THE STATE OF NEW HAMPSHIRE

CARROLL, SS.
COOS, SS. **SUPERIOR COURT**

The State of New Hampshire

v.

Nathaniel Kibby

Nos. 212-2014-CR-195 and 214-2014-CR-153

ORDER

The defendant, Nathaniel Kibby, stands indicted on 205 charges. The charges include kidnapping, four counts of criminal threatening, seven counts of witness tampering, four counts of second degree assault, six counts of criminal use of an electronic defense weapon, two counts of felonious use of a firearm, indecent exposure, ten counts of falsifying physical evidence, two counts of sale of a controlled drug, 80 counts of aggravated felonious sexual assault, and 80 counts of felonious sexual assault. Before the court are a number of motions from the defendant and one motion from the state. The court heard evidence and argument during the November 17, 2015 hearing and will address each motion in turn.

HISTORY

On October 9, 2013, the complaining witness, A.H., did not return home after leaving Kennett High School in Conway, New Hampshire. A.H.'s mother called the Conway Police Department to report A.H. missing the same day. Federal, state, and local law enforcement commenced an immediate investigation. On July 20, 2014—approximately nine months later—A.H. returned to her home. Local law enforcement interviewed A.H. regarding her whereabouts. A.H. initially stated that she did not know the identity of her alleged captor, but on July 27, 2014, A.H.

identified the defendant. Shortly thereafter, the police obtained a warrant for the defendant's arrest. The instant indictments followed.

ANALYSIS

Motion to Recuse

In a separate case, a grand jury indicted the defendant on a felony charge of improper influence and misdemeanor charges of criminal threatening and obstructing governmental administration. The charges arose from the defendant's alleged threat to harm Associate Attorney General Jane Young, lead counsel for the state, made during a recorded phone call from the Carroll County House of Corrections on December 18, 2015. The improper influence indictment alleges that the defendant stated, "this is going to backfire on [J.Y.]. And, I know, you're going to listen to this Miss [J.Y.]. And then, I'm going to pull you f…king down, and I'm going to take your f…king panties off, and f…king [inaudible]. That's what's coming, this is coming." The Attorney General's Office initially reviewed the phone call and referred the matter to the Cheshire County Attorney, who investigated the matter and brought it before a grand jury. The Attorney General's Office represents that, other than the referral, it has had no involvement with the investigation or prosecution.

The defendant moved to recuse the Attorney General's Office or, alternatively, to recuse Associate Attorney General Young because of an alleged conflict of interest. The court denied the motion by a bench ruling at the November 17, 2015 hearing. The court now provides a narrative order.

The defendant argues that Attorney Young has a personal interest arising from the additional charges against the defendant related to alleged threats against her. He asserts that Attorney Young cannot be both prosecutor and victim. He also argues that these charges affect her ability to prosecute the defendant fairly and raises a specter of impropriety. The state objects. It

asserts that there is no conflict of interest because it is not involved in the prosecution of the improper influence, criminal threatening, and obstructing governmental administration charges. The state cites the analysis of a number of courts that have rejected the notion that a defendant can cause a prosecutor's recusal by the defendant's own misconduct. The court agrees with the state.

The case of *State v. Ayer*, 150 N.H. 14, 34-36 (2003) is instructive. There, the court held that, under the Code of Judicial Conduct, a defendant's alleged threat against a judge and other court personnel did not warrant the judge's recusal because there was no evidence that the judge considered the alleged threats to be credible or that the threats affected the court's normal procedures. The rule applies with equal force to prosecutors. Like a judge's ethical obligation to remain impartial and avoid the appearance of impropriety, a prosecuting attorney must recuse herself from a matter in which he or she has a conflict of interest. N.H. R. PROF. CONDUCT, 1.7 & 1.9.

Public policy disfavors recusal where the prosecuting attorney is not the allegedly injured party and where the so-called bias is the result of the misconduct of the litigant unless there is evidence the case was prosecuted differently because of the litigant's misconduct. Otherwise, a litigant would be handed the ability to cause a change in a judge or prosecutor by his own misconduct. *See People v. Hall*, 499 N.E.2d 1335, 1347 (Ill. 1986) (requiring recusal under such circumstances would "invite misconduct towards judges and lawyer."); *see also Resnover v. Pearson*, 754 F. Supp. 1374, 1388–89 (N.D. Ind. 1991) ("The law is clear that a party, including a defendant in a criminal case, cannot drive a state trial judge off the bench … by threatening him or her. It is likewise true that a criminal defendant cannot cause the recusal of his prosecutor by threatening the prosecutor…."); *State v. Robinson*, 179 P.3d 1254, 1261 (N.M. Ct. App. 2008), quoting *State v. Gonzales*, 119 P.3d 151, 159 (N.M. 2005) ("[A] defendant's conduct will almost

never be sufficient to disqualify a member of the prosecution team, unless the crime being prosecuted was committed against the prosecuting attorney or someone else involved in the prosecution."); *State v. McManus*, 941 A.2d 222, 231–32 (R.I. 2008) (recusal of a prosecutor in a case where the prosecutor was not the alleged injured party was improper because the prosecutor did not have a personal interest based solely on the defendant's alleged death threat); *State v. Cope*, 50 P.3d 513, 515–16 (Kan. Ct. App. 2002) (district attorney's office did not have a conflict of interest sufficient to disqualify it from prosecuting the defendant for threatening to bomb the district attorney's office); *Millsap v. Superior Court*, 82 Cal. Rptr. 733, 738 (Cal. Ct. App. 1999) (there was a "real potential for actual prejudice" if the prosecutors who were the target of the defendant's alleged murder solicitation were allowed to prosecute the case); *State v. Boyce*, 233 N.W.2d 912, 914 (Neb. 1975) (a prosecutor was not disqualified as a matter of law from prosecuting a case where the defendant allegedly kidnapped a police officer for the purpose of locating and killing the prosecutor because the prosecutor was not the alleged injured party in the case).

Here, the court need not make a finding on whether the threat was credible or realistic because the issue of whether the prosecutor changed normal procedures is dispositive. The defendant obliquely argues that Attorney Young's bias is clear based on alleged overcharging. The court is not persuaded. The 205 indictments in the present case were returned before the alleged threat. Indeed, there is no evidence that Attorney Young or the Attorney General's Office altered any normal procedure in prosecuting the present case.

For the foregoing reasons, the court cannot conclude that Attorney Young's recusal is required based on the defendant's alleged threats against her. *See Ayer*, 150 N.H. at 34-36. Ac-

cordingly, the defendant's motion to recuse the Attorney General's Office or Associate Attorney General Jane Young is DENIED.

Motion to Suppress Statements

The defendant moves to suppress statements allegedly made to New Hampshire State Police Trooper James Berube on July 28, 2014, on the grounds that the statements were obtained in violation his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, the defendant maintains that Trooper Berube engaged in the functional equivalent of a custodial interrogation while transporting the defendant to the Conway Police Department. The state objects. Because the state has satisfied its burden of showing that that the defendant's statements were spontaneous and not the product of a custodial interrogation, the defendant's motion to suppress statements is DENIED.

On July 28, 2014, Trooper Berube was assigned to transport the defendant from Gorham, New Hampshire, to the Conway Police Department. Upon meeting the defendant, Trooper Berube informed him that he would be the transferring officer. Having previously encountered the defendant, Trooper Berube recognized him. The defendant also appeared to recognize Trooper Berube, but he did not say anything at that time.

Trooper Berube transported the defendant in a fully marked State Police cruiser followed by another cruiser. While en-route, Trooper Berube received a phone call with the instruction that there be no contact with the defendant. Trooper Berube had not had any contact with the defendant before the telephone call, but the defendant made several statements to Trooper Berube afterward.

The defendant first stated that he was surprised Trooper Berube was treating him respectfully and that he knew Trooper Berube from a prior arrest. The defendant also stated he "made a vow to somebody, and I apologize for what I did." Trooper Berube did not respond to these

statements. The defendant then said that he recalled Trooper Berube being louder. At this point, Trooper Berube believed the defendant was anxious, and he became concerned about his emotional state because it is the transporting officer's duty to ensure the transport is safe. In an effort to calm the defendant, he stated, "Everything comes to an end sometimes." The defendant was quiet for some time after this comment, but then he asked whether his residence would be searched, mentioning that the police would have a problem opening his safe without the combination. Trooper Berube responded that the defendant should discuss his concern with the Conway Police Department. The defendant made no further statements during the transport.

The defendant asserts that admission of the foregoing statements would violate his rights under part I, article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. The New Hampshire Constitution provides at least as much protection in this area as the United States Constitution; thus, the court will address the defendant's claims under the state constitution, referring to federal authority for guidance only. *See State v. Ball*, 124 N.H. 226, 232 (1983).

Part I, article 15 of the New Hampshire Constitution affords criminal defendants the right against self-incrimination. "To protect this privilege, statements obtained through custodial interrogation cannot be used unless the procedural safeguards outlined in *Miranda* are followed." *State v. Thelusma*, 167 N.H. 481, 484 (2015), citing *State v. McKenna*, 166 N.H. 671, 676 (2014). "Interrogation for *Miranda* purposes occurs when 'a person in custody is subjected to either express questioning or its functional equivalent.'" *State v. Gribble*, 165 N.H. 1, 11 (2013), quoting *State v. Spencer*, 149 N.H. 622, 625 (2003). "The functional equivalent of interrogation includes 'any words or actions on the part of the police … that the police know are reasonably likely to elicit an incriminating response from the suspect.'" *Id*., citing *Rhode Island v. Innis*, 446

U.S. 291, 301 (1980). The court will "focus[] primarily upon the perceptions of the suspect, rather than the intent of the police." *State v. Plch*, 149 N.H. 608, 614 (2003), quoting *Innis*, 446 U.S. at 301.

The defendant was in custody at the time the statements were made. Therefore, the remaining issue is whether Trooper Berube's statements constituted an interrogation. Based on Trooper Berube's credible testimony, the court finds that the defendant's statements were not the product of interrogation. The defendant's initial statements, which referenced his surprise that Trooper Berube was treating him respectfully, his acknowledgement that he knew Trooper Berube from a prior arrest, his vow and apology, and his recollection of Trooper Berube being louder, were not in response to any statement by Trooper Berube. Those statements were therefore voluntary because there was no interrogation.

Only one of the defendant's statements occurred after Trooper Berube's comment about everything coming to an end. The court agrees with the state that the trooper's comment does not constitute interrogation because it was a vague statement not reasonably likely to elicit an incriminating response from the defendant. This finding is underscored both by the lapse of time between Trooper Berube's comment and the defendant's next statement and by the fact that the subject of the defendant's statement—access to his safe—was not responsive to Trooper Berube's comment. These facts support the reasonable inference that the defendant did not perceive the comment to be seeking an incriminating response.

Based on the foregoing, the court finds and rules that the state has sustained its burden of showing that all of the defendant's statements during the transport with Trooper Berube were voluntary statements, not a product of custodial interrogation, and the defendant's privilege

against self-incrimination was not violated. Accordingly, the defendant's motion to suppress statements is DENIED.

Motion to Suppress Evidence

By separate motion, the defendant seeks suppression of 55 pieces of evidence seized pursuant to ten search warrants. The defendant contends this evidence was seized in violation of his privilege against unreasonable searches and seizures for two reasons: (1) the warrants lacked probable cause to search for or seize a number of the items because the attached affidavits did not demonstrate a substantial likelihood that the item sought would be found; and (2) the warrants did not state with particularity all of the items to be seized because some items ultimately seized were not listed in the search warrant. In response, the state declined to contest the defendant's claims with respect to much of the evidence because it does not intend to introduce said evidence. Accordingly, the defendant's motion to suppress is GRANTED to the extent it is directed at the items of evidence that the state does not contest. The state does object to the defendant's motion to the extent that it applies to evidence it will seek to introduce—specifically a mask, a laptop computer, various firearms, an HP printer, sex toys, CDs, DVDs, still cameras, a video camera, a container of women's clothing, additional firearms, an X-Box with controllers, an iPod, a gold and black mask, newspapers, an additional laptop computer, external hard drive, SD disks, a GPS device, a cellular phone, financial records, and four cardboard discs. Because the state has not sustained its burden with respect to firearms not fitting the specific descriptions in the July 29, 2014 warrant and any additional firearms seized pursuant to the August 1, 2014 warrant, the defendant's motion to suppress evidence of those firearms is GRANTED. Because the state has sustained its burden with respect to all other contested items, the defendant's motion is DENIED in all remaining respects.

Part I, article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution protect against unreasonable searches and seizures. *State v. Saunders*, 164 N.H. 342, 353 (2012). Evidence obtained in violation of a defendant's constitutional rights is inadmissible. *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014). When a defendant moves to suppress evidence on the ground that it was obtained illegally, the state has the burden of showing that the evidence was obtained lawfully. *State v. Martin*, 145 N.H. 362, 364 (2000). As previously stated, the court addresses the defendant's claims under the state constitution, referring to federal authority for guidance only, because the New Hampshire Constitution provides at least as much protection in this area as the United States Constitution. *See State v. Ball*, 124 N.H. 226, 232 (1983).

The items the defendant seeks to exclude were all seized in the course of the execution of various search warrants or a motion to search in lieu of warrant. Thus, the court's analysis is directed at the standards applied to search warrants. Search warrants may only be issued upon a finding of probable cause. *State v. Ward*, 163 N.H. 156, 159 (2012). "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *State v. Orde*, 161 N.H. 260, 269 (2010). "[T]he affiant need not 'establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result.'" *Ward*, 163 N.H. at 159, quoting *State v. Fish*, 142 N.H. 524, 528 (1997). All that is required is "a fair probability that evidence of a crime will be found in a particular place." *State v. Letoile*, 166 N.H. 269, 274 (2014). The court considers the totality of the circumstances when determining the sufficiency of a warrant's supporting affidavit. *State v. Ball*, 164 N.H. 204, 207 (2012). The court "afford[s] much deference to the [issuing court's] probable cause determination" and will avoid invalidating "warrants by reading the sup-

porting affidavit in a hypertechnical sense." *Letoile*, 166 N.H. at 273. Instead, the court must "review the affidavit in a common-sense manner, and determine close cases by the preferences to be accorded to warrants." *Id*., quoting *Ball*, 164 N.H. at 208. The review may only consider "information that the police brought to the issuing court's attention." *Id*.

In addition to the probable cause requirement, a warrant must describe with particularity the person or place to be searched and the items to be seized. *State v. Champagne*, 152 N.H. 423, 430 (2005); RSA 595-A:2. There is no exact standard for whether a warrant has met the specificity requirement because it varies with the subject matter of the warrant. *State v. Tucker*, 133 N.H. 204, 206 (1990). As a general rule, "generic descriptions are inadequate whenever it is reasonably possible for a warrant's applicant or issuing magistrate to narrow its scope by using descriptive criteria for distinguishing objects with evidentiary significance from similar items having no such value." *Id*. at 207. Generic descriptions may be adequate, however, "when probable cause has been demonstrated for believing that any example of generically described objects is likely to have evidentiary character." *Id*. at 206.

With these standards in mind, the subsequent analysis addresses each warrant in chronological order and the disputed evidence seized pursuant to that warrant organized as follows:

A. July 28, 2014 warrant: mask.
B. July 29, 2014 warrant: laptop computer; various firearms; HP printer; and sex toys.
C. August 1, 2014 warrant: CDs, DVDs, Cameras, and video camera; container of women's clothing; additional firearms; gold and black mask; X-box with controllers and iPod; and newspapers.
D. August 18, 2014 warrant: laptop, external hard drive, and SD disks; and GPS device.
E. August 27, 2014 warrant: cellular phone.
F. October 10, 2014 warrant: financial records.
G. January 28, 2015 motion in lieu of search warrant: four cardboard discs.

At the November 17, 2015 hearing, the defendant's motion was argued based on offers of proof. For ease and efficiency, the court incorporates the relevant facts as it addresses each claim.

A. July 28, 2014 Warrant

The defendant first challenges the seizure of a "scream-style" mask during the execution of the July 28, 2014 warrant. The defendant claims that the law enforcement did not establish sufficient probable cause to support that seizure. The state objects. The court agrees with the state.

Detective Ryan Wallace of the Conway Police Department submitted the warrant's supporting affidavit, which recounted information gleaned from interviews with A.H. shortly after her return. During an initial interview, A.H. stated that she was walking home from school on October 9, 2013, when an unknown male driving a blue pickup truck asked her if she wanted a ride. Upon entering the truck, A.H. said the driver drew a knife and instructed her to keep her head between her legs. She further alleged that she never saw her captor's face during captivity because he always wore a "Scream-style" mask to hide his identity. A.H. later revealed to her mother that she was not completely forthright with law enforcement and that she knew the identity of her alleged captor. Investigators subsequently met with A.H. for another comprehensive interview in which A.H. identified the defendant as her alleged captor. She said that she had seen a cookbook with his name written inside. In her retelling, A.H. stated that she was walking home from school on October 9, 2013, when an unknown male driving a silver car offered her a ride. She accepted. Eventually, the male drove her to the Home Depot parking lot where he drew a handgun and used a Taser on her leg. He then covered her with a Carhartt-style jacket and placed a baseball cap over her head before taking her to a shed, which she believed was his property. A.H. did not refer to a "Scream-style" mask at any time during the retelling.

The defendant contends that the supporting affidavit lacks probable cause for seizing the mask at issue because A.H. had changed her story considerably before the warrant was executed. Thus, Detective Wallace knew A.H.'s statements regarding the mask were not true. The defend-

ant asserts that Detective Wallace should have excised reference to the mask from the warrant because he had knowledge of the initial story's falsity. The state disagrees. It argues that the defendant may not challenge the facially valid warrant unless he shows that Detective Wallace recklessly or intentionally made material misrepresentations in the affidavit. The state asserts that the defendant has not made this showing.

A defendant claiming that a facially valid warrant application rests on intentional or reckless misrepresentations by the police is not entitled to a hearing unless he makes a preliminary showing that the affiant's statements were false and material "to the degree that there would have been no demonstration of probable cause without them." *State v. Valenzuela*, 130 N.H. 175, 189 (1987), citing *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978). "The appropriate focus in attacking a facially valid warrant on the ground that it contains misrepresentations is whether it contains misrepresentations by the affiant, the police officer." *State v. Jaroma*, 137 N.H. 143, 147 (1993), quoting *State v. Carroll*, 131 N.H. 179, 191 (1988).

Here, the defendant has not made the necessary preliminary showing that Detective Wallace's affidavit included misrepresentations sufficient to deprive the warrant of probable cause as to the mask. At the point Detective Wallace executed the search warrant, investigators had two stories from A.H. They were entitled to investigate both stories to evaluate their accuracy. To that end, the affidavit accurately and openly recounts the changes in A.H.'s story, which cuts against the defendant's conclusion that Detective Wallace's reference to a "Scream-style" mask was an intentional or reckless misrepresentation. The court is also mindful of the deference afforded to search warrants and the notion that a warrant should not be read in a hypertechnical sense. Consequently, the defendant is not entitled to suppress the mask seized pursuant to the July 28, 2014 warrant.

B. July 29, 2014 Warrant

The defendant claims that the July 29, 2014 warrant lacked probable cause with respect to the seized laptop. He also asserts that the warrant was not sufficiently particularized to support the seizure of firearms, sex toys, and HP printer. This warrant, accompanied by another supporting affidavit from Detective Wallace, included the same information as the July 28, 2014 warrant plus additional information obtained in the interim.

The court will first address the issue of whether there existed sufficient probable cause to support the seizure of the laptop computer. The July 29, 2014 warrant's supporting affidavit states that Charissa Kennard, the General Manager of Staples in North Conway, informed investigators that the defendant had visited the store on February 22, 2014, and inquired about data transfer cables to an external hard drive. The store advised the defendant to bring his computer to the store to see whether it was compatible. The defendant initially declined, but ultimately left his computer at the store for two hours. The defendant returned approximately every two weeks to purchase computer equipment. Additionally, Thomas Blakeney was an acquaintance of the defendant who informed investigators that the defendant brought and used a laptop computer during a visit to Mr. Blakeney's home. The affidavit further stated that officers had observed an Eddie Bauer laptop computer case inside the defendant's residence during the execution of the previous search warrant. The affidavit specifically provided that, based on Detective Wallace's training and experience, people involved in the crimes of kidnapping, sexual assault, or related crimes often use electronic devices to facilitate the crimes by conducting research or documenting their activities, and that this information is regularly stored on computers, hard drives, flash drives, cellular phones, and any other electronic storage devices. Attachment A to the warrant permits law enforcement to search for and seize "[c]omputers, laptops, digital storage devices,

digital storage media, video, photos, external storage devices to include USB drives, and cellular telephones."

The defendant contends this warrant does not provide sufficient probable cause for the seizure of the defendant's laptop because the information relied upon consists of benign observations with no connection to the alleged kidnapping and assault. He also points out that A.H. did not mention anything about a laptop. The defendant further maintains that Detective Wallace's training and experience is not sufficient to support a finding of probable cause because it lacks detailed information about the type of training or the basis of knowledge. The state argues that the defendant's contention is flawed because probable cause is based on the totality of circumstances, not each isolated piece of evidence, and all rational inferences would lead a reasonable person to believe that law enforcement would find a laptop computer at the defendant's residence. The court agrees with the state.

The warrant provided sufficient probable cause with respect to the laptop computer because the totality of the circumstances—specifically the combination of Detective Wallace's training and experience with the information about the defendant's attempt to offload data at Staples—would permit a reasonable person to conclude that there is a substantial likelihood that the laptop was connected to the crime and would be located in the defendant's residence. While each of these facts taken alone might be insufficient, the combination is sufficient to support a finding of probable cause. Additionally, Detective Wallace was not required to include a *curriculum vitae* detailing his training and experience to support the affidavit because such detailed information is not required to support a finding of probable cause. *See Ward*, 163 N.H. at 161 ("Certainly additional information regarding an affiant's training and experience could be helpful in establishing probable cause. Here, however … additional information regarding the affiant's

training and experience [is not] required to establish probable cause.") Finally, the defendant's contention that there was no probable cause with respect to the laptop because A.H. did not mention a laptop is misplaced. A.H. cannot be expected to know every detail of the commission of the crime, and she is not the only source of evidence supporting the affidavit. The seizure was supported by probable cause. Consequently, the defendant is not entitled to suppress the laptop seized pursuant to the July 29, 2014 warrant.

The court now turns to the defendant's claims directed at the firearms seized during the execution of the July 29, 2014 warrant. The affidavit specifically refers to two firearms: a black or camouflage long gun that the defendant showed to A.H. while she was in the shower and a black semi-automatic handgun that the defendant drew during the alleged kidnapping. Despite the reference to only those two firearms, law enforcement seized a larger number. The defendant contends that because the warrant did not state with particularity the firearms to be seized, the seizure of firearms other than the two specifically listed constituted a warrantless search. In response, the state asserts that all of the seized firearms fit the descriptions contained in the warrant. The state argues that a more detailed description, such as a specific type, manufacturer, or serial number, is not required.

The defendant's argument includes elements of a trial objection under New Hampshire Rule of Evidence 403 based on an anticipated state request to introduce more than one of the seized firearms fitting each description at trial. Such an evidentiary ruling would be premature. The court must base its decision here on an analysis of the warrant. In this context, the court agrees with the state that law enforcement was entitled to seize all firearms fitting the specific descriptions contained in the affidavit. *See Tucker*, 133 N.H. at 207–08 (evidence falling within a warrant's specific description is subject to seizure). A.H. provided a sufficient description to es-

tablish probable cause as to the black or camouflage long gun and the black semi-automatic handgun because there is no reasonable indication that she could have known more detailed identifying information. *See Quigg v. Estelle*, 492 F.2d 343, 345–46 (9th Cir. 1974) (the phrase "any .22 caliber pistol" was sufficiently particular because requiring police "to set forth information they could not know, under the guise of particularity, is to thwart reasonable police activity").

The foregoing is not fully dispositive. While the defendant is not entitled to suppression of any firearm actually fitting the specific descriptions in the warrant, he is entitled to suppression of any other firearm seized during the execution of the July 29, 2014 warrant. The state offered no evidence of the inventory of seized weapons. Thus, the court cannot determine whether all of the seized firearms actually are consistent with the warrant description. As indicated, the defendant is entitled to suppression of any firearm seized that is not consistent with the warrant description.

The defendant next contends that the HP printer must be suppressed because neither the July 29, 2014 warrant nor the accompanying affidavit references a printer. The state does not contest the lack of reference; however, it asserts that the defendant does not have standing to challenge the seizure of the HP printer because it was found on property not owned by him, and he had no reasonable expectation of privacy. The facts support the state's argument. Fish and Game Conservation Officer Robert Mancini discovered the printer in a gray plastic bag covered with dirt and leaves located across the Moose River from the defendant's residence on property owned by Wallace Corrigan, Sr. It is undisputed that Mr. Corrigan consented to the search of that area of the property.

"The threshold question as to the determination of a party's standing to challenge the introduction of evidence by means of a motion to suppress is whether any rights of the moving par-

ty were violated." *State v. Flynn*, 123 N.H. 457, 466 (1983). "Absent an invasion of the defendant's reasonable expectation of privacy, there has been no violation of the defendant's rights under Part I, Article 19." *State v. Orde*, 161 N.H. 260, 264 (2010). The defendant did not have any rights in the property where the printer was located. Therefore, he lacks standing to challenge the seizure. Consequently, the defendant is not entitled to suppress the HP printer.

Sex Toys (July 29, 2014 and August 1, 2014 Warrants)

The defendant next challenges the admission of seized sex toys under both the July 29, 2014 warrant and the August 1, 2014 warrant. The defendant asserts that neither warrant specifically referenced sex toys. The defendant further reasons that A.H. did not tell investigators that she knew of, had access to, or came into contact with any sex toys during her alleged captivity. The state counters that the sex toys were properly seized under the warrant provision allowing for the search and seizure of "[f]orensic, physical and trace evidence to include, but not limited to, bodily fluids, bodily tissue, DNA, blood, hairs, fibers, finger prints and palm prints." The state reasons that a greater degree of specificity is impossible given the indistinguishable nature of items on which DNA, bodily fluids, and the like may be found. The state alternatively contends that the sex toys are not subject to suppression because they were in plain view and their evidentiary value was immediately obvious because of the nature of the alleged crime.

The supporting affidavits indicate that the defendant kidnapped and held A.H. captive on his property for nine and a half months. During this time the defendant allegedly sexually assaulted A.H., allowed her to move about the trailer and storage shed, used restraining devices on her, and permitted her to shower and use the bathroom. Detective Wallace states:

> Based upon my training and experience, individuals who are kidnapped and/or sexually assaulted and held for an extended period of time will transfer evidence to anywhere that person had the ability to be, any items that person had the ability to touch or come in contact with, and [any] area where DNA, hair, and fluids may be transferred/travel outside the immediate area of where the victim had access.

August 1, 2014 Aff. ¶67; *see also* July 29, 2014 Aff. ¶60. The affidavits sought to seize items on which the police had probable cause to believe such trace evidence was located. Attachment A to both warrants specifies the right to seize and forensically analyze, test, or search for evidence of "[f]orensic, physical and trace evidence to include, but not limited to, bodily fluids, bodily tissue, DNA, blood, hairs, fibers, finger prints and palm prints." Neither the warrants nor the supporting affidavits specifically identify sex toys as a source of such forensic evidence. Nor does the affidavit state that sex toys were used on A.H. The sex toys seized appeared to be intended for use on or by females, though the defendant lived alone at his residence.

Initially, the court rejects the state's contention that the seized sex toys are subject to the plain view warrant exception. "Under [the plain view] exception, the State must prove that: (1) the initial intrusion which afforded the view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was 'immediately apparent.'" *State v. Nieves*, 160 N.H. 245, 247 (2010), quoting *State v. Davis*, 149 N.H. 698, 700-01 (2003). The state has not sustained its burden on this issue. The record is devoid of evidence of where the sex toys were found. Thus, the court lacks a basis to find that the initial intrusion was lawful or that the discovery of the evidence was inadvertent. Thus, the court will confine its analysis to whether the seizure of the sex toys was justified under the warrant's trace evidence provision.

The state has sustained its burden of showing that the seizure of the sex toys was permitted under the trace evidence provision. A person of ordinary caution could justifiably believe A.H.'s DNA, bodily fluids, or bodily tissue would be found on those items. The defendant correctly argues that the trace evidence provision is generic; however, it nonetheless satisfies the particularity requirement because it is not reasonably possible for an affiant to distinguish further objects with evidentiary significance and those without given the varied nature of objects on

which trace evidence may be found. That A.H. must have been able to come into contact with and likely transfer trace evidence onto an item is sufficiently specific given the nature of the evidence. The seized sex toys were the type to be used on or by females; thus, they are the type of items on which such trace evidence is likely to found because use of those objects places them in direct contact with DNA, bodily fluids, bodily tissue, and fingerprints. This is supported by the sexual nature of the alleged crimes and the location of the sex toys in the trailer in which the male defendant was the only resident. Therefore, the trace evidence provision of the warrant satisfies the particularity requirement. As the seizure of the sex toys was justified, the defendant is not entitled to suppression.

C. August 1, 2014 Warrant

The defendant next maintains that the August 1, 2014 warrant lacked probable cause to support the seizure of the CDs, DVDs, cameras and video camera, and the container of women's clothing. Additionally, the defendant claims this warrant lacked sufficient particularity to authorize the seizure of additional firearms, a gold and black mask, an X-box with controllers, an iPod, and newspapers. This warrant, accompanied by another supporting affidavit from Detective Wallace, included the same information as the July 29, 2014 warrant as well as additional information obtained in the interim.

With respect to the CDs, DVDs, cameras, and video camera, the affidavit stated that while executing prior warrants, the police found items under the defendant's trailer but above the ground. Among these items were binders containing CDs and DVDs that appeared to be both commercial products and personal recordings. Based on their labels, many of the commercial items appeared to be pornography. Law enforcement also found cameras capable of capturing videos and images, as well as a laptop capable of creating CDs and DVDs. Detective Wallace

further stated in the affidavit that, based on his training and experience, individuals who kidnap and confine others will create and keep audio and video documentation.

The defendant's first attack is directed at whether the affidavit established probable cause. He asserts that pornography is neither illegal nor suggestive of involvement in a crime. He also points out that the affidavit does not indicate that A.H. was ever filmed or photographed or that she even knew the defendant owned these items. Finally, the defendant argues that the only indication of what the CDs and DVDs contained or to their link to the alleged crime was Detective Wallace's reference to his training and experience. The state objects. It argues that the defendant's argument ignores the totality of the circumstances.

The state is correct in its argument that the court must consider the totality of the circumstances and refrain from a hypertechnical construction of the affidavit. *Ball*, 164 N.H. at 207; *Letoile*, 166 N.H. at 273. On this basis, the August 1, 2014 warrant is sufficient to demonstrate a substantial likelihood that the CDs, DVDs, cameras, and video camera are related to the commission of the alleged crime and would be found underneath the defendant's trailer. The defendant correctly claims that the affidavit does not indicate that A.H. stated she was filmed or photographed or knew of these items. This does not disturb the court's analysis. A.H.'s statements are not the only support for a finding of probable cause. Here, the issue of probable cause rests on Detective Wallace's training and experience as it relates to the general conduct of an individual who commits the types of crimes alleged in this case.[1] This representation is the only information within the four corners of the warrant that links the CDs, DVDs, cameras, and laptop to the alleged crime, because those items do not otherwise have direct and apparent evidentiary value.

[1] The court agrees with the defendant that more detailed information relating to Detective Wallace's training and experience would be helpful. In context, however, such detailed information is not necessary to establish probable cause given the totality of the circumstances and a commonsense reading of the affidavit. *See State v. Ward*, 163 N.H. 156, 161 (2012).

That link is established, however, by the additional circumstances, which include the number of CDs and DVDs that were personally manufactured and the existence of the equipment necessary to record videos and images and store them on those CDs and DVDs. Those circumstances combined with Detective Wallace's training and experience would allow a person of ordinary caution to believe the CDs, DVDs, and cameras would aid in conviction of the alleged crimes. Therefore, the state has sustained its burden of showing that the August 1, 2014 affidavit contained sufficient information to support a finding of probable cause. Accordingly, the defendant is not entitled to suppression of the seized CDs, DVDs, cameras, and video camera.

The defendant also asserts that the August 1, 2014 warrant affidavit did not establish probable cause to support the seizure of the container of women's clothing. The affidavit states that during the execution of a prior warrant, the police located a plastic bin appearing to contain women's clothing located under the defendant's trailer but above ground. The affidavit also referenced an interview with A.H., in which she stated that she was forced to remove the clothing she was wearing when she was kidnapped and that the defendant provided her clothing during her captivity. A.H. specifically referenced an orange sweater and World War I pajama pants. Additionally, the affidavit stated that the defendant was the only resident of the single-family residence. The affidavit sought to forensically analyze the clothing and container for DNA, bodily fluids, tissue, hair, and fingerprints because of the likelihood that A.H. came into contact with the items during her alleged captivity. Attachment B to the warrant specifically authorizes the seizure and forensic analysis of women's clothing and the container in which the clothing is found.

The defendant's attack on probable cause is directed at A.H.'s identification of only two articles of clothing. The defendant asserts that there is no other information to support the belief

that A.H. wore any other articles of clothing during her alleged captivity. The state objects. It argues that the defendant fails to consider the totality of the circumstances and that the affidavit establishes that DNA, bodily fluids, tissue, hair, and fingerprints may be found on the clothing worn by A.H.

The court agrees with the state that the affidavit supports the reasonable belief that trace evidence, including DNA, bodily fluids, tissue, hair, and fingerprints, would be found on the clothing and the container in which the clothing was located. The totality of the circumstances include the affidavit statement that the male defendant was the only resident of the home, which provides little rational explanation for the presence of women's clothing in a container underneath his property. Moreover, the affidavit alleges the defendant held A.H. captive, took away her clothing and provided her with different clothing. It is reasonable to believe A.H. would have come into contact with the women's clothing found at the defendant's residence and that she left trace evidence on the clothing. This would provide evidence of A.H.'s presence at the defendant's residence. It is true that the affidavit only relays A.H.'s mention of two specific articles of clothing. Under the totality of the circumstances, a rational person would justifiably believe that those two articles of clothing were not the only clothes A.H. would have worn during the months of her alleged captivity. The state has sustained its burden of showing that the August 1, 2014 warrant contains sufficient information to support a finding of probable cause. Accordingly, the defendant is not entitled to suppression of the container of women's clothing.

The defendant next asserts that the seizure of firearms under August 1, 2014 warrant must be suppressed. Unlike the July 29, 2014 warrant, which authorized the search and seizure of a black or camouflage long gun and black semi-automatic handgun, the August 1, 2014 warrant contains no additional qualifying descriptions. None of the information contained in the August

1, 2014 warrant that was not also contained in the July 29, 2014 warrant references firearms. Nevertheless, Attachment B of the August 1, 2014 warrant authorized law enforcement to search for and seize "firearms."

The defendant points out that the warrant lacks any additional information related to firearms to justify an expanded, categorical search. The state argues the affidavit's reference to the defendant brandishing a handgun during the kidnapping, showing A.H. a long gun, and threatening to hurt others if A.H. identified him demonstrates that the defendant possessed firearms that he used during the commission of the alleged crimes. The court agrees with the defendant.

The August 1, 2014 warrant affidavit does not justify the categorical search and seizure of all firearms because it failed to state with particularity the items to be seized and lacked probable cause to support the seizure of additional firearms. A more particularized description of the firearms was possible because A.H. did describe two specific firearms and did not reference the defendant's possession or use of a gun on any other occasion. Additionally, the reference to the defendant's threats does not support a probable cause finding because nothing in the affidavit indicates the defendant either used a gun to make these threats or would carry out the threats using a gun. Accordingly, the affidavit did not provide sufficient information to justify a reasonable belief that firearms, other than those particularly described in and seized pursuant to the July 29, 2014 warrant, would aid in the defendant's conviction. Accordingly, the defendant is entitled to suppression of additional firearms seized during the execution of the August 1, 2014 warrant.

The defendant next seeks suppression of the seized gold and black mask. The supporting affidavit indicates that the defendant kidnapped and held A.H. captive on his property for nine and a half months, during which time he allegedly allowed her to move about the trailer and storage shed. As indicated above, the affidavit established probable cause to seize trace evidence.

See August 1, 2014 Aff. ¶67. Attachment A to the warrant specifies the right to seize and forensically analyze, test, or search for evidence of "[f]orensic, physical and trace evidence to include, but not limited to, bodily fluids, bodily tissue, DNA, blood, hairs, fibers, finger prints and palm prints." Neither the warrant nor the affidavit specifically identifies a mask as a source of such forensic evidence. Indeed, the August 1, 2014 warrant affidavit references only a singular, "Scream-style" mask and the warrant authorization specifies only one mask. Plural masks are not referenced until Attachment D of the August 27, 2014 warrant, even though the affidavit supporting that warrant does not make any additional references to other masks. The October 10, 2014 affidavit specifically references a time where the defendant showed A.H. an online picture of a mask, which he later purchased and used on A.H. The October 10, 2014 warrant also incorporates the same Attachment D attached to the August 27, 2014 warrant.

The defendant claims the gold and black mask must be suppressed because it is not referenced in either the warrant or the affidavit. The state's objection argues that the gold and black mask is particularly described because the warrant specifically permitted law enforcement to seize masks. The state also asserts that the seizure of the gold and black mask was authorized by the warrant's provision relating to "[f]orensic, physical and trace evidence."

It is true, as the defendant asserts, that only later affidavits and warrants reference plural masks. Thus, the issue turns on whether the August 1, 2015 warrant provision permitting seizure of items accessible to A.H. and on which trace evidence can be found is sufficient to justify the seizure of the gold and black mask. As previously discussed, although the trace evidence provision is generic, it nonetheless satisfies the particularity requirement because it is not reasonably possible for an affiant to further distinguish objects with evidentiary significance and those without given the nature of trace evidence. What is required for specificity purposes is that A.H. must

have been able to come into contact with and transfer trace evidence onto the item in question. Although there is no evidence about the specific location within the defendant's residence or storage container in which the gold and black mask was located, it was seized from one of those locations, both of which were accessible to A.H. according to the affidavit. The seized mask was a likely source of trace evidence such as DNA, bodily fluids, bodily tissue, and hairs because it is designed to be worn over the face where it could come into contact with such trace evidence. Thus, the state has sustained its burden of showing that the trace evidence provision of the warrant satisfies the particularity requirement. The seizure of gold and black mask was therefore justified. Accordingly, the defendant is not entitled to suppression.

The defendant next seeks suppression of a seized X-box with controllers and an iPod. The state asserts that the items were seized in accordance with Attachment A of the August 1, 2014 warrant, which permits the search for and seizure of "[c]omputers, laptops, digital storage devices, digital storage media, video, photos, external storage devices to include USB drives, and cellular telephones." Like the previously discussed July 29, 2014 warrant authorizing the seizure of the defendant's laptop, this authorization was based on facts in the affidavit supporting the reasonable inference that the defendant was attempting to offload digital data to external storage. The authorization was further supported by Detective Wallace's representation that, based on his training and experience, people involved in the crimes of kidnapping, sexual assault, or related crimes often use electronic devices to facilitate the crimes by conducting research or documenting their activities, and this information is regularly stored on computers, hard drives, flash drives, cellular phones, and any other electronic storage devices.

The defendant's motion characterizes his argument as a particularity challenge because neither the warrant nor the affidavit references an X-box with controllers or an iPod. At the hear-

ing, the defendant further argued that the warrant lacked probable cause as to these items because A.H. did not mention them. The state contends the X-box and the iPod are digital storage devices and, therefore, are particularly described in the warrant and supporting affidavit. The court agrees with the state.

The August 1, 2014 warrant authorized the seizure of the X-box and iPod. Attachment A of the warrant specifically authorizes the search and seizure of digital storage devices. The state asserts that an X-box and iPod are capable of storing digital data. The defendant does not contest this assertion. The warrant description is sufficiently detailed to satisfy the particularity requirement because it was not reasonably possible for the affiant to know of additional criteria to distinguish objects of significance from those without evidentiary significance given the spectrum of devices that fit in this category. Additionally, like the laptop seized pursuant to the July 29, 2014 warrant, the authorization is supported by probable cause based on facts related to the defendant's attempts to offload digital data and Detective Wallace's representation, based on his training and experience, that perpetrators of the types of crimes alleged here often attempt to electronically document their activities and store that information on electronic storage devices. The state has therefore sustained its burden of showing the provision of the warrant relating to electronic storage devices, including the X-box with controls and the iPod, satisfies the particularity requirement and is supported by probable cause. Accordingly, the defendant is not entitled to suppression of those items.

The defendant's final complaint about the execution of the August 1, 2014 warrant is directed at the seizure of newspapers located in the open on top of a stack of dried and canned goods in the kitchen of the defendant's residence. The front page of the top newspaper included a story about A.H. and a sketch of the alleged kidnapper. The other seized newspapers also con-

tained stories about the alleged crime. The defendant asserts that the August 1, 2014 warrant does not mention the newspapers and, consequently, they were not seized pursuant to the warrant. The state concedes that the newspapers were not seized pursuant to a warrant, but maintains they were lawfully seized under the plain view exception to the warrant requirement. The court agrees with the state.

"Warrantless searches [and seizures] are *per se* unreasonable unless they fall within the narrow confines of a judicially crafted exception." *State v. Newcomb*, 161 N.H. 666, 670 (2011), citing *State v. Craveiro*, 155 N.H. 423, 426 (2007). "The State has the burden of proving that a search [and seizure] falls within one of the exceptions." *Id*. (citation omitted). Here, the state asserts the warrantless seizure of the newspaper evidence was proper under the plain view exception to the warrant requirement. "A law enforcement officer, in certain circumstances, may seize objects which are in plain view." *Ball*, 124 N.H. at 234. As discussed above, the plain view exception has three prongs: (1) the initial intrusion which afforded the view must be lawful; (2) the discovery of the evidence must be inadvertent; and (3) the incriminating nature of the evidence must be immediately apparent. *Davis*, 149 N.H. at 700–01. "Thus, the plain view doctrine permits a law enforcement officer to seize clearly incriminating evidence or contraband without a warrant, if such evidence is inadvertently discovered during lawful police activity." *Ball*, 124 N.H. at 234.

Here, the initial intrusion was lawful. The police were in the defendant's residence to execute the August 1, 2014 warrant. The discovery was also inadvertent. The newspapers were out in the open, laid out on a stack of dried and canned goods. Finally, the incriminating nature of the newspapers was apparent because the papers contained stories about the alleged crime and a sketch of the purported kidnapper. Thus, the state has sustained its burden of proving the ele-

ments of plain view exception. Accordingly, the defendant is not entitled to suppression of the newspapers.

D. August 18, 2014 Warrant

The defendant also seeks to suppress evidence seized during the execution of the August 18, 2014 warrant. Specifically, the defendant asks the court to suppress a laptop computer, external hard drive, and SD disks based on a lack of probable cause. Additionally, the defendant asserts that a seized GPS device from his car must be suppressed because the police did not yet have a warrant authorizing its seizure. This warrant, accompanied by another supporting affidavit from Detective Wallace, included the same information as the August 1, 2014 warrant as well as additional information obtained in the interim. The court will address the defendant's August 18, 2014 warrant claims in turn.

The defendant first challenges the admission of the seized laptop computer, external hard drive, and SD disks. The August 18, 2014 affidavit states that the defendant used his employer's wireless Internet on a laptop computer in his car in the parking lot after work. Attachment A of the August 18, 2014 warrant authorized the search for and seizure of "[c]omputers, laptops, digital storage devices, digital storage media, video, photos, external storage devices to include USB drives, and cellular telephones." Like the previously discussed July 29, 2014 and August 1, 2014 warrants authorizing the seizure of the defendant's laptop computer, X-box, and iPod, this authorization was based on the reasonable inference that the defendant was attempting to offload digital data to external storage and Detective Wallace's representation that, based on his training and experience, these devices are often used in crimes like those alleged in this case. When law enforcement executed the August 18, 2014 warrant, the officers found and seized a laptop computer, an external hard drive, and SD disks from the defendant's blue 2001 Honda Civic.

The defendant maintains the seizure of a laptop computer, external hard drive, and SD disks pursuant to this warrant lacked probable cause because the defendant's use of a laptop in his car does not alone imply criminal behavior. The state maintains that the information in the affidavit combined with Detective Wallace's representation is sufficient to find probable cause. The analysis concerning the laptop, hard drive, and SD disks found in the defendant's car is identical to the court's prior analysis relating to the seizure of a laptop computer, X-box, and iPod pursuant to the July 29 and August 1, 2014 warrants. The authorization is sufficiently supported by probable cause based on the facts related to the defendant's offloading of digital data and Detective Wallace's representation that perpetrators of these types of crimes often use this type of equipment in the commission of the crime. Indeed, this analysis has additional support because the defendant was seen in his car using the laptop, and the location of these items in the car suggests that the defendant may have been more intent on hiding them.

The state has sustained its burden of showing that the affidavit contained sufficient facts to support a finding that the laptop, hard drive, and SD disks were substantially likely be found in the car and would have evidentiary value. Therefore, the seizure of these items during the execution of the August 18, 2014 warrant was supported by probable cause. Accordingly, the defendant is not entitled to suppression of those items.

The August 18, 2014 warrant also authorized the search of a GPS device discovered in the defendant's car on August 13, 2014. The defendant maintains the GPS device data must be suppressed because the seizure was warrantless and the GPS is not digital storage media. The state disagrees. It asserts that the August 18, 2014 warrant authorized the search of the GPS for forensic electronic data relating to travel destinations, locations, dates, and the like. It also asserts that the seizure of the GPS was authorized by the provision in the July 29, 2014 warrant relating

to "[c]omputers, laptops, and digital storage media." The state maintains that GPS units are capable of operating as digital storage devices because they can contain information about past use, destinations, and actual travel of the car.

The court rejects the state's claim that one can use the GPS to store electronic data in a manner that would make it subject to the digital storage media provision of the July 29, 2014 warrant. This provision is based on Detective Wallace's representation that people involved in kidnapping, sexual assault, or related crimes often use electronic devices to facilitate the crimes by conducting research or documenting their activities, and that this information is regularly stored on computers, hard drives, flash drives, cellular phones, and any other electronic storage devices. A GPS device does not fit this description because the information it stores, such as information about past use, destinations, and actual travel of the car, is not direct documentation of the alleged criminal acts created by the defendant. It is only documentation of the GPS unit's past use created by the GPS unit. Consequently, the GPS unit cannot be considered a digital storage device authorized for seizure by the July 29, 2014 warrant.

The foregoing is not dispositive. Law enforcement established probable cause for the seizure of the GPS device because a person of ordinary caution would justifiably believe that the forensic analysis of the device's past use, destinations, and actual travel could have evidentiary value. Specifically, it could corroborate A.H.'s testimony about when and where she was allegedly kidnapped and returned. On this basis, law enforcement may have had the general authority to seize the GPS based on the July 29, 2014 warrant but, in any event, the August 18, 2014 warrant appropriately authorized the forensic search of the GPS. The state has sustained its burden of showing that the seizure of the GPS was supported by probable cause. Accordingly, the defendant is not entitled to its suppression.

E. August 27, 2014 Warrant

The defendant next seeks suppression of a cellular phone found in and seized from his car during the execution of the August 27, 2014 warrant. This warrant, accompanied by another supporting affidavit from Detective Wallace, included the same information as the August 18, 2014 warrant as well as additional information obtained in the interim. As it relates to the cell phone, the affidavit states that A.H. told investigators that the defendant had shown her an image on the phone of a mask that he wanted to purchase from a website and that he ultimately did purchase. A.H. further represented that the defendant had also purchased a ball gag on the same website and that he used both the mask and the ball gag on her. The affidavit states that cellular phones contain Internet search history, call history, and other data. Taking these facts together, the affidavit sought to seize the cellular phone to determine whether the defendant used it to place an order, either online or by phone, for either the mask or the ball gag.

The defendant asserts that the warrant lacks probable cause to seize the cell phone because the only fact supporting its seizure was that the defendant had shown A.H. a picture of a mask on the phone. The defendant also argued at the hearing that the defendant had a phone in his possession when he was arrested and that there was nothing in the affidavit showing the defendant had multiple phones or that the phone in the car was his phone. The state objects. It contends that the defendant ignores important facts in the affidavit that support a finding of probable cause.

Considering the totality of the circumstances, the court agrees with the state. The affidavit provides sufficient probable cause to believe that evidence of the alleged crimes would be found on the cellular phone. A.H. had seen an image of a mask from a website on a cell phone possessed by the defendant and knew that he purchased both the mask and the ball gag from the same website. The phone's search and call history could reasonably be expected to reveal wheth-

er it was used to purchase the mask and ball gag that he used on A.H. Additionally, there is probable cause to believe that the phone belonged to the defendant. The phone was in his car and therefore in his custody and control. The defendant lived alone. Unlike other items that may casually be left in another person's car, a cell phone generally stays with its owner. The court state has therefore sustained its burden of showing the seizure was supported by probable cause. Accordingly, the defendant is not entitled to suppression of the cellular phone seized during the execution of the August 27, 2014 warrant.

F. October 10, 2014 Warrant

The defendant next seeks suppression of financial records from Amazon, PayPal, and EBT transactions seized during the execution of the October 10, 2014 warrant. This warrant, accompanied by another supporting affidavit from Detective Wallace, included the same information as the August 27, 2014 warrant as well as additional information obtained in the interim. The affidavit indicates that the defendant had shown A.H. an online image of a mask that he wanted to purchase from a website and that he ultimately did purchase that mask. A.H. further represented that the defendant had also purchased a ball gag online and that he used both the mask and the ball gag on her. Investigators obtained the defendant's credit card records, which revealed certain online transactions at Amazon and PayPal made during A.H.'s alleged captivity. The affidavit also stated that defendant had made purchases at various Wal-Mart locations in connection with the alleged crimes. Investigators discovered transactions in the same time period at a Wal-Mart in Gorham, New Hampshire, made using the defendant's EBT card issued by the State of New Hampshire.

The defendant contends the warrant lacks sufficient probable cause to support such broad requests, although he concedes the possibility that a narrower request directed at obtaining purchase records specifically related to a mask may be supported. The state's objection argues pri-

marily that the defendant lacks standing to challenge this seizure because he has no expectation of privacy in the records. Alternatively, the state maintains the seizure of the bank records was supported by probable cause because the affidavit contains information showing that the defendant purchased items used in the commission of the alleged crimes at Wal-Mart with an EBT card and online from Amazon.com and that he may have made additional online purchases of such items using PayPal.

In order to have standing to challenge evidence by a motion to suppress, the defendant must show that his rights were violated. *State v. Flynn*, 123 N.H. 457, 466 (1983). "Absent an invasion of the defendant's reasonable expectation of privacy, there has been no violation of the defendant's rights under Part I, Article 19." *Orde*, 161 N.H. at 264. A defendant has no privacy interest in information voluntarily produced to third parties and recorded in the ordinary course of business. *See, e.g., State v. Mello*, 162 N.H. 115, 120 (2011) ("[A] defendant has no reasonable expectation of privacy in subscriber information voluntarily provided to an Internet service provider"); *State v. Gubitosi*, 152 N.H. 673, 677–78 (2005) (a defendant has no reasonable expectation of privacy in a cellular phone call record where it was "recorded for business purposes and retained … in the ordinary course of [the carrier's] business"); *State v. Valenzuela*, 130 N.H. 175, 181 (1987) (there was no violation of a defendant's privacy interest when the record of the information the defendant communicated to a telephone company to make the telephone system work for him was later disclosed); *see also Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

The foregoing authority supports the state's standing argument. The defendant has no reasonable expectation of privacy in the Amazon, PayPal, and EBT records. These records are in

the hands of third-party entities. The defendant voluntarily disclosed this information to them in order to utilize each entity's services. These entities then recorded the defendant's transaction information in the ordinary course of business. This is reinforced by Amazon and PayPal's customer privacy policies, which clearly state that the companies collect customers' transaction information and reserve the right to share the information under a variety of circumstances, included when appropriate to comply with the law. *See Mello*, 162 N.H. at 120 ("Our conclusion is bolstered by Comcast's customer service policy, which specifically reserves the right to disclose subscriber information to 'comply with the law.'"). Thus, the state has sustained its burden of showing that the seizure of these financial records did not violate the defendant's privacy rights because he has no reasonable expectation of privacy in those records. Accordingly, the defendant lacks standing to challenge the seizure of these financial records.

Although a substantive analysis is not necessary given the defendant's lack of standing, such an analysis would lead to the same result. The affidavit sufficiently sets forth facts demonstrating that the seizure was not a fishing expedition. The seizure of the financial records was focused on finding corroborating evidence of A.H.'s assertions that the defendant had shown her an online image of a mask that the defendant wanted to purchase and did purchase from a website. A.H. further represented that the defendant had also made an online purchase of a ball gag, and that he used both the mask and the ball gag on her. Amazon and PayPal are online marketplaces fitting the description in A.H.'s statement. The defendant's transaction records from these online marketplaces are substantially likely to lead to information such as product descriptions of purchases, pictures, time of purchase, and delivery date, which has value as corroborating evidence. Similarly, the affiant had information showing that the defendant had made purchases connected to the alleged crimes at Wal-Mart locations and that he used his EBT card. This is suf-

ficient to demonstrate a substantial likelihood that corroborating evidence of the alleged crimes would be found in the EBT transaction records. Accordingly, the records' seizure is supported by probable cause. The defendant would not be entitled to suppression of the Amazon, PayPal, or EBT records under a substantive analysis.

G. January 28, 2015 Motion in lieu of Search Warrant

The defendant's final claim is directed at four cardboard discs seized on April 29, 2015, while making a search authorized by the court's order on the state's January 28, 2015 motion to search in lieu of warrant. Specifically, on April 27, 2015, the court granted the state's request to seize all cameras and memory cards, a "Top Secret Spy Camera Mini Clock Radio and Hidden DVR" and manual, and a SanDisk microchip and adapter. The order denied the state's request to fumigate in the defendant's storage container. The court specifically interpreted the request as one to enter the storage container to search and seize evidence other than the evidence authorized by the order, including cameras, memory cards, and a clock radio and manual. By the terms of the order, law enforcement was allowed to enter the storage container only for the purpose of searching and seizing those items. While searching the storage container, a detective saw the four cardboard discs and was immediately aware of their incriminating nature because A.H. stated the defendant ran a counterfeiting operation in which she would spray the bills with Scotchgard using the cardboard discs.

The state does not contest the defendant's claim that the court's order did not authorize the seizure of the cardboard disks. It maintains, however, that the seizure was nevertheless lawful under the plain view exception to the warrant requirement. The defendant disagrees. Specifically, the defendant argues the seizure does not satisfy the inadvertence element of the doctrine because the state was aware of the discs and the defendant's alleged counterfeiting during A.H.'s captivity and could have sought a probable cause determination. At the hearing, the defendant

also argued that the disks were not in plain view because the detective only saw the discs after moving another piece of cardboard. The state responds that the inadvertence requirement was met because law enforcement did not believe the discs still existed, considering both that the printer used in the alleged counterfeiting operation was found across the river and that witnesses saw the defendant burning a variety of objects. The court agrees with the state.

As discussed above, the state has the burden of establishing that: "(1) the initial intrusion which afforded the view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was 'immediately apparent.'" *Nieves*, 160 N.H. at 247, quoting *Davis*, 149 N.H. at 700–01. A "discovery is inadvertent if, immediately prior to the discovery, the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object." *Davis*, 149 N.H. at 701, quoting *State v. Cote*, 126 N.H. 514, 526 (1985).

The defendant contends that the state has not sustained its burden of establishing the first prong of the plain view exception because the detective moved a piece of cardboard to reveal the cardboard disks. It is true that "taking action, unrelated to the objectives of the authorized intrusion, which expose[s] to view concealed … contents … produce[s] a new invasion of [a defendant's] privacy unjustified" by the initial lawful objective. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Here, however, the detective's initial intrusion in the storage container was lawfully justified under the court's order, which permitted law enforcement to enter the storage container to search for cameras, memory cards, and a clock radio and manual. The act of moving the piece of cardboard is likewise a lawful intrusion because doing so is reasonably related to the initial intrusion—to search for cameras, memory cards, and a clock radio and manual—that does not constitute a new invasion of the defendant's privacy. A lawful intrusion may include moving other objects if doing so is related to the initial justification for the entry and search. *See id*. at 324–25

(where the police officer's initial justification for entry was based on exigent circumstances, moving stereo equipment in plain view to search for serial numbers to determine whether the stereo was stolen was a search separate from the officer's initial lawful objective).

The state has also sustained its burden of showing the second prong—that the discovery of the evidence was inadvertent. While the state knew of the alleged counterfeit operation, it also knew that the defendant disposed of the HP printer, a key component of the counterfeiting operation, and was observed burning other items. Consequently, law enforcement could not know the location of the discs or whether they still existed. Because the state could not show a substantial likelihood that the discs would be found in the defendant's trailer or storage container, it could not establish probable cause to seize them by seeking a warrant.

Finally, the state has sustained its burden of establishing the third prong—the incriminating nature of the evidence was immediately apparent. Law enforcement had A.H.'s description of the alleged counterfeiting operation, including a description of the use of the cardboard discs. The detective immediately recognized the discs as those described by A.H.

The state has sustained its burden of establishing all three prongs of the plain view exception to the warrant requirement. The seizure was justified. Accordingly, the defendant is not entitled to suppression of the four cardboard discs.

Based on the foregoing, the court finds and rules that the state has failed to sustain its burden on the items it has not contested, any firearms not fitting the specific descriptions in the July 29, 2014 warrant, and any additional firearms seized pursuant to the August 1, 2014 warrant. Accordingly, the defendant's motion to suppress is GRANTED to that extent. The state has sustained its burden with respect to all other contested items. Accordingly, the defendant's motion to suppress is DENIED as to all remaining items.

Supplemental Motion for Discovery: Medical Records

The defendant seeks supplemental discovery of all of A.H.'s medical records since birth. The state partially objects. It represents that is has already produced all records from 2004 forward. The dispute is therefore limited to whether the defendant is entitled to pre-2004 records.

Part I, article 15 of the New Hampshire Constitution and the Fourth and Fourteenth Amendment of the United States Constitution afford defendants the right to confront adverse witnesses. The foregoing Constitutional provisions also provide defendants the due process right to the benefit of potentially exculpatory evidence. A defendant also has "the right to produce all proofs which may be favorable to himself" under part I, article 15. Pursuant to these rights, "[a] defendant is entitled to an *in camera* review of confidential or privileged records if the defendant establishes a reasonable probability that the records contain information relevant and material to his defense." *State v. Porter*, 144 N.H. 96, 99 (1999), citing *State v. Gagne*, 136 N.H. 101, 105 (1992). "The defendant must meaningfully articulate how the information sought is relevant and material to his defense" and "present a plausible theory of relevance and materiality sufficient to justify review." *Id*., quoting *State v. Graham*, 142 N.H. 357, 363 (1997). The defendant is not required to prove the theory is true, but "[a]t a minimum, a defendant must present some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought." *Id*., quoting *Graham*, 142 N.H. at 363.

The defendant claims all of A.H.'s medial records since birth are relevant and material because they will reveal whether any of A.H.'s symptoms or injuries observed after her return pre-dated the alleged kidnapping. A comparison of A.H.'s medical condition before and after the alleged crimes is important because serious bodily injury is an element of some of the charged crimes. The state asserts that nine years of medical records is sufficient for the defendant to compare injuries that pre-date the alleged crimes.

The court agrees with the state. The defendant has not explained how records since birth could potentially add anything to his ability to compare in the context of this case. Thus, his request for A.H.'s pre-2004 medical records is not reasonably likely to be relevant and material to the defendant's theory. Indeed, medical records from only one year prior to the alleged kidnapping would certainly establish a baseline. The state has provided records well in excess of that time period. Accordingly, the defendant's supplemental motion for discovery of medical records is DENIED.

Motion for Bill of Particulars

The defendant seeks a bill of particulars requiring the state to provide a detailed description of the alleged serious bodily injury in the kidnapping charges. In its response, the state specified the serious bodily injury it is alleging. *See* State's Obj. ¶ 5. The defendant indicated that the state's response was sufficient. On this basis, the defendant's motion for a bill of particulars is DENIED because the defense is not entitled to any additional information other than what he has been provided; however, the state is constrained from later asserting that something other than that conveyed in its response constitutes serious bodily injury.

Motion for *In Camera* Review—Redacted Pages

The defendant seeks *in camera* review of the redacted discovery pages. Of the 32,000 pages of discovery specified to the date of the motion, pages 4016–4020 and 29,243–29,587 are fully redacted. The state represented that it redacted these pages because they contain information about a pending investigation independent of the charges in this case. Nevertheless, the state produced those pages for *in camera* review. The court has completed its *in camera* review of the provided pages. There is no exculpatory material. Thus, the records will not be provided to the defense; however, they will be sealed and preserved for appellate review.

The state also provided the defendant additional partially redacted discovery from the Federal Bureau of Investigation (FBI). The redacted pages contain "leads" that came in during the nine and a half months A.H. was missing and were compiled as reports in a central system called "ORION." Pursuant to 5 U.S.C. § 552a(b), the state was required to redact all personal identifying information in the ORION reports that was not already redacted when the United States Attorney's Office (USAO) gave the reports to the state. The substance of the leads was not redacted unless the FBI determined that doing so would release work product and hinder future investigations. While the state agrees to an *in camera* review, it maintains that it cannot compel the USAO to submit non-redacted documents for review.

Based on the foregoing, the ruling on the defendant's motion for *in camera* review of the redacted pages that remain at issue is DEFERRED pending the state's resolution of the issues related to disclosure of the redacted ORION reports. The parties agree that the defendant will disclose which leads he believes may provide exculpatory information, and the state will work with the USAO on those leads. If the defendant is not satisfied with the state's response, he may seek assistance from the court at that time.

Motion for Discovery: Jailhouse Informants

The defendant seeks discovery regarding jailhouse informant information. The state agrees to attempt to locate and provide most of the requested discovery; however, the state objects to the defendant's request for information regarding Jason Garrett's military service and the circumstances surrounding his discharge. The state reasons that it cannot produce such information because it does not have any records indicating Mr. Garrett was in the military, and it does not have access to that information. The state's "duty to disclose exculpatory material does not extend to records not within the control of the prosecutor or police department." *State v. Downs*, 157 N.H. 695, 698 (2008). Because the state does not have the requested military records

within its control, the state has no obligation to produce the records. Accordingly, the defendant's motion for discovery relating to jailhouse informants is DENIED.

Defendant's Motion to Dismiss Felonious Sexual Assault Charges Alleging Pattern of Sexual Assault and State's Motion to Amend Indictments

The defendant seeks dismissal of the 16 counts of felonious sexual assault alleging pattern of sexual assault. The specified indictments have the following Charge ID Numbers: 1021099c, 1021101c, 1021103c, 1021121c, 1021123c, 1021125c, 1021127c, 1021129c, 1021131c, 1021133c, 1021135c, 1021137c, 1021139c, 1021141c, 1021143c, and 1021145c. The defendant alleges that these indictments fail to state a crime. In response, the state filed a motion to amend the identified indictments to charge pattern aggravated felonious sexual assault. The state maintains that a naming error labeled each of the indictments as felonious sexual assault under RSA 632-A:3 with a penalty of three and a half to seven years for each. According to the state, the language of the indictments indicates a charged offense of aggravated felonious sexual assault under RSA 632-A:2 with a penalty of 10 to 20 years for the first offense and 20 to 40 years for every subsequent conviction. The state contends that amending the title, applicable statute, and penalty to reflect the language of the indictments is not a substantive amendment because the substantive language naming the elements of the crime remains unchanged. The defendant objects to the state's motion to amend. As resolution of the state's motion to amend is dispositive of the defendant's motion to dismiss, the court will address the controversy in that context.

In his objection to the state's motion to amend, the defendant argues that the amendments would be substantive because of the significantly increased penalties. The defendant reasons that he is prejudiced by this amendment because the grand jury was not presented with accurate information. Because the grand jury process is secret, the defendant has no ability to know what

information the grand jury used to make its decision or whether it would have indicted the defendant on the amended indictments. The state responds that the amendment is not substantive as all substantive portions of the indictments are unchanged. The court agrees with the state.

"Trial courts may amend indictments in form, but not in substance." *State v. Bathalon*, 146 N.H. 485, 489 (2001). "Amendments relate to form if they 'do not jeopardize [a defendant's] right to be tried only on charges that have been passed on by a grand jury.'" *Id*., quoting *State v. Elliot*, 133 N.H. 759, 764 (1990). Amendments to the elements of the charged offense are substantive and impermissible except as directed by a grand jury; however, "cumulative or superfluous details … [may be] properly disregarded as surplusage" and may be amended. *Id*., quoting *State v. Wright*, 126 N.H. 643, 649 (1985). The underlying rationale for this rule is the defendant's "right to rely upon the information contained in an indictment in preparing his defense." *Id*., quoting *State v. Erickson*, 129 N.H. 515, 519 (1987).

The state's requested amendments are not substantive. Nothing in the body of the indictments, which set forth the elements and basic facts of the charged offense, is changed. *See State v. Davis*, 149 N.H. 698, 704 (2003), quoting *State v. Sinbandith*, 143 N.H. 579, 584 (1999) (an indictment is sufficient if it contains the elements of the offense and "enough facts to notify the defendant of the specific charges"). The court is not ignoring the defendant's increased exposure by virtue of the fact that the crime charged is more serious; however, nothing about the amendment affects the defendant's ability to rely on the information in the indictment in preparing his defense because the body and elements all remain the same. The court is also not persuaded by the defendant's grand jury argument. The grand jury considers only whether there is evidence to return a true bill on an indictment, not whether the defendant is being charged with a more seri-

ous crime.[2] Because the state's proposed amendment is one of form, it is permitted to amend the title, applicable statute, and penalty in the indictments to reflect the offense described in the body. Accordingly, the state's motion to amend is GRANTED and the defendant's motion to dismiss the same charges is DENIED as moot.

Motion to Dismiss the Aggravated Felonious Sexual Assault Charges and Felonious Sexual Assault Charges Alleging Pattern of Sexual Assault

The defendant seeks dismissal of the certain aggravated felonious sexual assault charges and felonious sexual assault charges alleging a pattern of sexual assault. The specified indictments have the following Charge ID Numbers: 1021098c–1021104c, 1021121c–1021145c. The defendant maintains these charges, each of which are based on two-month time periods for each of the four variants of sexual penetration, violates his double jeopardy protections. In support, the defendant cites RSA 632-A:1, I-C, which defines pattern sexual assault as "committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years."

Since the November 17, 2015 hearing, the state went back to the grand jury, which handed down 10 indictments alleging a longer "pattern" time period to replace the 33 indictments alleging a two-month "pattern that are the subject of this motion. The state has filed a motion to join and the defendant has not yet had an opportunity to respond. If granted, the state's motion to join would render the instant motion moot. Accordingly, a ruling on the defendant's motion is DEFERRED pending the adjudication of the state's motion to join.

[2] While grand jury transcripts exist, the court has not reviewed or considered the transcripts because the present issue has been decided as a matter of law. At the defendant's request, however, the court will order that the transcripts be sealed and preserved for appellate review if the information presented to the grand jury becomes an issue.

Motions for Discovery

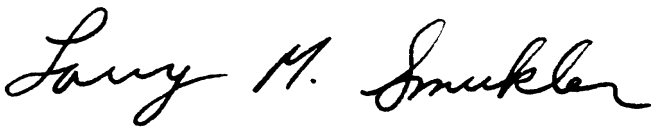
The defendant filed two motions for discovery. The first sought an evaluation of A.H. completed by Dr. Karen Wayment and A.H.'s school records. The second sought guardian *ad litem* records related to A.H.'s parents' divorce proceedings. In response, the state agrees to an *in camera* review of these records, but opposes disclosure to the defendant until the *in camera* process determines the relevance of the records. As the records sought are privileged and confidential and neither party has access, the state has made the correct procedural request. The court must conduct an *in camera* review to determine the relevancy of the information in the privileged and confidential documents before giving that information to the defendant. *Porter*, 144 N.H. at 99, citing *Gagne*, 136 N.H. at 105 ("A defendant is entitled to an *in camera* review of confidential or privileged records if the defendant establishes a reasonable probability that the records contain information relevant and material to his defense."). Given state's concession that an *in camera* review is appropriate, the court need not address the issue of whether the defendant has sustained his burden of making a threshold *Gagne* showing. The defendant's motions for discovery are GRANTED to the extent that the state shall secure the requested records and provide them to the court for *in camera* review.

CONCLUSION

The parties agreed to defer all other pending motions to the pending motions hearing now scheduled for June 1–3, 2016. *See* Court's Rescheduling Order of December 18, 2015. The current pending motions include: (1) defendant's notice of intent to use evidence of prior sexual activity pursuant to Superior Court Rule 100-A; (2) defendant's motion to preclude admission of recorded telephone calls and jailhouse visits; (3) defendant's motion to preclude admission of pornography; (4) defendant's motion to preclude the testimony of Scott Hampton, Psy.D.; and (5) defendant's motion to preclude testimony of Frank M. Ochberg, MD.

Based on the foregoing, the court finds and rules as follows: (1) the defendant's motion to recuse the Attorney General's Office or Associate Attorney General Jane Young is DENIED; (2) the defendant's motion to suppress statements is DENIED; (3) the defendant's motion to suppress evidence is GRANTED as to the items the state does not contest, any firearms not fitting the specific descriptions in the July 29, 2014 warrant, and any additional firearms seized pursuant to the August 1, 2014 warrant, and is DENIED as to all remaining items; (4) the defendant's supplemental motion for discovery of medical records is DENIED; (5) the defendant's motion for a bill of particulars is DENIED, although the state is prohibited from later asserting that something other than that conveyed in its response constitutes serious bodily injury; (6) a ruling on the defendant's motion for *in camera* review of redacted pages of discovery has been GRANTED in part and DEFERRED in all remaining respects; (7) the defendant's motion for discovery related to jailhouse informants is DENIED; (8) the state's motion to amend is GRANTED; (9) the defendant's motion to dismiss the pattern felonious sexual assault charges is DENIED as moot; (10) a ruling on the defendant's motion to dismiss pattern aggravated felonious sexual assault and felonious sexual assault charges is DEFERRED pending adjudication of the state's motion to join; and (11) the defendant's motions for discovery of school and guardian ad litem records are GRANTED to the extent that the state is required to provide the records to the court for *in camera* review.

So ORDERED.



Date: January 7, 2016

LARRY M. SMUKLER
PRESIDING JUSTICE