prosecutor is unclear as to precisely why the evidence is or is not admissible." Id. at 508 (quotations and citations omitted).

A. Not relevant to intent

Prior bad act evidence may be relevant to prove a defendant's intent at the time of the charged offense. However,

> [t]o be relevant to intent, evidence of other bad acts must be able to support a reliable inference, not dependant on the defendant's character or propensity, that the defendant has the same intent on the occasions of the charged and uncharged acts. [This Court] will find sufficient support for a reliable inference of intent only if the defendant's intent in committing other bad acts and the defendant's intent in the charged offenses is closely connected by logically significant factors. Although temporal proximity alone between charged and uncharged bad acts will never support a reliable inference of shared intent, time is one factor to be considered.

State v. Bassett, 139 N.H. 493, 499 (1995) (citations omitted).

This Court considers the temporal proximity and factual similarity between the uncharged and charged acts to decide whether the uncharged act supports an inference as to the defendant's intent at the time of the charged act, apart from inferences of the defendant's propensity. Id. at 500 (citation omitted); see also McGlew, 139 N.H. at 507 ("to be relevant,

prior bad acts must be in some significant way connected to material events constituting the crime charged and not so remote in time as to eliminate the nexus.") (citation omitted). But such analysis must not rely on "reckless generalizations," because "even if the accused entertained a certain intent during a similar uncharged incident, the accused may not have formed that intent on the charged occasion." Bassett, 139 N.H. at 500 (quotations and citations omitted). Even if the prior act is the same as the charged act, with the same mental state, "[w]ithout the necessary clear connection between" them, an assumption that the intent was the same is "indistinguishable from the impermissible use of [the uncharged bad act] to prove the defendant's propensity to commit the charged crime in order to show that he acted in conformity therewith on the subsequent occasion." Id. at 501-02 (citation omitted).

This Court has found a lack of temporal proximity when the prior bad act occurred three and a half months before the charged act. Id. at 500. On the other hand, this Court has also found sufficient temporal proximity when the prior bad act was five months before the charged act. Pepin, 156 N.H. at 275-78; State v. Sawtell, 152 N.H. 177, 181 (2005). Here, the prior bad act was two to three months before the charged offense. While this amount of time may be sufficiently close, if there is also

significant factual similarity between the two incidents, they are not so close in time as to be conclusive.

In this case, the State had to prove that Cassavaugh had a purpose to kill Jennifer and that he acted with premeditation and deliberation. Thus, the prior threat had to have been made with the same intent to be relevant to Cassavaugh's intent at the time of the murder. However, the evidence showed that Cassavaugh did not kill Jennifer at the time of the threat, even though the trial court found that he was alone with Jennifer at that time. App. A27. Two to three months passed between the threat and Jennifer's murder, during which Cassavaugh dated Jennifer and was presumably alone with her, and during which time he did not kill her. The threat was made during an argument, which was a common occurrence between Cassavaugh and Jennifer. See, e.g., H3 16; T 245, T 1010-11. It appeared to have been made with the purpose of getting Jennifer off the phone.

There was insufficient evidence about the circumstances of the threat to meet the State's burden of proving the threat relevant to Cassavaugh's intent at the time of the murder. The threat could have been intended to communicate Cassavaugh's intention to kill Jennifer in the future, which would be relevant to his intent at the time of the murder. However, the threat could also have been an expression of transitory anger, uttered during an argument. If so, it would have no relevance to

Cassavaugh's purpose to kill Jennifer during a subsequent argument months later. Evidence is relevant if it has "any tendency to make the existence of any fact more or less probable than it would be without the evidence." N.H. R. Evid. 401. Without knowing more about the circumstances of the threat, it does not make Cassavaugh's purpose to kill at the time of the murder any more or less probable.[1]

This Court has considered evidence of prior threats to prove a defendant's state of mind or intent at the time of a charged violent or threatening offense against the same person. However, "[p]roof that the defendant acted threateningly on one occasion to prove that he acted threateningly on another is evidence of propensity, pure and simple; calling it relevant to prove 'state of mind' does not make it so." State v. Richardson, 138 N.H. 162, 168 (1993). When it has found a prior threat admissible, the Court has found that it is uniquely relevant to the defendant's state of mind at the time of the charged offense.

For example, in State v. Brewster, this Court found a prior threat against the same person, involving a similar threat that the victim would be shot, under similar circumstances, relevant to the defendant's purpose to put the victim in fear and cause

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[1]Indeed, the State later argued that the threat showed that Cassavaugh's anger towards Jennifer had been "simmering for months," T 1109, 1132 (State's closing argument), not that the threat showed Cassavaugh's purpose on the night of the murder.

her alarm during the charged offenses. 147 N.H. 645, 649-50 (2002). In Pepin, the Court found that a prior threat to kill the victim occurred under similar circumstances ("to intimidate the victim when she did something he disliked") and that it illuminated the defendant's intent to kill or seriously injure the victim when he said to her during the charged assault, "I've had it. I've f'ing had it, I might as well finish it and end it now, it's over for you bitch." 156 N.H. at 278. In Sawtell, the Court found prior threats with a gun against the victim "under similar circumstances" relevant to prove the defendant's intent in shooting his girlfriend to death. 152 N.H. at 178-82. In State v. Lesnick, this Court found prior threats to kill the decedent relevant to the defendant's intent at the time of the murder, particularly as the defendant was claiming that she accidentally killed her husband. 141 N.H. 121, 124-30 (1996).[2] In Richardson, the Court found the defendant's threatening behavior to, and in the presence of, the victim in the "immediately preceding days relevant to and probative of his intentions towards [the victim] ... at the time of the charged

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[2]The Court in Lesnick performed a Rule 404(b) analysis for evidence of the defendant's prior assault of the victim. Id. at 124-29. The Court found that Rule 404(b) did not apply to the defendant's prior threats, because they were admissions. Id. at 129-30. Thus, the Court only performed an analysis under Rule 403. Id. This Court has not rejected the Rule 404(b) analysis in any other case involving prior threats. See, e.g., Pepin, Sawtell, Brewster, Richardson, *supra*.

offenses [and made it] ... more probable than not that the defendant on the later occasion acted with an intent to terrorize" the victim. 138 N.H. at 166.

Here, the prior threat was not relevant to Cassavaugh's state of mind or intent at the time of the murders. There was no evidence of the circumstances of the murders or of the argument surrounding the prior threat, thus the State could not show that the prior threat was made under similar circumstances. The prior threat did not involve the use or threatened use of a gun, the weapon used to murder Jennifer. Cassavaugh was not charged with an offense that required the state to prove that he had a more specific purpose, such as a purpose of terrorize or cause alarm, which could be shown through the prior threat.

B. Not relevant to motive

The State argued below that the threat was relevant to Cassavaugh's motive, which was important evidence to prove the killer's identity. H2 6. "Motive has been defined as supplying the reason that nudges the will and prods the mind to indulge the criminal intent." Bassett, 139 N.H. at 497 (quotation and citation omitted). However, the State does not bear the burden of proving the defendant's motive and such evidence may only be relevant if the defense raises an issue as to the defendant's lack of motive to commit the charged offense. Id. at 498.

Here, the prior threat was not relevant to why Cassavaugh killed Jennifer two or three months later. Cassavaugh did not object to evidence of his rocky relationship with Jennifer, which supplied a motive for the killing. See, e.g., App. A14-23 (objection to threat evidence does not contain objection to Sanborn's testimony that she overheard Jennifer and Cassavaugh arguing or Jennifer's statement that she and Cassavaugh argued frequently); T 504 (testimony that Cassavaugh and Jennifer argued days before the murder), T 245 (testimony that on night of murder witness heard Cassavaugh and Jennifer arguing, which was not unusual), T 1010-11 (testimony that on night of murder, Cassavaugh spoke of his rocky relationship with Jennifer), T 491 (Cassavaugh's statement to police that he and Jennifer argued the night of her murder).

Here, the threat was used to show that Cassavaugh acted threateningly toward the victim and must have done so on the night of the murder. Such use only shows Cassavaugh's propensity. That the State argued at the hearing that the threat was relevant to Cassavaugh's motive and thus to the identity of the killer showed the State's uncertainty about the admissibility of the evidence. The State sought to admit the prior threat to prove that Cassavaugh was Jennifer's killer. However, the evidence tended to prove the killer's identity by showing Cassavaugh's propensity to act violently and threateningly

towards her. As the trial court held, the prior threat showed "the defendant's intent to act toward the victim in a physically threatening and intimidating manner," App. A27, which is another way of saying he had a propensity to so act.

C. Probative value substantially outweighed by danger of unfair prejudice

Finally, any probative value of this evidence was substantially outweighed by the danger of unfair prejudice. While this Court accords "considerable deference to the trial court's determination in balancing prejudice and probative worth under Rule 404(b)," reversal is required if "the trial court's ruling was clearly untenable or unreasonable to the prejudice of [the defendant's] case." State v. Russell, 159 N.H. ___, ___ (decided December 16, 2009) (quotation and citation omitted).

Evidence of prior bad acts is "inherently prejudicial and increases the likelihood that a jury will decide the case on an improper basis." McGlew, 139 N.H. at 509 (citation omitted).

> Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.

Id. at 510 (quotation and citation omitted). When prior bad act evidence carries a risk of unfair prejudice, it must "possess significantly greater probative value." Id.

Here, the risk that the jury would use the prior threat evidence improperly was high. A violent threat towards a vulnerable individual is "inflammatory." Russell, 159 N.H. at ___. While the jury heard evidence of more violent acts, the murders of Jennifer and Jeremy, the central issue in the case was who had committed those murders. Evidence that Cassavaugh had acted threateningly towards Jennifer in the past created a significant risk that the jury would make a decision based on Cassavaugh's propensities and not on the evidence that linked him to the charged crimes. The State recognized the prejudicial impact of evidence of prior violent and threatening acts. It did not seek to introduce evidence of physical violence between Cassavaugh and Jennifer. H3 90.[3] However, it argued that the jury could infer the killer's identity because of Cassavaugh's prior threat. T 1132 (in arguing the evidence that pointed to Cassavaugh as the killer, State argued "It is the defendant who had previously threatened to kill Jennifer.").

While evidence of the defendant's intent is always relevant, its probative value is higher in cases where the defendant specifically disputes the requisite mental state. In such cases, evidence of prior bad acts probative of the defendant's intent is

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[3]The only evidence of physical violence admitted during trial was the inadvertent testimony of the victims' father that, several days before the murders, Jennifer and Cassavaugh argued and Jennifer returned to the house with a "hand print on her neck." T 504.

given significant weight. See, e.g., State v. Ayer, 154 N.H. 500, 513 (2006) (defendant's mental state "central to the trial"); Brewster, 147 N.H. at 650 (defendant argued he lacked requisite mental state); Lesnick, 141 N.H. at 127-28 (self-defense claim); State v. Dukette, 145 N.H. 226, 232 (2000) (self-defense claim); Richardson, 138 N.H. at 166-67 (defendant argued he lacked the requisite mental state). However, if the defendant contests that the act even occurred or that he committed the act, evidence of intent is less probative. See, e.g., United State v. Colon, 880 F.2d 650, 657 (2d Cir. 1989) (cited in Richardson, 138 N.H. at 167).

Here, Cassavaugh did not dispute that the killer must have acted purposely. Rather, he argued that he was not the killer. Thus, the threat was not highly probative of a contested issue in the case.

"The probative value of the other bad act evidence must also be considered in the context of its incremental value: trial courts must consider the extent to which the issue is established by other evidence, stipulation, or inference." McGlew, 139 N.H. at 510-11 (quotation and citation omitted). If the State already has evidence of the defendant's intent, the prior bad act evidence "may add little and consequently will be excluded more readily." Id. at 511 (quotation and citation omitted).

The State had ample evidence that the killer acted with the purpose to kill. Jeremy suffered three gunshot wounds and twelve stab wounds. Jennifer died within seconds of being shot in the chest. The State also had evidence of Cassavaugh's motive to kill Jennifer. Numerous witnesses testified about their rocky relationship and the jury heard Cassavaugh's statement to the police that he and Jennifer argued on the night of her murder.

The prejudice of prior bad act evidence is lessened with an instruction to the jury as to the use it may make of the evidence and instructing the jury that it may not use the evidence as proof of the defendant's character. See, e.g., State v. Berry, 148 N.H. 88, 93 (2002); Pepin, 156 N.H. at 279; Ayer, 154 N.H. at 513; Richardson, 138 N.H. at 167. Here, the trial court did not issue a limiting instruction regarding this evidence either when the evidence came in or in its general charge at the end of the trial.

The central issue in this case was the identity of the killer. Cassavaugh's threat to kill Jennifer two or three months before the murders was not relevant to whether he had a purpose to kill her on the night of the murders. Any relevance was greatly outweighed by the risk that the jury would use the evidence to identify the killer through judgments about Cassavaugh's propensity. The risk that the jury would misuse the evidence outweighed any minimal probative value. Because of the

risk that the jury misused the evidence and came to its verdicts based on judgments about Cassavaugh's character, this Court must reverse.

II. THE TRIAL COURT ERRED IN ADMITTING CASSAVAUGH'S STATEMENTS TO THE POLICE FROM THE MOMENT HE FIRST EXERCISED HIS RIGHT TO REMAIN SILENT.

On September 20, 2006, Cassavaugh voluntarily spoke with the police on two occasions: at 2:50 p.m. and 5:37 p.m. T 416-23, T 428-30; App. A71-109, App. A110-120. During the first interview, the police asked Cassavaugh about his interactions with the victims and when he last saw them. App. A72-109. Cassavaugh said that he had argued with Jennifer and that she and Jeremy had left the trailer on foot at about 4 a.m. App. A72-73. He denied that any physical altercation occurred. App. A74, A85-86, A103, A108. Cassavaugh was aware that the police were searching his property. App. A109. When the officers expressed the belief that Cassavaugh had strangled or shot the victims, Cassavaugh ended the interview. App. A108-09 ("But you said I could choose when to end this ... to end this meeting and I'm choosing to end it."). This interview lasted about 47 minutes. App. A71, A109.

After the police discovered a human foot in one of the debris piles, they asked to speak to Cassavaugh again, telling him they had information to share with him. T 428; App. A110. During the second interview, the officers advised Cassavaugh of his Miranda rights, which he indicated he understood. App. A110-14. After some discussion about Cassavaugh's grandparents, the conversation turned to the investigation into the Huards' disappearance. App. A115-18. Hunt asked Cassavaugh, "What do

you think we found?" App. A119. Cassavaugh replied, "I don't know, but that's just what you said you were going to tell me." Id. After a bit more conversation, Cassavaugh invoked his rights and the interview ended. App. A62-64.

Cassavaugh moved to suppress his second interview. App. A30-35. He argued that his invocation was inadmissible under Doyle v. Ohio, 426 U.S. 610 (1976) and that the pre-invocation portion of the second interview was irrelevant and would leave the jury with the prejudicial impression that Cassavaugh had invoked his rights. App. A32-33.

The State agreed that Cassavaugh's invocation and the portion of the conversation about Cassavaugh's prior representation by a public defender were inadmissible. App. A40, A43; H1 23-25. However, the State argued that the rest of the interview was relevant to show Cassavaugh's demeanor and consciousness of guilt. App. A41-43. The State argued that when Cassavaugh said he did not know what the police found during their search of his property, he was being dishonest. App. A42.

The court agreed with the State. App. A66-70. It found the probative value was not outweighed by the danger of unfair prejudice. App. A69-70. In so ruling, the trial court erred.

A. The trial court erred in admitting evidence that Cassavaugh terminated his first conversation with the police.

During its case-in-chief, the State admitted Cassavaugh's entire first interview. T 420; App. A71-109. This interview concluded when Cassavaugh exercised his right to remain silent and stopped answering questions. App. A109. Cassavaugh did not testify during trial. It was plain error to admit Cassavaugh's invocation of his right to remain silent.

Since trial counsel did not object to admission of his first invocation, Cassavaugh relies on this Court's plain error rule. Sup. Ct. R. 16-A. Under that rule, this Court considers the following elements: "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. MacInnes, 151 N.H. 732, 737 (2005) (citation omitted).

"[U]se of pre-arrest silence in the case-in-chief, in which the defendant does not testify, is unconstitutional." State v. Remick, 149 N.H. 745, 747 (2003) (citing Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989)). Such use violates a defendant's right to silence, protected by the Fifth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. See, e.g., Remick, 149 N.H. at 747.

The harm of putting the defendant's exercise of the right to remain silent before the jury is that the jury will infer guilt from such silence. "Any refusal to speak, no matter how couched, in the face of police interrogation, raises an inference that the person being questioned probably has something to hide." Coppola, 878 F.2d at 1566. See also, Lakeside v. Oregon, 435 U.S. 333, 340 n.10 (1978) ("It has often been noted that such inferences may be inevitable.... The layman's natural first suggestion would probably be that the resort to privilege ... is a clear confession of crime.") (quotation and citation omitted).

In Remick, this Court identified "three basic principles [that] guide the application of the Fifth Amendment privilege against self-incrimination." 149 N.H. at 746. Those principles are:

> (1) invocation of the right is construed liberally; (2) invocation of the right does not require any magic words; and (3) the privilege applies to suspects questioned during investigations - it is not limited to persons in custody or charged with a crime.

Id. at 746-47. Thus, although not in custody at the time of the first interview, Cassavaugh still had the right to terminate police questioning.

It was plain error to admit evidence that Cassavaugh exercised his right to remain silent during the first interview. Remick clearly establishes that use of pre-arrest silence is unconstitutional in the State's case-in-chief. This error

violated Cassavaugh's substantial right to remain silent under the State and federal Constitutions.

This error seriously affected the fairness, integrity or public reputation of the judicial proceeding. The central issue in the trial was the identity of the killer. The State's case was circumstantial. While there was strong evidence to support the conclusion that the victims were killed in Cassavaugh's trailer with his rifle, there was no witness to the murders. Cassavaugh denied any kind of physical altercation with the victims. Without an explicit admission of guilt, there was a substantial risk that the jury would infer Cassavaugh's guilt from his choice to terminate the interview.[4] It was plain error to admit this evidence and this Court must reverse.

B. The court erred in admitting portions of the second interview.

The State also played portions of Cassavaugh's second interview for the jury. T 430. The jury heard that Cassavaugh was advised of his Miranda rights. App. A110-20. After some casual conversation, the officers turned the discussion to the Huards' whereabouts. Id. At that point, so far as the jury

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[4]This risk was enhanced when the State argued an incriminating inference from Cassavaugh's silence. In discussing the first interview, the State argued that when accused of harming the victims, Cassavaugh's "demeanor changed. His breathing became rapid and shallow. He looked nervous. He started slouching in his seat. He looked sickly. Shortly thereafter, the defendant ended that first interview." T 1125.

heard, the interview ended abruptly, with Nolan saying, "Be a stand up type of guy and be full, and-and let us just sit back and you tell us what happened. But be honest with us." App. A120. The jury heard that the interview ended when Cassavaugh was arrested for murdering Jeremy and Jennifer. T 430.

New Hampshire Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This Court reviews a trial court's determination in balancing prejudice and probative worth for an unsustainable exercise of discretion. Sawtell, 152 N.H. at 181.

The evidence here was minimally relevant. The first four and a half pages of the transcript of Cassavaugh's interview pertain to his rights under Miranda and his understanding of those rights. App. A110-14. Pages six through eight contain a discussion about Cassavaugh's grandparents. App. A115-17. For the last two and a half pages, the conversation turned to the investigation, mostly with the officers speaking and Cassavaugh giving one-word answers. App. A118-20.

The State argued that the entire ten-and-a-half pages of transcript, and the video of those portions, should be admitted to show a change in Cassavaugh's demeanor when the discussion

turned to the investigation. App. A41-43. While change in demeanor when accused of a crime may be relevant to a defendant's consciousness of guilt, the State did not need to present this evidence to make that point. The State presented evidence about Cassavaugh's change in demeanor during the first interview when the conversation turned to the officers' belief that Cassavaugh had harmed the victims. T 421-22; App. A104. Furthermore, the State questioned the officer at trial about Cassavaugh's change in demeanor during the second interview. T 452. Thus, the redacted interview was cumulative of other evidence presented.

The State also argued that the second interview was necessary to show that Cassavaugh lied to the police when he said he did not know what they had found on his property and that this lie was evidence of consciousness of guilt. App. A42-43. Lying to the police may be relevant evidence of consciousness of guilt. This Court has found that "[e]xculpatory statements later shown to be false are akin to other evidence that may be relevant to show consciousness of guilt, such as flight and efforts to avoid suspicion." State v. Evans, 150 N.H. 416, 421 (2003) (citation omitted). "It is reasonable to infer consciousness of guilt from a defendant's false exculpatory statement because an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his or her

innocence." Id. at 420 (quotation, citation and brackets omitted).

Here, Cassavaugh said that he did not know what the police had found. It is unclear from the remainder of his statement that this is untrue. See, e.g., App. A114 (Cassavaugh told by police not to go down to his property and Cassavaugh was not watching the police from the window). Even if Cassavaugh had some awareness of the police activity at his property, he would not necessarily know what they had found. Finally, if Cassavaugh did know what the police had found, denying that he knew that is not the kind of false exculpatory explanation that strongly indicates a defendant's consciousness of guilt.

When Cassavaugh's denial of knowledge could have both incriminating and innocent explanations, it was error to admit the entire statement because it could have left the jury with an improper impression. In State v. Philbrook, this Court found that "[e]vidence of flight may support a variety of inferences." 138 N.H. 601, 603 (1994). In that case, the defendant's statement that he intended to flee as a result of his conversation with his attorney may have indicated his consciousness of guilt but may also have indicated that "the defendant's own attorney thought he was guilty." Id. The Court found that that ambiguity "could have left the jury with [an]

improper impression" and thus the evidence should not have been admitted under Rule 403. Id. at 603-04.

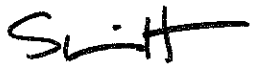
Here, the danger of unfair prejudice, confusion, and misleading the jury substantially outweighed the slight probative value of the evidence. The abrupt end of the conversation and immediate arrest of Cassavaugh, after the officer told him to "tell ... what happened [and] be honest," communicated to the jury that Cassavaugh declined the officers' invitation to speak and invoked his right to remain silent. This was not a proper consideration and created a risk that the jury would infer guilt from Cassavaugh's silence. It was error to admit this evidence and this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Cassavaugh respectfully requests that this Honorable Court vacate his convictions.

Undersigned counsel requests 15 minutes oral argument before a full panel.

Respectfully submitted,

By 

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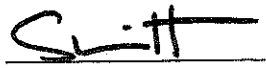
CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 8th day of January, 2010.



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DATED: January 8, 2010