State of New Hampshire
Supreme Court

NO. 2006-0049

2006 TERM

JUNE SESSION

STATE OF NEW HAMPSHIRE

v.

JEFFREY PEPIN

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT JEFFREY PEPIN

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Preserved: Sufficiency of evidence disputed during trial, *passim.*

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Jeffrey Pepin and Mary Pepin[1] were married in 1987, 2 *Trn*. at 47[2], and have three children. In recent years their marriage deteriorated due to the stresses of family life, Jeffrey's long work hours, an on-going home-building project, and what Jeffrey suggests is Mary's mistaken belief of infidelity. Due to these issues, Mary had first filed for divorce in September 2002, but withdrew the petition a month later based on the couple's attempts to reconcile. 2 *Trn.* at 48; 3 *Trn.* at 42; 4 *Trn.* at 71. Later they again separated, 2 *Trn.* at 51, but again decided to work out their problems, 3 *Trn.* at 24, and in March 2004 had their third child in an attempt to strengthen their bonds. 3 *Trn.* at 42.

Mary is a nurse. Jeffrey owns a company that sells equipment to commercial painting facilities. His office is in a building on the family's property in Deerfield, adjacent to their home. 4 *Trn*. at 64. He has been very successful, accumulating assets for his family worth about $2.5 million. 4 *Trn*. at 120-21.

On the evening of October 15, 2004, the couple argued. She was angry that he had forgotten their 16th anniversary, 2 *Trn*. at 56-58; he was humiliated that she had pestered him in front of his employee in her effort to persuade him to come home and spend the evening with her. 4 *Trn*. at 98.

Mary claims that at about 8:00 P.M. she decided to leave with the couple's infant to spend the night at their vacation home in Laconia, and had begun making preparations for that. 2 *Trn.*

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[1]To ease confusion, this brief will refer to Mary Pepin and Jeffrey Pepin by their first names.

[2]Citations to transcripts are as follows: The five days of trial are referred to by the trial day, *e.g.*, 3 *Trn.* at 1 means trial-day 3, page 1. The two pre-trial hearing transcripts are referred to by date, and then page, in the same format.

at 63. She met Jeffrey on the stairs when she was going up with laundry and he was coming down after taking a shower. 2 *Trn*. at 64. She claims that she informed him of her plans, but that he wanted to talk. 2 *Trn*. at 65. Mary alleges that when Jeffrey wouldn't let her pass, she turned to go back down. 2 *Trn*. at 65-67. He then pulled her up to a stair-landing, pushed her to the floor, threatened her, and choked her until she was unconscious. 2 *Trn*. at 67-70. She claims that when she came-to and heard the baby crying, she jumped up and tried to get away. 2 *Trn*. at 71. Rather than letting her go, Mary asserts that Jeffrey held her arms behind her back, forced her up the stairs, and pushed her face into the floor five times causing injuries. He then choked her a second time until she was again unconscious. 2 *Trn*. at 72-75.

Mary claims that she awoke dizzy and nauseous to sounds of Jeffrey crying and professing love for her, but that she pretended to be unconsciousness so that she could invent a plan of escape. 2 *Trn*. at 76-77. She crawled to the bathroom, vomited, and laid down again on the bathroom floor. 2 *Trn*. at 78. A few minutes later Mary said she made her way into the bedroom, 2 *Trn*. at 82, stopping on the way to fetch a towel to protect her bed from getting stained. 2 *Trn*. at 83. During this time Jeffrey was caring for the baby. 2 *Trn*. at 84.

Mary then claims that at about 9:30 P.M. she got into bed fully clothed, kept herself uncovered so that she would not fall asleep, and noted that Jeffrey got into bed and told her he loved her. Mary testified that she then spent the next seven hours laying in bed awake figuring out a plan. 2 *Trn*. at 84-87. At about 4:00 A.M., she says she got quietly out of bed, checked on the baby, but decided to leave the child in the house with Jeffrey, walked downstairs, found her cell phone, slipped out the back door, opened the garage, got in her car, located the key inside, backed out, and drove away. 2 *Trn*. at 88-91.

Mary called 911, and following the dispatcher's instructions, met the police at the Deerfield Post Office. 2 *Trn.* at 91-92. In her 911 call, Mary told her story of the evening's events. Later she told others as well: the policeman who met her at the Post Office, the emergency room nurse, a doctor, several Deerfield police officers who recovered evidence from the house, and a number of friends and members of her family. She also appeared at the Deerfield Police Department and wrote a 21-page statement the day after the incident; later she read the statement for a police video.

Jeffrey's version of the incident is different. He explained that Mary had recently been depressed, and had unwarranted fears concerning his fidelity. 4 *Trn.* at 76-77, 81-82. He described his busy work day that included a drive to Boston, 4 *Trn.* at 83-86, and an afternoon session with Mary and their marriage counselor. 4 *Trn.* at 88-89. When he got back to Deerfield, he did some things around the house, 4 *Trn.* at 90-95, and then met with his employee in his office. 4 *Trn.* at 96. He testified that Mary showed up at the office carrying the baby, 4 *Trn.* at 97-98, and urged him to come home in a way that humiliated him in front of his employee. When he went up to the house a short time later, he and Mary argued about their anniversary which he had forgotten, Jeffrey's humiliation in front of his employee, whether Mary would accompany him on a business trip during which she feared that he would resume his alleged affair, and the state of their marriage in general. 4 *Trn.* at 99-101.

Jeffrey then went upstairs to take a shower and calm himself. 4 *Trn.* at 102-04. When he was finished, he went to apologize, 4 *Trn.* at 105, and met Mary on the stairs. 4 *Trn.* at 106. He said he was sorry, and reached out to her to show his concern. *Id.* She pushed his hands away, and swung her arms at him. 4 *Trn.* at 107. He tried to grab her arms in defense, but both lost

their balance on the stairs. 4 *Trn.* at 108. Mary screamed at him, ran down the stairs, then reversed direction and ran back up. He went to put his arms around her waist in an effort to calm her, but she swung at him again. They spun around and fell together at the base of the steps. 4 *Trn.* at 108-09. The baby, upstairs in her crib, began to cry. Jeffrey tried to persuade Mary to leave the baby alone because Mary was acting "frantic" and "wild." 4 *Trn.* at 109. Mary nonetheless started in the direction of the child. When Jeffrey reached out for her, she missed a step, tripped, and fell forward onto the stairs. In the confusion, they both slid down several steps and Jeffrey landed on her back. 4 *Trn.* at 110.

Jeffrey, crying, realized Mary was bleeding, but first got up to console the child. 4 *Trn.* at 111. He went down the stairs to find a bottle for the baby, 4 *Trn.* at 112, then assisted Mary to the bathroom where she vomited. 4 *Trn.* at 113-14. A few minutes later he went to the couple's bedroom where he saw Mary in bed. He pulled the covers over her, talked with her, offered several times to take her to the hospital, checked on the baby one more time, and then got into bed with Mary. 4 *Trn.* at 115-17.

During the night Jeffrey heard the baby fussing, and was aware that Mary slid quietly out of bed. He saw her gather her clothes from the floor, and heard her leave out the back door, get in the car, and drive away. 4 *Trn.* at 118. Forty-five minutes later Jeffrey heard commotion at his door and realized that Mary had gone to the police. Fearing he would be arrested, he got dressed and hid in a closet, where the police later found him. 4 *Trn.* at 119.

As a result of the incident, Mary suffered some bruising, broke a tooth, and had a "non-displaced nasal fracture." 3 *Trn*. at 131.

There was some physical evidence – the broken tooth, a bloody towel, a floorboard with a

tooth mark, a flattened earring, photos, and some other items – but none favored the truth of either story over the other.

A few days after the incident Mary again filed for divorce, 3 *Trn.* at 109, and intends this time to pursue it to completion. 3 *Trn.* at 25.

Based on Mary's allegations, Jeffrey was charged with two counts of attempted murder, first degree assault, second degree assault, and felony criminal restraint. A Rockingham County jury (*Tina Nadeau*, J.) acquitted him of the attempted murders, but found him guilty of the three remaining felonies. He was sentenced accordingly, and this appeal followed.

SUMMARY OF ARGUMENT

Jeffrey Pepin first notes that Mary Pepin's 911 call came seven hours after the alleged events, that she had plenty of time to fabricate and plan, that she actually did plan, and then implemented her plan. He argues that the call cannot be considered an excited utterance, and therefore the jury should not have heard the 911 tape.

He points out that a prior threat he made to Mary, which resulted in a conviction, were useful only to show a propensity for violence, and the jury should not have heard about the threat. He also argues that because the conviction was a class B misdemeanor, the State should not have been allowed to cross-examine him with regard to it.

Jeffrey Pepin then argues that marital counseling is protected by the doctor-patient privilege, and that it cannot be waived by just one spouse. He argues that because the doctor's testimony lends special credence to the threats revealed during counseling, testimony of the doctor was not harmless error.

On the sufficiency of the evidence for criminal restraint, Jeffrey Pepin notes that he did not "confine" Mary Pepin, and that if he did it was unknowingly and it did not expose her to risk of injury.

On the sufficiency of the evidence for first degree assault, Jeffrey Pepin argues that a broken tooth and a "non-displaced nasal fracture"do not constitute serious bodily injury.

Finally, based on plain error review, Jeffrey argues that the court should have excluded police testimony regarding him being found hiding in a closet because the search that found him was unlawfully conducted.

ARGUMENT

Jeffrey and Mary Pepin told the jury two versions of events. The physical and circumstantial evidence – presented by medical personnel and police officers – favored neither. The emergency room doctor, for instance, testified that Mary's injuries were consistent with either story. 3 *Trn*. at 133.

The rest of the evidence consisted of testimony by people to whom Mary told her version, and a 911 tape which also contained her version. While each of these supporting testimonies was merely cumulative and if there were error admitting them arguably it was harmless, together they formed a steady reinforcement of just one side of the story. Mary's was told over and over, each time with obvious emotion. The jury heard Jeffrey's just once.

I. 911 Tape Provided Only Cumulative Evidence but its Overwhelming Emotion was Highly Prejudicial

After Mary Pepin left the house, she called 911, and reported the alleged incident in hysterical tones. She was so frantic that the officer who met her at the Post Office was unable to communicate with her and had to direct the 911 dispatcher to terminate the call. Mary then told the officer her story, in the same hysterical way. The words on the 5-minute 911 tape (to which the Court is urged to listen) are nearly indiscernible. But what is absolutely clear from the tape is its emotion.

Because of this, the defendant filed a motion to exclude it. The trial court, after a non-evidentiary pre-trial hearing, determined:

> The 911 tape clearly satisfies the exception of the excited utterance. The witness in this case, the event that caused her extreme emotional upset, was not only the beating, but the time that it took her to decide whether or not to leave her child in the home with the defendant. And the 911 tape indicates that she was still clearly upset and out of control and hysterical, which is substantial evidence to this court that she did not use the time to concoct this story.

2 *Trn.* at 5-6. *See 10/3/05 Trn.* passim (motion hearing). During trial, the tape was played to the jury, but not allowed as a full exhibit. 4 *Trn*. at 44-45.

A. An Excited Utterance Begins with "Oh my God" and Ends With "!"

An excited utterance, otherwise hearsay, is defined by the rules of evidence as, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.H. R. EVID. 803(2). To be admissible the statement must be "a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by that event, and before he had time to contrive or misrepresent." *Semprini v. Railroad*, 87 N.H. 279, 280 (1935).

"The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

The rule of thumb is that "an excited utterance always begins with the words 'Oh my God,' and ends with an exclamation mark." *See* N.H. R. EVID. 803 *Reporter's Notes*, citing *Stanley v. Bowen Brothers*, 96 N.H. 467 (1951). Spontaneity, with no opportunity for reflection, is what makes a statement an excited utterance. *State v. Lesnick*, 141 N.H. 121 (1996); *State v. Coppola*, 130 N.H. 148 (1987).

> Spontaneous exclamations are admissible only when made so closely to the particular occurrence that we may assume that the declarant's mind is controlled thereby, so that the exclamation is involuntarily forced out of him by that event, without opportunity for reflection or determination as to what it might or might not be wise to say. There must be no fair opportunity for the will or choice of the speaker to mould his words or for reflection to form opinion, and the hearsay declaration may be admitted only if it has the mark of such spontaneity.

Bennett v. Bennett, 92 N.H. 379 (1943); *State v. Bean*, __N.H. __ (decided April 25, 2006) (startling event may go on for some time, but spontaneous exclamation must be related to it); *State v. Martineau*, 114 N.H. 552 (1974).

B. Excited Utterance is Reliable When Time Between Event and Utterance is Short

"If a statement is clearly deliberate, . . . courts must exclude it regardless of its proximity to startling events. *State v. Cole*, 139 N.H. 246, 249 (1994).

If there is any time between the startling event and the utterance, it cannot be so long as to provide the declarant an opportunity to contrive. An immediate statement is clearly admissible, *Stanley v. Bowen Brothers*, 96 N.H. 467 (1951), as is a statement made within a few minutes. *State v. Demeritt*, 148 N.H. 435 (2002) (15 minutes); *Simpson v. Wal-Mart Stores, Inc.*, 144 N.H. 571 (1999) (10 minutes); *State v. Lesnick*, 141 N.H. 121 (1996) (within minutes); *State v. Hudson*, 121 N.H. 6 (1981) (10 minutes); *State v. Kenna*, 117 N.H. 305 (1977) (2 to 3 minutes).

C. Other Indications of Reliability Necessary When Time Between Event and Utterance is Not Short

When the time is longer than that, however, this Court has required additional indicia of reliability to show that the statement was truly spontaneous, and that the declarant had no opportunity to fabricate it. *MacDonald v. B.M.D. Golf Assoc., Inc.*, 148 N.H. 582 (2002). In *State v. Gordon*, 148 N.H. 710 (2002), for instance, two women were kidnaped and raped in the middle of the night and dropped off in an unfamiliar place. They made their way, naked, to a house where they found someone awake, and sought aid. This Court found that even though some time had passed between the event and the utterance, the circumstances gave them no opportunity to make up the story.

Similarly, in *State v. Plummer*, 117 N.H. 320 (1977), a description of the assailant was

made three or four hours after the victim was beaten. But the declarant "lapsed in and out of consciousness during the period of time between his injury and the time he made the statements, . . . was in a state of intoxication throughout this period, and due to the severity of the injuries was in considerable pain." These factors, this Court found, showed that the "statements were made under the influence of his beating." *Plummer*, 117 N.H. at 325.

When the time is long, and there is no separate indication that the statement is spontaneously related to the startling event, it is hearsay and not admissible. In *Bennett v. Bennett*, 92 N.H. 379 (1943), a statement made four hours after the incident was not admissible. Even though she was "suffering terribly," "the declarant had had ample time for reflection, and the self-serving character of the declaration, even if not conclusive, was properly to be considered under the circumstances." *Bennett*, 92 N.H. at 380. *See* Annotation, *Time Element As Affecting Admissibility Of Statement Or Complaint Made By Victim Of Sex Crime As Res Gestae, Spontaneous Exclamation, Or Excited Utterance*, 89 A.L.R.3d 102.

Factors that affect the determination of reliability might be the sophistication of the declarant, *State v. Hudson*, 121 N.H. 6 (1981) (three-year-old boy), whether the statement is self-serving in nature, *Bennett*, 92 N.H. at 380, the declarant's evident shock or excitement, *State v. Coppola*, 130 N.H. at 153, and what induced the declarant's eventual calm. *State v. Kenna*, 117 N.H. at 308.

The trial court's ruling here, that the statement satisfies the exception because "the time that it took her to decide," was part of the startling event, 2 *Trn.* at 5-6, if allowed to stand, would undo the rule. If post-event planning is part of the event, the amount of time after the event that an excited utterance is valid would be infinite.

D. 911 Calls and Excited Utterances

Cases involving 911 calls, which because of their emergency nature tend to highlight the prejudicial potential of excited utterances, have become a discrete corner of the law. *See* Annotation, *When Is Hearsay Statement Made to 911 Operator Admissible as "Excited Utterance" Under Uniform Rules of Evidence 803(2) or Similar State Rule*, 7 A.L.R.6th 233.

In *State v. Jordan*, 148 N.H. 115 (2002), a child who witnessed an assault on her parent called 911 immediately after the assault. This Court allowed admission of the tape because it contained evidence not otherwise available as the child was reluctant to testify, and because the report contained on the tape was not overly emotional.

In *State v. Yates*, 152 N.H. 245 (2005), upon being summoned to help make the call, a citizen made a 911 report of a victim laying in the woods cold and undressed. The defendant, on trial for rape, conceded that the 911 tape was an excited utterance. He suggested, however, that its probative value was outweighed by its unfair prejudice because during the call the citizen offered her opinion that the victim had been "sexually abused," and the 911 operator repeatedly used similarly loaded language. This Court agreed, ruling that the jury should not have heard the tape because the citizen's call came about an hour after the probable time of the apparent rape, the evidence contained on the tape was readily available from other witnesses, and because the citizen's demeanor during the call was prejudicially "distraught."

This Court distinguished *Yates* from *Jordan* because of the amount of time that passed before the 911 report, because the evidence was available from other sources, and because the 911 report in *Yates* was more emotionally charged and thus unfairly prejudicial.

E. Mary Pepin Had an Opportunity to Fabricate and Spent Her Time Planning

According to Mary, the incident probably occurred around 9:00 P.M. She testified she got

into bed around 9:30 or 9:45 P.M., 2 *Trn.* at 87, and that she got out of bed at about 4:00 A.M. 2 *Trn.* at 88. The Deerfield police were dispatched at 4:18 A.M., 3 *Trn.* at 162, and Mary arrived at the hospital at about 4:30 A.M. 3 *Trn.* at 14. Thus, Mary testified, she laid in bed for six or seven hours.

Six or seven hours to clam down, evaluate her situation, and think up a story.

1. Planning

Mary Pepin not only had an opportunity to plan, but clearly did plan; she even had a backup plan. 3 *Trn.* at 96-97. During the incident, Mary testified, "I pretended like I was still unconscious because I had to think of a plan to try to get away from him." 2 *Trn.* at 77; 3 *Trn.* at 86-87.

As she prepared herself for bed she did further planning. Mary testified that as she left the bathroom she paused at the closet to get a towel, and spread the towel on the bed. Sounding like deliberate – not emergency – action, Mary got the towel because "I do all the laundry and I didn't want to mess up my bed." 3 *Trn.* at 90.

And she spent hours and hours planning while in bed. Mary testified, "I laid there for quite some time and I then came up with a plan," 3 *Trn.* at 91, and "praying to God to try to help me to come up with a plan." 2 *Trn.* at 84. She said she did not fall asleep for the entire night. "I decided I was going to leave and I was going to wait until he fell asleep. And then as I waited and was laying in the bed, pretending like I was sleeping, I did come up with a plan." 3 *Trn.* at 91. Regarding the location of her cell phone, Mary "remembered it when I was laying in the bed coming up with a plan." 3 *Trn.* at 92. Thus Mary "purposely laid there and tried to make my breathing even so he would think I was falling asleep, when in actuality I wasn't, I was still trying to think and come up with a plan." 2 *Trn.* at 87. Mary's plan was well thought out:

> I decided that I was going to wait until he fell asleep and then go downstairs and see if I could find my cell phone that I left on the bar downstairs in the dark. And then I was going to try to get to my car, which is in the unattached garage. And if the keys were still in it, that I was going to try to drive away to get away from him. . . . And then if the keys weren't in the car, or if the garage was locked, then I was going to run to the nearest neighbor's house."

2 *Trn.* at 89. When she finally got out of bed, Mary "already had the plan in my mind of what I wanted to do." *Id.* Regarding what to do with the baby, she "pondered on it the whole night." 2 *Trn.* at 86.

The State admits Mary's planning. In its opening argument the State told the jury Mary spent the night in bed "thinking what am I going to do to get out of here, what am I going to do to survive this situation." 2 *Trn.* at 18.

2. Implementation

Mary then implemented her plan. She claims she stayed clothed, 2 *Trn.* at 84, kept the blankets off so that she would be cold and stay awake, and so that she could more easily get out of bed. 2 *Trn.* at 86. Mary said she successfully stayed awake, 2 *Trn.* at 87, and "purposely laid there and tried to make my breathing even so he would think I was falling asleep, when in actuality I wasn't." 2 *Trn.* at 87. She "laid there waiting for him to go into a deep sleep." 3 *Trn.* at 93. Mary then carefully inched her way out of the bed as she had planned, 2 *Trn.* at 87-89, checked on the baby, found her phone in the dark, did not put her shoes on, went out the back door to the garage, climbed into the car, and found the keys. 2 *Trn.* at 90-91; 3 *Trn.* at 94-95. She even left the garage open, just as she had planned, 3 *Trn.* at 95, drove off, and called 911.

Thus Mary had not only an opportunity to plan, but unlike the women in *Gordon*, she actually had a plan, and methodically implemented it. As her "statement is clearly deliberate" it must be excluded. *Cole*, 139 N.H. at 249.

F. Mary's Excited Demeanor During the 911 Call Was Not Caused by a Startling Event

Some courts have based decisions on whether a 911 call is admissible by commenting on the hysterical nature of the caller's voice and demeanor. *See e.g., Williams v. State*, 714 So.2d 462, 466 (Fla.App. 1997) (choosing to believe witness's hysterical 911 report over inconsistent trial testimony in domestic violence prosecution).

There is no doubt that Mary was hysterical during her call, but that doesn't matter much here because Mary was agitated in her reports of the alleged incident to nearly *everyone* she told *regardless* of when she told them. From the evidence it is apparent that Mary's method of reporting is with a fearful or agitated demeanor, even when it is clear there is no danger or reason for agitation.

• At about 4:30 A.M., the emergency room nurse noted that Mary came to the hospital on a backboard from the ambulance. The nurse noted "her being upset." 3 *Trn.* at 147.

• At about 7:00 A.M., from her hospital room Mary called a close friend and described the alleged incident. The friend testified that at that time, three hours after Mary left her house, and ten hours after the alleged assault, "she was hysterical, she was crying, she could barely speak." 4 *Trn.* at 38.

• At about 10:00 A.M., now six hours after Mary left her house, and thirteen hours after the alleged assault, the police were summoned to the hospital to get evidence. Mary was in a room with her sister, a friend, and the baby. The police officer who took pictures of Mary's injuries testified that at that time Mary was "afraid and she was upset about what happened to her." 4 *Trn.* at 23-25.

The excitement that is obvious on the tape was not caused by the incident Mary alleged.

Rather, hyper-excitement is simply the tone Mary adopts when she talks about that evening, or it was acting. In either case, her excited demeanor is not an indication of reliability.

G. Mary's Excitement Was Caused by Concern for the Child, or By the Escape

Even if the excitement were genuine, it was caused by factors other than the alleged assault.

First, Mary acknowledged her hysteria was out of concern for her child. She testified that at the time she called 911, "I got frantic and hysterical, because I left my baby in the house with him and I was afraid he was going to hurt her when he realized that I was gone." 2 *Trn.* at 91. After the police met her at the Post Office, Mary testified, "I was still frantic and I wanted them to get my baby out of that house and get her to me so I'd know she was safe." 2 *Trn.* at 92.

Second, to the extent Mary was genuinely startled by her experiences that evening, the potential startling events were (1) the alleged attack, or (2) the alleged escape. The two events were separated by seven hours time, repose, and both an opportunity to plan and actual planning. Thus this case is not like *State v. Bean*, __N.H. at __, where the attempted kidnaping was immediately followed by adult questioning which the defendant claimed was the actual starting event. Nor is this case like *State v. Martineau*, 114 N.H. at 552, where the rape victim escaped but was pursued by her attackers during her hideout behind a tavern bar before making statements two hours after the rape. In *Bean* and *Martineau* this Court held that because there was no extended period of repose between, the events were thus continuous, and the excitement related to the entire event. There is no such continuity here. Thus if the 911 tape can be admitted for anything, at most it relates to the alleged escape, but not the alleged assault before the seven-hour repose, and it should have been redacted or transcribed accordingly. *See State v. Yates*, 152 N.H. at 253.

H. Mary's Had Motives to Fabricate

Moreover, Mary had motives to fabricate, and the record reveals that she took great effort to maximize Jeffrey's jeopardy.

Although it is standard for medical personnel to call the police when patients present as possible crime victims, 3 *Trn.* at 141, *and* Mary's professional experience was such that she knew this, 3 *Trn.* at 98, *and* Mary knew the hospital had contacted the police, 3 *Trn*. at 100, Mary nonetheless called the police to ensure they saw her injuries at the hospital. 3 *Trn.* at 101. In an effort to get the best pictures, Mary testified that she prevented medical staff from cleaning her face for *three hours* until after the police came with a camera. 3 *Trn.* at 101-03; *see also* 3 *Trn*. at 138 (doctor finished treatment at 7:15 A.M.); 4 *Trn.* at 23 (police saw Mary at hospital at 10:00 A.M.). When she finally allowed medical personnel to finish their work with her, Mary went directly to the police station, where she sat for *four hours* writing a *twenty-one* page statement about the incident. 3 *Trn.* at 103-04. She then read the statement for a police video. 3 *Trn.* at 107; 4 *Trn*. at 29. Mary later called the police to make sure Jeffrey got charged with murder, not merely assault, 3 *Trn.* at 186-87, and again called the police to make sure that none of Jeffrey's employees removed anything from the office adjacent to the home in Deerfield. 3 *Trn.* at 110.

Mary had before filed for divorce, and was admittedly contemplating separation on the evening of the alleged incident. Mary believed Jeffrey was adulterous, and was admittedly angry and afraid because of it. Less than a week after the incident she filed another petition for divorce, which she has since pursued. Mary knew of Jeffrey's obvious business success, of the substantial house, of the large parcel on which it sits in Deerfield, and of the new vacation home on the lake in Laconia. 4 *Trn.* at 36, 45. The Pepin's assets are worth $2.5 million, 4 *Trn.* at 120-121, and with Jeffrey in jail as long as possible on felonies, it is likely Mary will enjoy a bulk of it. *See* RSA

458:7, IV (imprisonment for felony is grounds for cause-based divorce); *Liberato v. Liberato*, 93 N.H. 219 (1944) (imprisonment for crime constitutes constructive desertion); *and also* RSA 458:16-a, II(l) (property division not equal in caused-based divorce).

The 911 tape here contains no indicia of reliability, and is not an excited utterance spontaneously blurted in the midst of a startling situation. The call was placed many hours after the alleged event, with plenty of time to fabricate, by a wronged wife with a rich husband, who admits she spent seven hours planning.

J. 911 Tape Contains Cumulative Evidence Useful Only to Show Emotion

In *Yates* this Court noted that a 911 call lacks probative value when it contains evidence that is available from other sources, and that it 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." *Yates*, 152 N.H. at 249-50.

It is nearly impossible to discern the words spoken by Mary on the 911 tape. Those that can be understood tell nothing more than what she told the various police officers, the various medical personnel, and her friend who also testified. It has no information that is not also in her 21-page statement and video. Whatever evidence it contains is voluminously available elsewhere.

Unmistakable on the tape, however, is Mary's emotion. It is harrowing. Mary was, in the dispatcher's words, "hysterical." This was obvious to the State, whose repeated references to the tape in its closing argument was only to the emotion it contained. 5 *Trn.* at 26, 33, 42. The court erred in allowing the jury to hear the tape because it did nothing more than "arouse its sense of horror [and] provoke its instinct to punish." *Yates*, 152 N.H. at 249.

Accordingly, the tape should not have been played to the jury.

II. Prior Threat and Prior Conviction

About five months before the incident alleged here, Mary caught Jeffrey conversing on the phone with the woman with whom Mary thought Jeffrey was having relations. This prompted Mary to call the woman's husband. 3 *Trn.* at 111-112. The husband, in turn, left several voice-mails for Jeffrey (to which Mary listened) in which the husband (a federally-licenced gun dealer) made death-threats if Jeffrey continued the affair. 4 *Trn.* at 70. Mary testified that in response, Jeffrey threatened Mary that if she called the husband again, Jeffrey would retaliate by shooting her in the head. 2 *Trn.* at 50.

Mary and Jeffrey were in marital counseling during this period, with Dr. Joan Cavoli, a licensed clinical psychologist practicing in New Boston. 3 *Trn.* at 155. During one of their sessions, Mary brought up the issue of the threat Jeffrey made to her. 3 *Trn.* at 45, 156, 158. As part of her job, the Doctor confronted Jeffrey about it several times. Jeffrey acknowledged the threat, 3 *Trn.* at 156, and also said, according to the Doctor, "something like" given the situation, "if you push the same button, anyone would have the same kind of reaction." 3 *Trn.* at 156; 2 *Trn.* at 51. As the doctor continued to confront him, Jeffrey eventually got angry and told the marriage counselor that "this is being blown way out of proportion." 3 *Trn.* at 157, 159.

The doctor reported the threat to the police (presumably under statutory duties). This lead to Jeffrey's arrest for Class A misdemeanor criminal threatening, and several weeks of pre-trial incarceration. In a negotiated disposition the complaint was amended, and Jeffrey plead *nolo contendere* to a Class B misdemeanor. He was convicted on June 8, 2004 by the Auburn District Court and paid a $750 fine. 4 *Trn.* at 135; *9/26/05 Trn.* at 8 (Hearing on Motion to Admit Prior Bad Acts); ORDER (Oct. 3, 2005).`

These matters – the May 2004 threat, the discussion about it with Dr. Cavoli during

counseling, and the conviction – were the subject of State and defense motions, and a non-evidentiary pre-trial hearing. In its pre-trial written ruling, the court indicated because they were relevant to intent, it would allow the jury to hear evidence of the threat and the doctor's questioning of Jeffrey, but would not allow the jury to learn of the conviction. ORDER (Oct. 3, 2005), *appx. to br.* at 48.

Mary and Dr. Cavoli both testified during the State's case in chief regarding Jeffrey's threats against Mary, and Dr. Cavoli's confrontation of Jeffrey during counseling. When Jeffrey testified, he acknowledged to the jury his anger at Mary's insistence on calling the husband, his resulting threat to Mary, and the discussion of these matters with the doctor. 4 *Trn.* at 74-75. Upon cross-examination regarding the particular words he used, Jeffrey's answers were more reluctant, 4 *Trn*. at 128, and over objection the court allowed him to be cross-examined with use of the conviction.

A. Evidence of Prior Threats Was Used to Show Propensity, in Violation of Rule 404(b)

The jury was told of the prior threat by both Mary and by Dr. Cavoli. The New Hampshire Rules of Evidence provide that

> [e]vidence 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.

N.H. R. EVID. 404(b). "The purpose of Rule 404(b) in a criminal trial 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. Bassett*, 139 N.H. 493, 496 (1995).

Regardless of the limited grounds for its admission, the State made more creative use of the evidence. In its opening argument the State referred to the prior threat as merely one in a

series of actions in which Jeffrey threatened to use violence against Mary. 2 *Trn.* at 10. Its closing was even more blatant: "Last time when she said she was going to call the husband, he threatened to kill her." 5 *Trn*. at 42.

Prior threats are admissible to prove the defendant's intent only when their probative value outweighs their prejudicial effect. *State v. Sawtell*, 152 N.H. 177 (2005). But the State's arguments were nothing but propensity. Even with a limiting instruction regarding the jury's use of propensity evidence, 5 *Trn*. at 49, it is apparent from the State's own use of the prior threat (as predicted by the defendant during the pre-trial hearing on the matter, *9/16/05 Trn.* at 9) that its purpose was to show Jeffrey had a disposition toward violence regarding his marital difficulties. *See State v. Ayotte*, 146 N.H. 544 (2001).

Had the prior threat evidence not been disclosed, the charged conduct stands on its own, and the jury could evaluate the State's evidence. But knowing of the prior threat makes it look to a reasonable juror – as the State intoned – that the charged conduct is merely an escalation or continuation of the prior incident, creating a risk that Jeffrey was convicted due to a propensity. Accordingly the error in admitting the threat, the discussion at the doctor's office, and the conviction, is not harmless beyond a reasonable doubt.

B. Evidence of Jeffrey's Prior Conviction Was Admitted into Evidence in Violation of Rule 609(a)

Even if the threat were admissible, the conviction for it was not. The New Hampshire Rules of Evidence provide:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he or she was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2)

involved dishonesty or false statement, regardless of the punishment.

N.H. R. EVID. 609(a).

Jeffrey's prior conviction was for a Class B misdemeanor criminal threatening – not punishable with *any* jail time, and not involving dishonesty or falsehood. In accord with the rule, the court before trial deemed it not admissible. ORDER (Oct. 3, 2005), *appx. to br.* at 48. The jury nonetheless learned about the conviction in circumstances best demonstrated by reference to Jeffrey's testimony, several pages of which is reproduced in the appendix.

From the transcript it is apparent that on cross-examination when Jeffrey was asked about the threat and the discussion of it with the counselor, he tended to answer circumspectly. The State then wanted to confront him with the criminal threatening conviction. 4 *Trn.* at 129. Contrary to its previous order, the court allowed the State to refer to the conviction on the grounds that "given the discrepancy between the state's evidence and the defendant's explanation, then it's fair to allow the state to cross-examine him to give the jury the context to hear the evidence." 4 *Trn.* at 130. The defendant objected, pointing out that the plea was *nolo*, that Jeffrey had been incarcerated for several weeks, and that there was a favorable negotiated disposition involving a complaint amended to a Class B misdemeanor. *Id.* The court's response was that "every defendant who has a conviction used against them for cross-examination argues that the circumstances were such that they entered the plea because that was the only choice." *Id.*

It is not clear what "discrepancy" the court meant. Although Jeffrey was stubborn to admit the words used in the threat and the discussion with Dr. Cavoli, he didn't deny them. Regarding the threat, the State asked Jeffrey, "you said do I have to threaten you like he threatened me. Is that what you said?" Jeffrey acknowledged, "That's probably what I said." 4 *Trn.* at 128, *see appx. to br.* at 53. Regarding the discussion with Dr. Cavoli, the State asked

Jeffrey, "[y]our response was, if someone's buttons are pushed hard enough, they can do anything, right, they're capable of anything. Isn't that what you said?" Jeffrey acknowledged, "If someone is put into a situation where there are no other alternatives, I think that's possible." 4 *Trn.* at 129, *see appx. to br*. at 54.

Even if Jeffrey's recollection of the exact words can be construed as a denial, there is no known exception to Rule 609 for "discrepancy," "context," or the commonness of the pressure Jeffrey felt after being incarcerated to take a favorable deal. The language of Rule 609 has no exceptions at all for misdemeanor crimes that do not involve "dishonesty or false statement," N.H.R.EVID. 609(a), and the law on the matter is unambiguous. *State v. Newell*, 141 N.H. 199 (1996) (in trial for felony first degree assault, prior convictions for misdemeanors simple assault and reckless conduct not admissible to attack credibility where neither punishable by death or imprisonment in excess of one year, and neither involving dishonesty or false statement); *see also,* Annotation, *Construction and Application of Rule 609(a) of the Federal Rules of Evidence Permitting Impeachment of Witness by Evidence of Prior Conviction of Crime,* 39 A.L.R. Fed. 570; *but see, State v. Demeritt*, 148 N.H. 435 (2002) (prior conviction was felony).

Prior convictions can come in if the defendant opens the door to them. In *State v. Pugliese*, 129 N.H. 442, 443 (1987), the defendant testified on direct that he'd been driving lawfully since age 16. The court allowed in three prior misdemeanor convictions for driving without a license because "the State did not use the convictions to attack general credibility, but rather to prove that the defendant gave a knowingly false answer under oath in response to his own counsel's question on direct examination." This Court wrote that "[t]o apply Rule 609(a) to forbid reference to an otherwise relevant conviction for this purpose would convert a general rule of probative significance into a license to make affirmative misrepresentations and commit perjury

without fear of contradiction." *See also State v. Norgren*, 136 N.H. 399 (1992) (denial of acts constituting prior convictions).

Jeffrey didn't "make affirmative misrepresentations" or "commit perjury"; although he was reluctant, he acknowledged both statements under the State's cross-examination. As noted by the court, it is not unusual for a testifying defendant to minimize conduct constituting a prior conviction, to admit it reluctantly, or to argue that "the circumstances were such that they entered the plea because that was the only choice." If such small discrepancies are sufficient to displace the rule, its unequivocal language would be undermined.

The court's error in admitting the prior conviction was not harmless. The conviction was for criminal threatening of Mary not long before the charged conduct. A reasonable juror – as the State made clear – could see the charged conduct as merely an escalation or continuation of the prior conviction, thereby convicting Jeffrey for a predisposition or simply being a criminal.

In addition, being cross-examined regarding the conviction forced Jeffrey to explain that it was a result of a *nolo* plea, 4 *Trn.* at 131, which is itself not admissible. N.H. R.EVID. 410.

III. Marriage Counselor Should Not Have Testified

A. Violation of Counselor-Patient Privilege

As noted, Mary and Jeffrey attended marriage counseling with Dr. Joan Cavoli, a licensed clinical psychologist, in an effort to address their marital difficulties. During one of their sessions, Mary brought up the issue of the threat Jeffrey made to her. The doctor then confronted Jeffrey about the threat. He acknowledged it to the doctor, and also said, given the situation, "if you push the same button, anyone would have the same kind of reaction." 3 *Trn.* at 156; 2 *Trn.* at 51. The doctor continued to confront him, and Jeffrey eventually got agitated and told the marriage counselor that "this is being blown way out of proportion." 3 *Trn.* at 157, 159. During the State's case, Doctor Cavoli testified to these matters.

The court allowed this testimony over the defendant's objections that it was privileged. The court ruled from the bench regarding the testimonial privilege: "If one side calls her, it's waived." 3 *Trn.* at 152.

New Hampshire protects the counselor-patient privilege by both statute and rule. RSA 330-A:32[3] provides that "confidential . . communications" between mental health professionals and their clients "are placed on the same basis as those provided by law between attorney and client," and that such privileged communications can only be disclosed by a court order. New

[3]RSA 330-A:32 provides, in full: "The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order. Confidential relations and communications between a client and any person working under the supervision of a person licensed under this chapter which are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with the supervising person licensed under this chapter, unless such disclosure is required by a court order. This section shall not apply to hearings conducted pursuant to RSA 135-C:27-54 [involuntary commitments] or RSA 464-A [guardianships]."

Hampshire Rule of Evidence 503[4] similarly provides that "confidential relations and communications between a psychologist . . . and her client are placed on the same basis as those provided by law between attorney and client."

There are, of course, a number of exceptions to the rule, some of which are facially irrelevant here, such as certain types of proceedings,[5] when joint clients are in litigation,[6] the counselor is not properly licensed,[7] mental condition of a party is in issue,[8] the holder of the privilege divulges the confidentiality,[9] or there is a compelling reason for otherwise unavailable

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[4]New Hampshire Rule of Evidence 503(b) provides in full: "The confidential relations and communications between a psychologist or pastoral counselor certified under provisions of RSA 330-A and his and her client are placed on the same basis as those provided by law between attorney and client, and except as authorized by the patient or otherwise provided by law, no psychologist or pastoral counselor shall be required to disclose such privileged communications. Confidential relations and communications between a client and any person working under the supervision of a psychologist or pastoral counselor that are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising psychologist or pastoral counselor."

[5]*In re Brenda H.*, 119 N.H. 382 (1979) (statutory exception for neglect proceedings); *In re Marriage of Daneshfar*, 953 S.W.2d 95 (Mo. App. 1997) (marital counseling records admissible pursuant to statutory exception regarding child sex abuse).

[6]N.H. R. EVID 502(d)(5) provides that there is no privilege "when offered in an action between or among any of the clients." *See Dumas v. State Farm Mutual Ins. Co.*, 111 N.H. 43, 39 (1971); *Brown v. Green*, 165 S.E.2d 534 (N.C.App. 1969); *Ritt v Ritt*, 238 A.2d 196 (N.J. Super. 1967). For instance, in *Hahman v. Hahman*, 628 P.2d 984 (Ariz. 1982), the court found that statements made in marital counseling were not privileged because the parties had become adverse in the divorce action. *See also Redding v. Virginia Mason Med. Ctr.*, 878 P.2d 483 (Wash. App. 1994) (in litigation between joint patients, privilege not protect statements made by patient to therapist during joint counseling).

[7]*See In re Brenda H.*, 119 N.H. 382 (1979); *Ritt v Ritt*, 238 A.2d 196 (N.J. Super. 1967).

[8]This section shall not apply to hearings conducted pursuant to RSA 135-C:27-54 [involuntary commitments] or RSA 464-A [guardianships], RSA 330-A:32. *See also Ziemann v. Burlington County Bridge Com'n*, 155 F.R.D. 497 (D.N.J.,1994) (disclosure of marital counseling in sexual harassment case in which mental injury alleged); *State v. Kupchun*, 117 N.H. 412 (1977) (plea of not guilty by reason of insanity); *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999) (party put mental suffering at issue); *State v Roma*, 363 A2d 923 (N.J. Super. 1976) (competence to stand trial).

[9]*Cline v. William H. Friedman & Assocs.*, 882 S.W.2d 754 (Mo. App. 1994).

information.[10]

Beyond the lower court's conclusion that if one side calls the counselor the privilege is waived, 3 *Trn.* at 152, there is little discussion of the matter in the record.

The court's first error is somehow believing that Mary waived the privilege. Although Jeffrey obviously has no standing to claim Mary's privileges, there is *nothing* in the record showing a waiver by Mary.

The court's second error is its belief that if Mary waived, it operated for both patients – she and Jeffrey.

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. Redmond, 518 U.S. 1, 10 (1996). Thus, "confidentiality is a ***sine qua non*** for successful psychiatric treatment." *Id.*

This applies equally to marital counseling, in which the privilege is "intended to encourage marital reconciliation by providing a safe, confidential setting in which problems as well as possible solutions could be explored fully and honestly." *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. 1990), *appeal denied* 582 A.2d 205.

> The beneficial and therapeutic results which may be obtained for marital and family relationships through marriage counseling are entitled to . . . protection. It is well recognized that to obtain the full benefit of counseling, the participants must be

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[10] *In re Grand Jury Subpoena for Medical Records of Payne*, 150 N.H. 436, 442 (2004) ("To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure."); *McGranahan v. Dahar*, 119 N.H. 758 (1979) (no compelling need); *State v. Farrow*, 116 N.H. 731 (1976) (confrontation rights compelling).

> able to talk freely concerning their problems. That self-disclosures and the discussion of problems often should be in the presence of the other spouse or other persons has also become recognized as a beneficial part of such sessions. To withhold the privilege . . . would clearly have a chilling effect on the vital freedom of communication between the parties and the therapist, and therefore, in turn, a detrimental effect upon the results which might otherwise be obtained.

Wichansky v. Wichansky, 313 A.2d 222, 224 (N.J. Super. 1973). The Rule at issue in *Wichansky*, as in New Hampshire, places the counselor-patient privileges "on the same basis as those provided between attorney and client." The court found that because "[t]he purpose of marriage counseling is to benefit the parties seeking assistance[,] [i]t would be contrary to that purpose to punish, in effect, such persons by permitting testimony as to statements made during counseling."

A party does not waive their counselor-patient privilege in the presence of a third party when the third party is necessary for the purpose of the counseling. In *Sims v. State*, 311 S.E.2d 161 (Ga. 1984), the Georgia Supreme Court wrote:

> While it is true . .. that the presence of a third party will sometimes destroy the privileged nature of communications, we join the weight of authority from other jurisdictions in holding that there is a strong public policy in favor of preserving the confidentiality of psychiatric-patient confidences where a third party is present as a necessary or customary participant in the consultation and treatment. The public policy in favor of protecting these confidences is strengthened when the third party is the communicant's spouse.

Sims, 311 S.E.2d at 165 (citations omitted). The court thus held that because the couple was "jointly seeking psychiatric counseling for marital problems, . . . we find that the victim was a necessary participant in the psychiatric sessions and his communications to the psychiatrist were entitled to protection." *Id. See also Ellis v. Ellis*, 472 S.W.2d 741 (Tenn.App. 1971) (presence of stranger overcomes privilege, but spouse is not a stranger); *Guity v. Kandilakis*, 821 S.W.2d 595 (Tenn. App. 1991) (reaffirming *Ellis*, in different context).

The purpose of marriage counseling would be undermined if in order to preserve the

privilege a person would have to bar the other spouse from being present.

> [I]f one spouse alone could waive the privilege and compel the marriage counselor to testify[,] [o]ne party would then be at the mercy of the other. This risk can be circumvented where a psychologist or psychiatrist is involved by forbidding the other spouse to be present during therapy. In consulting a marriage counselor, however, one spouse cannot always bar the other's presence for efficacious treatment to result.

Touma v. Touma, 357 A.2d 25, 30 (N.J.Super. 1976).

Eichenberger v. Eichenberger, 613 N.E.2d 678, 681 (Ohio App. 1992), was a civil protection proceeding and not a criminal prosecution, but is closely analogous to Jeffrey's and Mary's situation. In *Eichenberger*, during the parties marital therapy, "threats of violence were uttered and discussion of them was a part of the counseling sessions." In the protection proceeding, one spouse waived the counselor-patient privilege, but the other did not. The court held that the waiving spouse was free to testify about the threats discussed during counseling sessions, but that testimony of the counselor was rightfully barred. The court also held that had the counselor testified, he would not be subject to civil liability. *See also, Genovese v. Usner*, 602 So.2d 1084 (La. App. 1992) (privilege applies to social worker doing marital counseling).

In Mary's and Jeffrey's case, Jeffrey did not waive his counselor-patient privilege. To the extent that Mary waived, she was free to testify – and did – regarding the threats Jeffrey allegedly made to her. But the testimony of Dr. Cavoli, with the extra credibility lent by a license to practice clinical psychology, should have been kept from the jury.

B. Doctor's Testimony About Jeffrey's Alleged Threat Cannot be Bootstrapped From Her Duty to Warn

The trial court appears to have based it determination on waiver, but the state may argue that Dr. Cavoli's testimony is admissible because it was disclosed to the police, 3 *Trn.* at 160, pursuant to the psychologist's duty to warn regarding threats of physical violence. RSA

330-A:35 ("The duty [to warn] may be discharged . . . if the licensee makes reasonable efforts to communicate the threat to the victim or victims, notifies the police department closest to the client's or potential victim's residence, or obtains civil commitment of the client.").

Pursuant to the statute, doctors have a choice under the statute of disclosing the threat to the potential victim *or* to the police. Because Mary already knew – Mary brought it to Dr. Cavoli's attention – the doctor's duty was already fulfilled. But Dr. Cavoli's decision to be extra-cautious by going to the police should not be allowed to determine evidentiary issues.

C. Doctor's Testimony About Jeffrey's Alleged Threat is Not Excepted From the Privilege Based on Furtherance of a Crime Because It Did Not Involve Future Wrong Doing

Finally, the State may argue that the counselor-patient privilege does not apply here because the alleged threat was in furtherance of a criminal purpose. *See* N.H. R. EVID. 502(d)(1). This exception to the privilege applies, however, "only to communications involving future wrong-doing, not to discussions or confessions of past misconduct." N.H. R. EVID. 502 (Reporter's Notes); *State v. Stone and Merchant*, 65 N.H. 124 (1889).

There was no furtherance of a criminal purpose here. First, the threat in Mary's and Jeffrey's case took place sometime – many months – before it was told to Dr. Cavoli. Thus the threat was a discussion of past misconduct and is not exempt from the privilege. Second, unlike in *Stone and Merchant*, Dr. Cavoli did not actually hear the threat; rather she heard *about* the threat, and *about* the impact it had on Mary's and Jeffrey's relationship. Third, when Dr. Cavoli confronted Jeffrey, the communication was hypothetical. The doctor reported him to have said, "if you push the same button, anyone would have the same kind of reaction." 3 *Trn.* at 156-57.

D. Doctor's Testimony About Jeffrey's Alleged Threat was Not Harmless Error

Even though the threat was brought to the jury's attention by Mary, thus making Dr.

Cavoli's testimony of it cumulative, the court's error in allowing her to disclose it to the jury is not harmless. This trial was about credibility. The circumstantial facts – Mary's injuries, the bent earring, the tooth mark in the floorboard, etc. – do not support either Jeffrey's or Mary's version of the incident more than the other. Jeffrey does not dispute that an altercation occurred on the stairs of the couple's home. In this context, the testimony of a marriage counselor, a licenced clinical psychologist who wears the moniker "doctor," lends special credibility to Mary's version. *See State v. Huard*, 138 N.H. 256, 259 (1994). It could lead a jury to believe that because the matter was discussed in confidence with a professional, and because that professional took the threats seriously enough to go to the police, the threat has an aura of which it might not otherwise be worthy.

IV. Jeffrey Pepin is Not Guilty of the Elements of Criminal Restraint

In *State v. Dustin*, 122 N.H. 544 (1982), the victim was hitchhiking when the defendant and another picked her up. She sat between them in their pickup, and they did not let her off where and when she requested. As a result, she was put in fear, and attempted to jump out the window of the moving truck. This court had little trouble finding that the facts met the *actus reas* elements of the crime: the hitchhiker was clearly confined to the cab of a moving truck, and the foreseeable escape could lead to fear and injury.

In Jeffrey Pepin's case, however, the elements have not been met.

A. "Confinement" Means Put in a Boundary

New Hampshire law makes criminal restraint a crime. The statute provides:

> A person is guilty . . . if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury. . . . The meaning of "confines another unlawfully", as used in this section . . ., includes but is not limited to confinement accomplished by force, threat or deception.

RSA 633:2, I & II. Thus the crime "has three elements: (1) the actor must act knowingly; (2) the victim must be exposed to the risk of serious bodily injury; and (3) the act must confine the victim unlawfully." *State v. Bruce*, 132 N.H. 465, 470 (1989).

Beyond the way "confinement" may be accomplished – by force, threat, or deception – the statute provides no further definition, and the court below offered the jury no guidance.

The word has been oft defined elsewhere, however, and virtually always means to physically put in some sort of boundary. In *State v. Bruce*, 132 N.H. at 466, for instance, this Court upheld a conviction for criminal restraint where the defendant "bound her ankles and hands" and "tied her to a ceiling beam." *See also, Berry v. State*, 668 So.2d 967, 969 (Fla. 1996) ("the act of tying someone up constitutes a 'confinement'"); *People v. Riley*, 579 N.E.2d 1008,

1013 (Ill.App. 1991) (" Confinement is established where the victim has been clearly enclosed within something, most commonly, a house or a car."); *State v. Hardin*, 359 N.W.2d 185, 190 (Iowa 1984) (defendant confined victim by putting her in his car and bringing her to his house against her will); *Brewer v. State*, 459 So.2d 293, 297 (Miss. 1984) (forced at gunpoint to drive a car); *State v. Fulcher*, 243 S.E.2d 338, 351 (N.C. 1978) ("the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle"); *State v. Burgess-Beynon*, 99 P.3d 383, 385 (Utah App. 2004) ("The plain meaning of 'confinement' is the state of being physically contained within some type of boundary."); *Westinghouse Elec. Corp. v. Occupational Safety and Health Review Com'n*, 617 F.2d 497 (7th Cir. 1980) (spray booths to be used to enclose or confine all spray-finishing operations; "confine" means being kept within limits).

There is danger in defining the term too broadly. The Iowa Supreme Court canvassed this problem in *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982). There, an element of the Iowa kidnaping statute required proof of "confinement." The court wrote:

> It will be observed that the statute makes no reference to the duration or circumstances of the confinement. Literally construed, the statute leads to absurd results. The trespasser who momentarily locks a caretaker in his cottage is placed on the same footing as the professional criminal who invades a home, seizes the occupants at gunpoint, transports them to a secret hideout, and holds them for ransom. The robber who orders his victim to stand motionless while his wallet is removed is guilty of the same crime as the robber who forces his victim to drive for miles to a deserted location, where he is terrorized and abandoned. A group of college students who invade a dean's office, wrongfully confining its occupants, commit the same offense as a gang of rapists who seize a woman and remove her from her family to a place of isolation.

State v. Mead, 318 N.W.2d at 445. To avoid the absurdity, the court held that "confinement" must be something more than a momentary seizure. The United States Supreme Court recognized the same problem in *Chatwin v. United States*, 326 U.S. 455, 464 (1946), writing:

"Were we to sanction a careless concept of [confinement] . . . the boundaries of potential liability would be lost in infinity."

Although it is not clear what facts the jury relied on to find the "confinement" element, there is no evidence that Jeffrey put Mary in any sort of boundary. At most she was the victim of an assault which involved, among other things, detaining her to accomplish the assault. If this Court accepts that act as "confinement," as pointed out by *Mead* and *Chatwin*, every street crime where there is a temporary detention and the risk of injury (or even just fear) would be turned into a felony "confinement" for the purposes of the criminal restraint statute.

Because Jeffrey didn't by force, threat, deception, or any other way, put Mary into any kind of a boundary, no confinement occurred and he is not guilty of criminal restraint.

B. Mary's Directional Confusion Prevented Jeffrey From Forming the Knowing Mental State Necessary for Criminal Restraint

The criminal restraint indictment charged that:

> "1. Jeffrey Pepin knowingly confined Mary Pepin unlawfully to the Pepin home,
> 2. under circumstances exposing her to risk of serious bodily injury,
> 3. in that Jeffrey Pepin would not allow Mary Pepin to leave the Pepin home after Jeffrey Pepin strangled Mary Pepin with both of his hands to the point that she lost consciousness."

INDICTMENT 05-S-133 (Jan. 4, 2005), *appx. to br.* at 44.

1. No Knowing Confinement After First Assault

According to Mary, she met Jeffrey on the stairs when she was going up with laundry and he was coming down after taking a shower. 2 *Trn*. at 64. She testified that she told him her plan to leave, but that he wanted to talk. Mary refused the conversation, told him that everything had already been said, and that she wanted to take the baby and go to Laconia. 2 *Trn*. at 65, 66-67.

Mary said that when Jeffrey wouldn't let her go up with the laundry, she turned to go back

down. 2 *Trn*. at 65-67. He then pulled her up to a landing, pushed her to the floor, and choked her with his hands around her neck until she was unconscious. 2 *Trn*. at 67-70.

Mary claims that when she regained consciousness and heard the baby crying, she "flipped out," jumped up, and tried to go down the steps. Mary testified that her intent was to go downstairs to the phone to call the police, but her only words to Jeffrey involved her dismay that he choked her. 2 *Trn*. at 71. She didn't tell Jeffrey that she was headed to the phone to call the police. 3 *Trn.* at 75. Mary claims that Jeffrey nonetheless prevented her from going down the stairs by standing in front of her and holding her arms. 2 *Trn.* at 71-72.

Then Mary testified she then realized again that the baby was crying, that her "maternal instinct just kicked in" and that she decided to go back up the stairs. 2 *Trn.* at 72. She got a short distance up, when Jeffrey again grabbed her and held her back. 2 *Trn*. at 73. At that point Mary said the second choking occurred. 2 *Trn.* at 74.

Even if the event happened precisely the way Mary described, and the detention constitutes a confinement, Jeffrey didn't "knowingly confine" her. Although she had expressed her general intent to go to Laconia, the intent was not immediate, as Mary had chores to do in preparation. According to Mary's testimony, from Jeffrey's point of view he was trying to talk to her, and she refused. According to Mary's testimony, Jeffrey saw her go up, then down, then down again, then up. In Mary's mind these changes of direction were for the reasons she gave – up with laundry, down when he tried to talk, down to call the police after the assault, then up to get the baby. She didn't, however, express these constant changes of direction in words. From Jeffrey's point of view, he just saw a see-saw of indecision.

Mary's directional confusion prevented Jeffrey from knowing he was confining her, and thus from forming the mental state necessary for the crime.

2. No Knowing Confinement After Second Assault

After the second assault, Mary testified she awoke dizzy and nauseous to sounds of Jeffrey crying and professing love for her. *Trn*. at 76-77. She crawled to the bathroom, vomited, and laid down again on the bathroom floor. 2 *Trn*. at 78. A few minutes later Mary said she made her way into the bedroom, 2 *Trn*. at 82, and stopped on the way to fetch a towel. 2 *Trn*. at 83. She said that during this time Jeffrey was caring for the baby. 2 *Trn*. at 84. Mary testified that then she got into bed fully clothed and uncovered, and that Jeffrey got into bed, told her he loved her, and went to sleep. Mary spent the next seven hours awake figuring out a plan, 2 *Trn*. at 84-87, and eventually left.

Even if Mary felt restrained while in bed awake, Jeffrey was sleeping. Any restraint his mere presence may have caused could not have been knowing, and also could not have exposed Mary to risk of injury.

C. No Evidence that Restraint Exposed Mary to Risk of Serious Bodily Injury

The State must prove that Jeffrey's alleged action confining Mary was in circumstances placing her at risk of serious bodily injury. Mary's injuries occurred separate from and before the alleged confinement. Even if there is evidence from which a jury might find that Mary suffered bodily injury, the State offered no evidence that the *confinement* exposed her to risk of injury. While any confinement might create a foreseeable risk that the confined person might escape, the circumstances here do not substantially create a risk that an escape would lead to further serious injury. This is not like *Dustin*, 122 N.H. at 544, where any escape from a moving truck would very likely result in injury. If merely creating a situation where an escape is likely meets the circumstances-exposing-to-risk-of-injury element of criminal restraint, RSA 633:2, I, then the element would become meaningless, as *every* restraint involves some possibility of escape.

V. Jeffrey Pepin is Not Guilty of the Elements of First Degree Assault

The first degree assault indictment alleged that Jeffrey "caused serious bodily injury to Mary Pepin, specifically, a broken nose and a broken tooth." INDICTMENT 04-S-3214 (Dec. 7, 2004), *appx. to br.* at 42. "'Serious bodily injury'" means any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body." RSA 625:11, VI.

A. Broken Tooth Does Not Constitute Serious Bodily Injury

The emergency room doctor testified that Mary's right front incisor was broken. 3 *Trn*. at 127. Mary testified she had to go to the dentist several times and got a root canal, 3 *Trn*. at 18, that she had to eat soft foods for a week, and that the dentist applied a cosmetic material. 3 *Trn.* at 17. There was no evidence of any "severe, permanent or protracted" injury, nor of any "impairment to the health or . . . function" of the tooth.

It is clear that the *loss* of a tooth qualifies as serious bodily injury. *Cliett v. State*, 612 S.E.2d 867 (Ga. App. 2005); *James v. State*, 755 N.E.2d 226 (Ind. App. 2001); *State v Bridgeforth*, 357 N.W.2d 393 (Minn. App. 1984); *State v Bogenreif*, 465 N.W.2d 777 (S.D. 1991). But there is no known authority holding that in the absence of other more serious ills, a mere broken tooth is sufficient.

B. Non-Displaced Nasal Fracture Does Not Constitute Serious Bodily Injury

The emergency room doctor also testified that an x-ray of Mary's nose showed a "non-displaced nasal fracture," which the doctor defined as "a break of the nasal bone that is not out of place." 3 *Trn*. at 131. There was no testimony from any witness that this affected Mary in any way.

In *State v. Scognamiglio*, 150 N.H. 534 (2004), this Court held that a broken nose

constituted serious bodily injury, but the injuries there were far more substantial than Mary's. In *Scognamiglio* the fracture was displaced, fluid was clogging the victim's nose and affecting her breathing, she had a chronic infection that the doctor testified "if left untreated . . . could develop into life-threatening conditions such as blood poisoning or meningitis," that even after healed her nasal passages would be narrowed, and a year after the assault she "could still feel a bump on her nose" and she "continued to have an unusually runny nose and was still having trouble breathing." *Scognamiglio*, 150 N.H. at 536-37.

When the broken nose injuries are slight, however, they do not constitute serious bodily injury. In *State v. Carmichael*, 405 A.2d 732 (Me. 1979), the Maine Court wrote:

> In view of the character of the injury, a broken nose, which did not require hospitalization and which, in the words of the victim himself without medical support, was described as giving him trouble for several weeks and caused a great amount of pain, the jury might well have concluded that the resulting bodily injury was not the "serious bodily injury"within the [statutory] definition.

Carmichael, 405 A.2d at 737. The Pennsylvania Supreme Court, pursuant to a definition nearly identical to New Hampshire's, recognized that a broken nose is not serious bodily injury. *Com. v. Alexander*, 383 A.2d 887 (Pa. 1978).

Thus, a fractured nose with no apparent lasting harm is not serious bodily injury.

Because Mary did not suffer serious bodily injury with regard to either her nose nor her tooth, the conviction was in error. Moreover, the language of the indictment requires that the State prove *both* "a broken nose *and* a broken tooth." INDICTMENT 04-S-3214 (Dec. 7, 2004), *appx. to br.* at 42 (emphasis added). Thus if one of the injuries are "serious" but the other is not, Jeffrey is not guilty of first degree assault.

VI. Court Should Have Suppressed Statements Concerning Where Jeffrey Was Found

The State offered testimony by a police officer that Jeffrey was found hiding in a closet in his house, giving rise to an inference of a guilty conscience.

The police were lawfully present on the *second* floor of Mary's and Jeffrey's house pursuant to a public safety concern after Mary told them the child was there, 3 *Trn*. at 166, and the police received no answer to their knocking. 3 *Trn*. at 167-69. Upon leaving and taking the baby out of the house, 3 *Trn*. at 173-74, the police accomplished the goals of the public safety exception to the State and Federal Constitutions' warrant requirements. U.S. CONST. amd. 4; N.H. CONST. pt I, art. 19.

The police then looked around the outside of the house, but could not find Jeffrey. With the purpose of finding him, and without a warrant, the police re-entered, 3 *Trn*. at 173-74, "to do a secondary, maybe a little better search" for him. They eventually found him on the *third* floor, "laying inside that crawl space hiding" 3 *Trn*. at 175.

The fruits of an unlawful search are inadmissible, *State v. Canelo*, 139 N.H. 376 (1995), and hiding indicates a consciousness of guilt. *State v. Cassell*, 129 N.H. 22 (1986).

The testimony, however, was not objected-to, and the issue is thus unpreserved. Nonetheless, this Court should reach the issue pursuant to the plain error rule. N.H. SUP.CT. R. 16-A. To "find error under the rule, (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. Matey*, __ N.H. __, 891 A.2d 592, 595 (decided Feb. 15, 2006).

The error here meets all four tests, and the evidence should have been suppressed.

The testimony does not constitute harmless error because it is the only evidence beyond

Mary's story that the jury heard.

Mary and Jeffrey gave conflicting explanations for the injuries. The physical evidence – tooth marks in the floor, blood drops on the steps, photos, etc. – equally support either version. The other evidence – from two doctors, two officers, a nurse, and the 911 tape – were all mere repetitions of Mary's story that those witnesses heard from Mary. The testimony of Jeffrey hiding in the closet was thus the only evidence that could tip the scales in the credibility contest between Mary and Jeffrey, and thus its admission is not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Jeffrey Pepin respectfully requests this honorable court to reverse his convictions.

Respectfully submitted,

Jeffrey Pepin
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 12, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Jeffrey Pepin requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on June 12, 2006, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: June 12, 2006

Joshua L. Gordon, Esq.

APPENDIX

Portion of Transcript Wherein Jury Learned of Prior Conviction
(Jeffrey's Testimony, 3 *Trn.* at 126-131)

Q: When Mary caught you on the phone with this other woman, you said that she said she was going to call this woman's husband, right?

A: She said she may, yes.

Q: Okay. And what was your response to that?

A: I told her that wasn't a good idea.

Q: Okay. And what else did you say to her?

A: That was my immediate response.

Q: Okay. Did you say anything else to her?

A: There was other questions that she asked.

Q: Okay. Did you say anything else to her?

A: We spoke more.

Q: Did you say anything else to her?

MR. WATKINS: I'm going to object. If she can make a more specific question. He's already testified that they had some conversation.

MS. CONWAY: I think it's a simple question, judge.

THE COURT: Let him finish.

MR. WATKINS: He's already testified that there were a number of comments during this conversation. If she has a specific question, she can ask him, it will be a lot less confusing.

THE COURT: Overruled.

Q: Did you say anything else to her, sir?

A: We spoke, yes.

Q: I'm asking you, did you say anything else to her?

A: I might have said, yes.

Q: What did you say to her?

A: We spoke more about, you know, why she felt the need to hurt someone else.

Q: And what did you say, what were the words you used?

A: What were the words that I used? That I didn't need someone who was obviously a federally licensed gun dealer who had already threatened my life twice. She listened to one of the voice mails. My therapist had listened to another voice mail.

Q: Sir, I'm asking you what were the words that you used?

A: You wanted to know what I said.

THE COURT: Let her finish the question.

Q: What were the words that you used when you were speaking with her?

A: These are the words that I used.

Q: Okay. Go on.

A: That I didn't need to be threatened any more.

Q: *And according to you, you said do I have to threaten you like he threatened me. Is that what you said?*

A: *That's probably what I said.*

Q: Don't you think that Mary had a good reason to be a little afraid at that point after you said that to her?

MR. WATKINS: Objection. Relevance and speculation.

THE COURT: Overruled.

A: She came up to the house five minutes later.

Q: A few weeks later when you met with Doctor Joan Cavoli, you said on your direct examination that the counselor brought it up and said could you kill your wife. She asked you that question, could you kill your wife. Is that what she asked you?

A: That wasn't the direct question she asked me.

Q: Isn't that what you just testified to, sir?

A: Her direct question was could you kill someone. It was a very general question.

Q: Didn't you just testify that she asked you if you could kill your wife?

A: No. She asked me if I could kill someone.

Q: What was your response?

A: I don't recall exactly the words that I used.

Q: *Your response was, if someone's buttons are pushed hard enough, they can do anything, right, they're capable of anything. Isn't that what you said?*

A: *If someone is put into a situation where there are no other alternatives, I think that's possible.*

MS. CONWAY: Your Honor, could we approach, please?

THE COURT: Sure.

(Bench Conference on the Record)

MS. CONWAY: I'd like to cross him with the conviction, the criminal threatening.

THE COURT: I think it's appropriate now. I originally ruled that the state could not use that conviction during opening statements when the defense provided the explanation for what the actual threat was in court and said to the defense that I could possibly let in the conviction after I heard the testimony.

In this case, the defendant entered a nolo conviction, which is essentially a denial of guilt and an admission that the state can prove the case beyond a reasonable doubt.

After hearing the defense direct testimony and given the discrepancy between the state's evidence and the defendant's explanation, then it's fair to allow the state to cross-examine him to give the jury the context to hear the evidence.

MR. WATKINS: However, judge, the circumstances of the conviction are such that the defendant pled nolo. He appeared at a hearing in which it was a scheduled bail hearing.

MS. CONWAY: He was represented by counsel.

MR. WATKINS: He was represented by counsel. He was charged with a Class A misdemeanor. He had been incarcerated for three weeks. They offered him a Class B misdemeanor and a fine if he wanted to plea. He pled nolo under those circumstances.

THE COURT: The nolo conviction is entered as a conviction. I mean every defendant who has a conviction used against them for cross-examination argues that the circumstances were such that they entered the plea because that was the only choice. I'm going to allow the state to cross-examine him on this given his explanation for the threat.

MR. WATKINS: Over the defendant's objection. Thank you.

(Bench Conference Concluded)

CROSS EXAMINATION CONTINUED
BY MS. CONWAY:

Q: Mr. Pepin, isn't it true that you were convicted of criminal threatening back in June of 2004 for the threat that we were just talking about, when Mary caught you on the phone?

A: I pled nolo to the charge.

Q: And isn't it true that you were convicted of criminal threatening?

A: I pled nolo to the charge.

Q: Isn't it true that you were convicted –

MR. WATKINS: Asked and answered, judge.

THE COURT: Sustained.

Q: And you were represented by counsel at that hearing, right?

A: Correct.

4 *Trn*. at 126-131 (emphasis added).