

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by email at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <https://www.courts.nh.gov/our-courts/supreme-court>.

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
Case No. 2024-0245
Citation: State v. Cherry, 2026 N.H. 22

THE STATE OF NEW HAMPSHIRE

v.

MARCUS CHERRY

Argued: November 6, 2025
Opinion Issued: June 3, 2026

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

Rothstein Law LLC, of Exeter (David M. Rothstein on the brief and orally), for the defendant.

MACDONALD, C.J.

[¶1] The principal question in this appeal is whether evidence that the defendant owned and possessed firearms was relevant to prove that he was a drug dealer. The defendant, Marcus Cherry, appeals his convictions following a jury trial in Superior Court (Anderson, J.) on one count of conspiracy to sell a

controlled drug, four counts of possession of a controlled drug with intent to sell, one count of sale of a controlled drug, and one count of being a drug enterprise leader. See RSA 318-B:2, I (2025); RSA 629:3 (2016); RSA 318-B:2, XII (2025). We hold that the trial court erred when it allowed certain testimony that the defendant owned and possessed firearms and when it joined the sale of a controlled drug charge with the other charges for trial. Accordingly, we reverse the defendant's convictions, vacate the trial court's joinder order in part, and remand.

I. Background

[¶2] The jury could have found the following facts, or they are otherwise supported by the record. On November 3, 2021, a police detective authored a sworn probable cause statement (the "affidavit") in support of an application for an arrest warrant for the defendant and search warrants for 508 Dubuque Street and 51 Cumberland Street in Manchester. The trial court issued the arrest and search warrants. The defendant was arrested, and searches were executed at 508 Dubuque Street and 51 Cumberland Street. The police observed the defendant's Honda Passport while executing the searches and they subsequently received and executed a search warrant for that vehicle.

[¶3] The defendant was indicted on numerous criminal charges. The State moved to join all the charges for trial. The defendant objected, arguing that the charges were not related and that joining them for trial would not be in the best interests of justice. The court granted the State's motion in part and joined the drug-related charges for trial.

[¶4] Before trial, the defendant moved to suppress the evidence seized in the searches of 508 Dubuque Street, 51 Cumberland Street, and his Honda Passport. The defendant alleged that the affidavit contained intentional and material misrepresentations by a law enforcement officer and he requested a pretrial hearing. The trial court denied the motion without a hearing.

[¶5] The State filed a pretrial motion to admit evidence of: (1) the defendant's ownership and possession of firearms; and (2) firearms which were found in the possession of alleged co-conspirators. The defendant objected, arguing that the evidence is irrelevant. The trial court ruled that the firearms evidence is relevant and admissible because the possession of firearms is "inextricably intertwined" with the charged conduct.

[¶6] At trial, the State presented numerous pieces of firearms evidence. Some of the evidence established only that the defendant owned and possessed firearms in general. For example, one witness agreed that the defendant "always had a gun" on him and "[a]lways had one in his car." Another witness testified that he saw the defendant with "handguns" in his car on "a number of different occasions." That same witness admitted he told the police that the

defendant was “selling guns,” but that he “didn’t know where he was getting them from.” He also affirmed that he “saw [the defendant] with guns” in 2021 and June of 2022, that he saw the defendant “with firearms in his vehicles,” and that the defendant was “pretty open about” possessing firearms and kept them on his “[l]ap, on the passenger seat, [and in] the compartment on the driver’s side door.” There was other testimony to a similar effect, *i.e.*, claiming that the defendant always carried a handgun, always kept one in his car, and carried a backpack filled with assorted firearms.

[¶7] Some of the firearms evidence, however, was more closely connected to the charged crimes. Specifically, the State introduced evidence establishing that: (1) a revolver and shotgun were found in the search of an alleged co-conspirator’s vehicle along with illegal drugs; and (2) the defendant had been seen on prior occasions possessing a similar looking revolver to the one found in that search. During trial, the defendant renewed his objection to the admission of the revolver and shotgun evidence. The trial court overruled the objection.

[¶8] The State put on other evidence that the defendant sold drugs and was a drug enterprise leader, including testimony that he sold a “white powder substance” to Jessica Furlow and Laura Williams which was tested and found to contain fentanyl. This sale served as the basis for the sale of a controlled drug charge. At the close of the State’s case, the defendant moved to dismiss the sale of a controlled drug charge for insufficient evidence. The trial court denied the motion.

[¶9] The defendant was found guilty on one count of conspiracy to sell a controlled drug, four counts of possession of a controlled drug with intent to sell, one count of sale of a controlled drug, and one count of being a drug enterprise leader. This appeal followed.

II. Analysis

[¶10] On appeal, the defendant argues that the trial court erred by: (1) admitting firearms evidence; (2) failing to hold a pretrial hearing on his motion to suppress; (3) denying his motion to dismiss the sale of a controlled drug charge; and (4) joining the sale of a controlled drug charge with the other charges for trial. We address these arguments in turn.

A. Firearms Evidence

[¶11] The defendant argues that the trial court erred when it admitted four categories of firearms evidence: (1) evidence that the defendant owned and possessed firearms in general; (2) evidence that a Magnum .357 revolver with a scope attachment and a Landor Arms shotgun were seized in the search of an alleged co-conspirator’s vehicle; (3) evidence that the defendant had been seen

in possession of a Magnum .357 revolver with a scope attachment; and (4) evidence that the defendant gave a Glock handgun to an alleged co-conspirator. The defendant asserts that this evidence is inadmissible “other acts” evidence pursuant to Rule 404(b) of the New Hampshire Rules of Evidence.

[¶12] We review the trial court’s ruling on the admissibility of evidence for an unsustainable exercise of discretion, and will reverse only if it was clearly untenable or unreasonable to the prejudice of the defendant’s case. State v. Rouleau, 176 N.H. 400, 405 (2024), 2024 N.H. 2, ¶13. When applying our unsustainable exercise of discretion standard of review, we determine only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. Id. We limit our review to considering only the record before the trial court when it rendered its decisions. See id. at 406, 2024 N.H. 2, ¶16.

[¶13] Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

N.H. R. Ev. 404(b)(1). The proper test to apply when deciding the admissibility of “other acts” evidence depends upon whether the evidence in question is “intrinsic” or “extrinsic” evidence. Rouleau, 176 N.H. at 405, 2024 N.H. 2, ¶14 (quotations omitted).

[¶14] Rule 404(b) applies only to extrinsic evidence, *i.e.*, evidence of other crimes, wrongs, or acts. See State v. Thomas, 168 N.H. 589, 599 (2016). Extrinsic evidence is admissible if it satisfies the three prongs of Rule 404(b), namely that: (1) the evidence is “relevant for a purpose other than proving the person’s character or disposition”; (2) “there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them”; and (3) “the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.” N.H. R. Ev. 404(b)(2).

[¶15] “Other act” evidence is “intrinsic,” and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are “inextricably intertwined,” both acts are part of a “single criminal episode,” or the other acts were “necessary preliminaries” to the crime charged. Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15 (quotations omitted). “Intrinsic” or “inextricably intertwined” evidence will have a causal, temporal, or spatial

connection with the charged crime. *Id.* (quotations omitted). Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense. *Id.* Rule 403 of the New Hampshire Rules of Evidence governs the admissibility of intrinsic evidence. See *State v. Dion*, 164 N.H. 544, 551 (2013).

i. Defendant's Ownership and Possession of Firearms

[¶16] Before trial, the State moved to admit evidence that the defendant owned and possessed firearms. The State alleged that witnesses would testify to having “seen the Defendant with firearms at various times in the course of their involvement with the Defendant.” The State primarily argued that this evidence is intrinsic to the charged offenses and not subject to Rule 404(b), but alternatively asserted that if the evidence is extrinsic then it should be admitted under Rule 404(b). The State argued that this evidence is relevant because “it is well established that illegal trafficking in controlled substances routinely involves the possession of firearms by those involved to protect themselves, the controlled substances, and the large amounts of cash that are associated with illegal trafficking.” According to the State, the defendant's ownership and possession of guns shows his “intention, preparation, and plan” to “engage in a conspiracy to sell controlled drugs.”

[¶17] The trial court agreed with the State, explaining that “[t]he Court's experience in handling cases in this jurisdiction is very consistent with the assertions made by the State” and the “[p]ossession of handguns almost always accompanies the possession of large amounts of controlled substances.” The trial court found that “the possession of guns is integrated within the Drug Enterprise Leader and drug conspiracy charges and thus inextricably intertwined with the conduct that forms the basis of these charges.” Therefore, the court ruled that “[t]his evidence of possession of guns is . . . not subject to Rule 404(b).”

[¶18] On appeal, the defendant argues that the trial court erred when it ruled that evidence establishing that he owned and possessed firearms is inextricably intertwined with the charged conduct. We agree.

[¶19] The State has failed to demonstrate that this evidence is inextricably intertwined with the charged conduct. Any connection offered by the State between this firearms evidence and the charged offenses is too attenuated to render this evidence intrinsic to the charged offenses. See *Rouleau*, 176 N.H. at 406, 2024 N.H. 2, ¶¶15, 17. The State did not allege in its motion that these firearms were connected to the commission of the charged acts or that the defendant was engaging in any of the charged conduct at the times that he was seen with these guns. Indeed, the State has failed to articulate any specific connection between this evidence and the charged

conduct other than reasoning that, because the defendant was seen with these guns during the same time period that he was allegedly leading a drug enterprise, they must be connected. This evidence therefore does not arise from the same events as the charged offenses. See id., 2024 N.H. 2, ¶15.

[¶20] Further, this evidence does not complete the story of the charged offenses or form an integral part of any witness’s testimony. See id. Testimony that the defendant owned and possessed guns in general was unnecessary to describe observations of the defendant leading a drug enterprise, conspiring to sell drugs, or selling drugs. In short, evidence that the defendant was frequently seen carrying firearms — an otherwise lawful activity — is too attenuated to show that the defendant’s ownership and possession of these firearms is inextricably intertwined with the charged conduct, and this testimony is extrinsic evidence. See id., 2024 N.H. 2, ¶¶15, 17.

[¶21] Because this testimony is extrinsic evidence, it should have been analyzed under Rule 404(b). See State v. Wells, 166 N.H. 73, 79-81 (2014). We will, therefore, undertake the analysis required by Rule 404(b) to determine whether there is only one way the trial court could have ruled as a matter of law. See id. at 79; State v. Hayward, 166 N.H. 575, 583 (2014) (explaining that when “a discretionary decision is at issue and the trial court has not exercised that discretion, we may sustain the trial court’s ruling on a ground upon which it did not rely only if there is only one way the trial court could have ruled as a matter of law” (quotation omitted)).

[¶22] Before evidence of other acts may be admitted pursuant to Rule 404(b), the State must demonstrate, among other things, that such evidence is “relevant for a purpose other than proving the person’s character or disposition.” N.H. R. Ev. 404(b)(2)(A). To meet this burden, the State is required to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the proffered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity. See Thomas, 168 N.H. at 599. That chain of reasoning must demonstrate a sufficient logical connection between the prior acts and the permissible purpose for which the State offers the evidence. Id. To be relevant, other acts must be in some significant way connected to material events constituting the crime charged and not so remote in time as to eliminate the nexus. See id. at 599-600.

[¶23] The State argues that evidence the defendant owned and possessed guns is relevant to proving that the defendant is guilty of the drug enterprise and conspiracy charges because firearms are tools of the drug trade. Citing federal court decisions, the State asserts that the defendant’s ownership of guns and other tools of the drug trade tends to show he was involved in drug-dealing activity. Those federal cases, however, do not support that there is a per se rule that gun evidence is always admissible in drug cases. See United

States v. Price, 13 F.3d 711, 718-19 (3d Cir. 1994) (stating that, “[w]hile we do not suggest that every previous weapons charge is probative in every drug conspiracy case,” evidence of (1) a previously-dismissed unlawful possession of a firearm charge and (2) the defendant’s possession of that gun was probative because he carried it during the duration of the conspiracy while he was allegedly dealing drugs).

[¶24] Instead, the cases address admitting such evidence when the guns were seized along with the drugs, the defendants were carrying the guns while dealing drugs, or there was some other logical connection between the guns at issue and the drug-dealing operations. See United States v. Wiener, 534 F.2d 15, 16, 18 (2d Cir. 1976) (holding that a loaded gun was relevant to prove drug charges when it was found in the defendant’s apartment — the alleged “focal point of the conspiracy” — inside of a bag that also contained drugs); United States v. Martinez, 938 F.2d 1078, 1082-83 (10th Cir. 1991) (holding that a submachine gun was relevant to proving drug charges when it was seized with \$69,000 in cash, half a pound of cocaine, and a triple-beam scale); United States v. Beverly, 921 F.2d 559, 562-63 (5th Cir. 1991) (holding that guns were relevant to prove drug charges when one defendant carried a gun while selling drugs and when “[t]he apartment where the guns were found was being used as both the storage site and the retail outlet for [the defendants’] cocaine distribution”).

[¶25] While we agree that firearms may be used as tools of the drug trade, “not every firearm the police may come across is inherently incriminating.” State v. Folds, 172 N.H. 513, 519-20 (2019) (concluding that gun found in the defendant’s residence along with drugs and cash was evidence of drug dealing). The State has not shown that the defendant’s ownership and possession of the guns discussed in this subsection is “in some significant way connected to material events constituting the crime charged” and has not demonstrated “a sufficient logical connection” between the defendant’s ownership and possession of these guns and the purpose for which the State seeks to admit this evidence. Thomas, 168 N.H. at 599-600. In the absence of such a connection, the trial court’s reliance on its experience handling other cases and on its personal observations that the “[p]ossession of handguns almost always accompanies the possession of large amounts of controlled substances” cannot justify admitting this evidence. Accordingly, we hold that this firearms evidence is irrelevant and inadmissible as a matter of law. See N.H. R. Ev. 404(b); see also N.H. R. Ev. 402 (“Irrelevant evidence is not admissible.”).

ii. Firearms Seized in Co-Conspirator’s Vehicle

[¶26] The defendant next argues that the trial court erred when it admitted evidence of two firearms that were seized during a search of an alleged co-conspirator’s vehicle. Two police officers testified that law

enforcement searched a vehicle owned by an alleged co-conspirator and seized a Magnum .357 revolver with a scope attachment, a Landor Arms shotgun, and illegal drugs.

[¶27] The trial court ruled that this evidence is inextricably intertwined with the charged conduct and admissible as intrinsic evidence. We hold that the trial court sustainably exercised its discretion. Evidence that those firearms were seized in the search of an alleged co-conspirator's vehicle is inextricably intertwined with the charged conduct because those firearms share a "causal, temporal, or spatial connection with the charged crime." Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15. Indeed, the revolver and shotgun evidence "arises from the same events as the charged offense" because those guns were found in a vehicle that also contained illegal drugs, and those drugs form the basis for some of the charges. Id. Further, those guns are "directly probative" of the charged offenses because the presence of the revolver and shotgun with those drugs would tend to show that those guns were being used as tools of the drug trade, *i.e.*, they were present in case necessity arose to protect the product. Id.; *cf.* Folds, 172 N.H. at 519-20 (holding that gun was evidence of drug dealing when found in the defendant's residence with drugs and cash because of the "close relationship between drugs and firearms in the narcotics trade" and "the firearm's close proximity to illegal drugs"). This evidence is therefore inextricably intertwined with the charged conduct and not subject to Rule 404(b).

[¶28] Instead, the admissibility of this evidence is governed by Rule 403. See Dion, 164 N.H. at 551. The defendant has not sufficiently developed an argument that this evidence does not satisfy the requirements of Rule 403 and, accordingly, has failed to demonstrate that the trial court unsustainably exercised its discretion in admitting it.

iii. Magnum .357 Revolver with a Scope Attachment

[¶29] Along with evidence that a Magnum .357 revolver with a scope attachment was seized in the search of an alleged co-conspirator's vehicle, multiple witnesses testified that they saw the defendant in possession of a revolver of that description on prior occasions. One witness testified that he saw a revolver of that description in the defendant's possession while he was purchasing another firearm from the defendant. Another witness affirmed that he saw a revolver of that description in the defendant's possession in "the summer into the fall of 2021" when the defendant came to his house and showed it to him. The defendant argues that the trial court erred when it admitted this evidence.

[¶30] The trial court ruled that this evidence is admissible as intrinsic evidence because it is inextricably intertwined with the charged conduct. We disagree. The State's motion did not allege, and neither witness testified, that

the defendant was engaging in any of the charged conduct — *i.e.*, possessing and selling controlled drugs, furthering a conspiracy to sell a controlled drug, or leading a drug enterprise — when they saw him with a similar revolver in those instances. The fact that one witness testified that he saw the defendant with a similar revolver sometime in the summer or fall of 2021, the same time period that the defendant was allegedly leading a drug enterprise, is insufficient to show that this evidence shares a “causal, temporal, or spatial connection with the charged crime.” Rouleau, 176 N.H. at 406, 2024 N.H. 2, ¶15. Accordingly, this testimony is extrinsic evidence, and it must satisfy the requirements of Rule 404(b) to be admitted. See id. at 405, 2024 N.H. 2, ¶14.

[¶31] As explained above, because the trial court did not exercise its discretion to determine whether this evidence is admissible under Rule 404(b), we may affirm upon that ground only if there is only one way the trial court could have ruled as a matter of law. See Hayward, 166 N.H. at 583. Here, testimony that the defendant had previously been seen with a Magnum .357 revolver with a scope attachment is relevant because of the firearm’s distinctive nature, and because the description of the revolver matches the revolver found in the co-conspirator’s vehicle with illegal drugs. Because of that distinctiveness and similarity, testimony that the defendant was previously seen in possession of such a revolver has some probative value to proving that he was involved in those drug-dealing activities. See N.H. R. Ev. 404(b)(2)(A) (for evidence to be admissible under Rule 404(b), it must be relevant for a purpose other than proving the person’s character or disposition). Nonetheless, testimony that the defendant was seen in possession of firearms carries a danger of unfair prejudice in the context of a trial for drug-trafficking charges. See N.H. R. Ev. 404(b)(2)(C) (for evidence to be admissible under Rule 404(b), the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice); *cf.* Folds, 172 N.H. at 519 (recognizing the close relationship between drugs and firearms in the narcotics trade). Weighing these two considerations, we cannot hold that the only way the trial court could have ruled as a matter of law was to have admitted the testimony that the defendant was seen in possession of a Magnum .357 revolver with a scope attachment on prior occasions, and we therefore cannot affirm the trial court’s ruling admitting this testimony. See Hayward, 166 N.H. at 583.

iv. Glock Handgun Found in Co-Conspirator’s Possession

[¶32] The defendant argues that the trial court erred when it admitted evidence that he gave a Glock handgun to an alleged co-conspirator. We construe the defendant’s argument as challenging the trial court’s pretrial ruling admitting evidence establishing that he gave a Glock handgun to an alleged co-conspirator. We need not decide whether the trial court erred in its ruling, however, because at trial evidence of that Glock handgun was not introduced by the State. Instead, on cross-examination by defense counsel,

the alleged co-conspirator admitted that he lied to the police about the defendant giving him that Glock handgun. Because evidence of that Glock handgun was introduced by the defendant rather than the State, we need not address the merits of the trial court's pretrial ruling with respect to that firearm.

v. Conclusion

[¶33] In summary, we hold that the trial court sustainably exercised its discretion when it admitted evidence that a Magnum .357 revolver with a scope attachment and a Landor Arms shotgun were seized in the search of an alleged co-conspirator's vehicle along with illegal drugs. The trial court erred, however, when it admitted, as intrinsic to the charged offenses, evidence that the defendant: (1) owned and possessed firearms, without a sufficient connection having been shown to the charged crimes; and (2) was seen in possession of a Magnum .357 revolver with a scope attachment on prior occasions.

[¶34] The erroneous admission of evidence does not always require reversal. See State v. Forbes, 157 N.H. 570, 577 (2008). However, the State has not argued harmless error. See id. Therefore, we must conclude that the defendant met his burden on appeal, reverse his convictions, and remand. See id.

[¶35] Although we reverse because of the erroneous admission of firearms evidence, we will address the defendant's remaining arguments to the extent that they are preserved because: (1) they are likely to arise again on remand, see State v. Marti, 143 N.H. 608, 611 (1999) (in the interest of judicial economy, we will address issues likely to arise on remand); and (2) if the defendant is correct that the State presented insufficient evidence as a matter of law on the sale of a controlled drug charge, then he could not be retried for that charge on remand, see State v. Price, 177 N.H. __, __ (2026), 2026 N.H. 3, ¶11 (explaining that a determination that the evidence was legally insufficient to convict the defendant precludes a second trial on that charge).

B. Motion to Suppress

[¶36] The defendant argues that the trial court erred when it denied his motion to suppress the evidence seized from 508 Dubuque Street, 51 Cumberland Street, and his Honda Passport without a hearing. He asserts that he was entitled to a pretrial hearing on his motion pursuant to Rule 15(b)(2) of the New Hampshire Rules of Criminal Procedure and our case law. We hold that the defendant has failed to preserve these arguments.

[¶37] The defendant did not argue before the trial court that Rule 15(b)(2) requires such a hearing. Accordingly, this argument is not preserved for

appellate review, and we decline to address it. See State v. Van Uden, 176 N.H. 772, 777 (2024), 2024 N.H. 47, ¶14.

[¶38] The defendant further argues that, pursuant to our case law, he was entitled to a pretrial hearing on his motion to suppress because the affidavit in support of the application for the search warrant contained intentional and material misrepresentations by a law enforcement officer. The defendant cites only State v. Valenzuela, 130 N.H. 175 (1987), in support of his argument. Valenzuela does not provide the right to such a hearing.

[¶39] That right is provided by the State Constitution. See Valenzuela, 130 N.H. at 191 (explaining that “the rule under [Part I, Article 19 of the New Hampshire Constitution] is that a defendant is entitled to be heard in attacking a facially valid warrant” after making a preliminary showing that the police made knowing or reckless misstatements that were material for the finding of probable cause (emphasis added)); State v. Spero, 117 N.H. 199, 205 (1977) (holding that “to ensure that search warrants are issued only upon probable cause, as required by part I, article 19 of the New Hampshire Constitution,” a defendant is entitled to a hearing to attack a facially sufficient affidavit once a showing has been made that the affidavit contains material misrepresentations by a police officer (emphasis added)).

[¶40] To preserve a state constitutional claim, the defendant must: (1) raise it in the trial court; and (2) specifically invoke a provision of the State Constitution in his brief. State v. Oakes, 161 N.H. 270, 285 (2010); State v. Dellorfan, 128 N.H. 628, 632 (1986). Although the defendant cites state case law in support of his argument, he does not specifically invoke a state constitutional provision in this section of his brief. Accordingly, this argument is not preserved for appellate review, and we decline to address it. See State v. Carter, 146 N.H. 359, 361 (2001) (declining to review a defendant’s state constitutional argument because, despite relying upon New Hampshire case law, he did not invoke a specific provision of the New Hampshire Constitution in his brief).

C. Sufficiency of the Evidence

[¶41] The defendant argues that the trial court erred by failing to dismiss the sale of a controlled drug charge for insufficient evidence. A challenge to the sufficiency of the evidence raises a claim of legal error, which we review de novo. Price, 177 N.H. at ___, 2026 N.H. 3, ¶7. When considering a challenge to the sufficiency of the evidence, we objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State. Id.

[¶42] The defendant was charged with the sale of a controlled drug; specifically, he was accused of selling “a fentanyl class drug in a quantity of less than one gram” to Williams and/or Furlow. At trial, the State presented a video of Williams and Furlow walking out of a hotel on the date of the charged offense. Williams testified that they approached a vehicle that was being driven by the defendant. Her testimony established that she “called [the defendant] to get [her] cigarettes . . . and then the whole thing escalated that night . . . from getting cigarettes to getting drugs.” She witnessed Furlow enter the vehicle with the defendant and exit with something that Furlow did not have before, but Williams could not see what it was. They then went back to the hotel room and ingested a white powdery substance. Williams testified that Furlow told her that the defendant sold Furlow the drugs that they were using. A bag containing a white powdery substance was recovered from the hotel room, and that substance was tested and found to contain fentanyl.

[¶43] The defendant asserts that the trial court erred by admitting Furlow’s hearsay statement that the defendant sold her the drugs and argues that there was otherwise no direct evidence that he committed the charged sale. We need not decide that question because it has no bearing on the issue before us, *i.e.*, whether the State presented sufficient evidence in support of the sale of a controlled drug charge. This is so because, when “determining whether the evidence was sufficient,” we “consider all the evidence, including evidence that was erroneously admitted.” State v. Gordon, 161 N.H. 410, 418 (2011); *see also* State v. Horak, 159 N.H. 576, 582-83 (2010) (explaining that we review for sufficiency of the evidence because where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clauses of the New Hampshire and United States Constitutions do not preclude retrial). Thus, we must consider the statement in our sufficiency analysis even if it was admitted in error.

[¶44] Williams’s testimony that Furlow told her that the defendant sold Furlow the drugs, together with the lab test showing that the white powdery substance recovered from the hotel room contained fentanyl, is sufficient evidence that the defendant sold fentanyl to Furlow. Accordingly, we hold that the State presented sufficient evidence for a rational trier of fact to find the defendant guilty of the sale of a controlled drug charge and that the trial court therefore did not err when it declined to dismiss the charge for insufficient evidence. *See Oakes*, 161 N.H. at 276 (“The evaluation of witness credibility and the weight given to witnesses’ testimony were issues for the jury to resolve.” (quotation omitted)).

D. Joinder

[¶45] Finally, the defendant argues that the trial court erred by joining the sale of a controlled drug charge for trial with the other charges. We will

uphold the trial court's decision to join the charges unless we conclude that the decision constitutes an unsustainable exercise of discretion. State v. Bell, 175 N.H. 382, 390 (2022). To show that the trial court's decision is unsustainable, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

[¶46] Rule 20 of the New Hampshire Rules of Criminal Procedure provides that “[i]f a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.” N.H. R. Crim. P. 20(a)(2). The Rule further provides that two or more offenses are related if they:

- (A) Are alleged to have occurred during a single criminal episode;
or
- (B) Constitute parts of a common scheme or plan; or
- (C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

N.H. R. Crim. P. 20(a)(1).

[¶47] Here, the trial court ruled that the charge of selling a controlled drug was related to the charges of conspiracy to sell controlled drugs and the defendant's status as a drug enterprise leader because the charges constitute parts of a common scheme or plan. The court explained that the “separately charged incidents . . . serve as overt acts in the conspiracy charges and form the basis of the drug enterprise leader charge” and that the charges all alleged conduct committed during the same time period and involved the sale of controlled drugs.

[¶48] The distinguishing characteristic of a common plan is the existence of a true plan in the defendant's mind, which includes the charged crimes as stages in the plan's execution. Bell, 175 N.H. at 391. This analysis ensures that the defendant was not merely taking advantage of opportunities as they arose, but instead was exhibiting forethought and premeditation in his scheming. Id. at 394.

[¶49] “A person is a drug enterprise leader if he conspires with one or more persons as an organizer, supervisor, financier, or manager to engage for profit in a scheme or course of conduct to unlawfully . . . sell . . . any controlled drug” RSA 318-B:2, XII. Put another way, a person must be the leader of a plan with others to sell controlled drugs to be a drug enterprise leader. See id. A trial court could reasonably conclude that individual drug sales carried out while executing that plan are part of the overarching plan of leading a drug

enterprise. Cf. Bell, 175 N.H. at 394-95 (affirming trial court's conclusion that theft charges were related because each theft was part of the defendant's overarching plan to "keep[] his shop open' by paying his expenses" while not performing the promised services); State v. Breed, 159 N.H. 61, 70 (2009) (affirming trial court's conclusion that theft and fraud charges were related because "each fraudulent transaction or theft in which the defendant engaged was part of an overarching plan of furthering his increasingly profitable" relationship with another business).

[¶50] Applying these principles here, we hold that the trial court sustainably exercised its discretion when it ruled that the charges were related. The indictments alleged that the defendant was the leader of a conspiracy with several individuals to unlawfully sell controlled drugs for profit. The conduct giving rise to the sale of a controlled drug charge occurred in the same period as the other charges and was listed as an overt act in furtherance of the conspiracy charge. The stages of the plan included the defendant working in concert with his co-conspirators to acquire illegal drugs, store those drugs in stash houses, sell the drugs, and collect the profits. In this way, the trial court could have reasonably found that the sale of a controlled drug, as charged, was part of the defendant's overarching plan of leading a drug enterprise because it contributed to the success of that plan's ultimate goal, *i.e.*, leading a profitable drug enterprise. Compare Bell, 175 N.H. at 394-95 (explaining that charges can be related because charged acts constitute "part of an 'overarching plan' and, presumably, contribute[] not to the success of each other, but to the success of that plan's ultimate goal"), with State v. Brown, 156 N.H. 440, 441, 443-44 (2007) (holding that four individual drug sales were not related when a police detective arranged the sales and "each of the sales . . . was a discrete event" with "no common plan").

[¶51] The defendant argues that, nonetheless, the trial court unsustainably exercised its discretion because joinder was not in the best interests of justice. He asserts that the sale of a controlled drug charge was "unfairly bolstered by evidence of extensive, unrelated drug activity."

[¶52] Rule 20 provides that the trial court shall join related charges for trial "unless the trial judge determines that joinder is not in the best interests of justice." N.H. R. Crim. P. 20(a)(2). The "best interests of justice" standard in Rule 20 means that

charges should be tried separately whenever it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence, which includes evaluating whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense.

State v. Brown, 159 N.H. 544, 555 (2009) (quotations omitted) (interpreting former joinder rule in Superior Court Rule 97-A); cf. State v. Rivera, 175 N.H. 496, 498, 502 (2022) (applying “best interests of justice” standard in Brown to Rule 20 of the New Hampshire Rules of Criminal Procedure, which superseded Superior Court Rule 97-A (quotation omitted)). Joinder can give rise to other concerns of undue prejudice as well, which may cause the best interests of justice to override conducting a single trial. Brown, 159 N.H. at 555. For example, the State may gain an unfair advantage if a weak case is joined with a strong case because the joint trial of offenses creates a significant risk that the jury will convict a defendant upon the weight of the accusations or upon the accumulated effect of the evidence. See id.

[¶53] Here, the trial court considered whether joinder was not in the best interests of justice. It ruled that the defendant would not be “unfairly prejudiced by this joinder as trial of the drug enterprise leader and conspiracy charges will necessarily require the State to admit evidence of the alleged conduct on specific dates.” In other words, the court reasoned, “the jury on the drug enterprise charge will still hear all of the evidence from the other cases.”

[¶54] The trial court’s reasoning is not incorrect, but its inverse is not necessarily true. While the conspiracy and drug enterprise leader charges were not unfairly bolstered by the joinder of the sale of a controlled drug charge, it does not follow that the sale of a controlled drug charge was also not unfairly bolstered by the joinder of the conspiracy and drug enterprise leader charges. Joining the charges for trial allowed the State to present evidence that the defendant conspired with multiple individuals to sell controlled drugs and was the leader of a drug enterprise alongside a case where it only needed to prove that the defendant sold fentanyl to either Williams or Furlow a single time. The trial court did not discuss the best interests of justice factor from the perspective of the sale of a controlled drug charge.

[¶55] On the facts of this case, we are unable to determine as a matter of law whether joinder of the sale of a controlled drug charge to the other charges is not in the best interests of justice. Cf. State v. Miller, 155 N.H. 246, 252 (2007) (holding that we were “unable to decide whether the proposed cross-examination was permissible under Rule 403 as a matter of law” and remanding “to the trial court for resolution in the first instance”). Accordingly, we vacate the trial court’s order to the extent that it joined the sale of a controlled drug charge with the other charges and remand for the trial court to resolve this question in the first instance.

[¶56] In summary, we hold that the trial court erred when it admitted certain testimony that the defendant owned and possessed firearms, and we therefore reverse the defendant’s convictions and remand. We also vacate the trial court’s ruling joining the sale of a controlled drug charge with the other

charges and remand for the trial court to consider, in the event of a retrial, whether joinder of that charge is in the best interests of justice.

Reversed; vacated in part; and
remanded.

DONOVAN, COUNTWAY, and GOULD, JJ., concurred.