

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-20

216-20220-CR-2372

**DEFENDANT'S MOTION TO ADMIT IMPEACHMENT EVIDENCE PURSUANT TO
NEW HAMPSHIRE RULES OF EVIDENCE 401, 402, 403, 404(b), and 609
re: Kayla Montgomery**

NOW COMES the accused, Mr. Adam Montgomery, by and through counsel, Caroline L. Smith and James T. Brooks, Public Defenders, and respectfully requests this Honorable Court admit impeachment evidence of Kayla Montgomery's prior felony convictions and/or any prior convictions for crimes requiring proof of a dishonest act or false statement, any charges pending at the time she cooperated with police and/or when she testifies at trial, and an uncharged theft from her employer. This motion is made pursuant to New Hampshire Rules of Evidence 401, 402, 403, 404(b), and 609, as well as Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments of the U.S. Constitution. The specific crimes at issue are:

- a. Convictions for two charges of perjury: 216-2022-CR-01037;
 - b. Convictions for false report to police officer: 447-2013-CR-00786; and
 - c. Conviction for attempted possession of prescribed drug (by forging prescription):
215-2012-CR-00282. Incarcerated on 8/29/2013 for probation violation;
 - d. Charges of two counts of receiving stolen property: 2016-2022-CR-0652;
 - e. Charge of theft by deception: 216-2022-CR-00039;
 - f. Uncharged crime of dealing/possession of prescription drugs – 9/9/2022 offense date;
- and

- g. Uncharged theft from Kayla's employer in November 2019, though admitted to by Kayla.

In support of this Motion, it is stated:

1. Mr. Adam Montgomery is scheduled for a February 6, 2024 jury selection on charges of second degree assault and second degree murder as well as other charges related to the death of Harmony Montgomery.
2. Kayal Montgomery is a potential witness in this matter.
3. Based upon a preliminary criminal record search, the defense believes that Kayla Montgomery has been convicted of the following qualifying offenses which it would seek to admit for impeachment purposes should Ms. Montgomery testify at the upcoming trial:
 - a. Convictions for two charges of perjury: 216-2022-CR-01037;
 - b. Convictions for false report to police officer: 447-2013-CR-00786; and
 - c. Conviction for attempted possession of prescribed drug (by forging prescription): 215-2012-CR-00282. Incarcerated on 8/29/2013 for probation violation in this docket, on information and belief, for above referenced false information to police officer crime.
4. Certified records of the above convictions will be supplied to the State prior to the final pre-trial conference.
5. New Hampshire Rule of Evidence 609 allows for either party to attack a witness's character for truthfulness by evidence of a criminal conviction when the crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, subject to New Hampshire Rule of Evidence 403. N.H. R. Ev. 609(a)(1)(A). Ms. Montgomery's perjury convictions qualify.

6. Rule 609 also permits a party to attack a witness's credibility for truthfulness by evidence of a criminal conviction for any crime, regardless of punishment, when "the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." N.H. R. Ev. 609(a)(2). Ms. Montgomery's misdemeanor convictions for false report to a police officer and attempted possession of a controlled drug by forging prescription meet this prerequisite.
7. Although New Hampshire Rule of Evidence 609(b) generally imposes a ten-year limitation for use of such prior convictions referenced in New Hampshire Rule of Evidence 609(a), convictions older than ten years are still admissible if:
 - a. One, the "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect;" and
 - b. Two, "the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use."
8. Rules 609's ten-year window runs from date of conviction or from date of release from confinement, whichever occurs later. See N.H. R. Ev. 609(b). On the forging a prescription drug conviction, Ms. Montgomery was re-incarcerated on August 29, 2013 for a probation violation after (on information and belief) committing the other crime of dishonesty - false report to a police officer - and sentenced to one year in the House of Correction, with sixty-three days pretrial credit and the opportunity for release if accepted to a residential rehabilitation facility. Thus, the false report charge was a component of her incarceration, and both are within the ten- year window.
9. Regardless, the two convictions for crimes of dishonesty should also be admissible as the probative value of her dishonesty substantially outweighs any prejudice. See N.H.R. Ev. 609(b). Ms. Montgomery gave the name of "Kayla Sawtell", a friend of hers, when

questioned by police officers about a shoplifting Ms. Montgomery herself committed. Ms. Montgomery tried to avoid the consequences of her actions by being dishonest and giving a false name. That conduct is highly probative. At the time, Ms. Montgomery was under a suspended sentence and on probation for dealing/possessing prescription drugs (also on information and belief, involving dishonesty). This is highly relevant and probative to her character and, given the lies she will be admitting to as a witness in this matter, including perjury to the grand jury, the prejudice to the witness is nonexistent.

10. In addition to her convictions, Ms. Montgomery has had both additional charges and an uncharged offense that are nevertheless relevant and admissible despite the lack of any conviction. Those offenses are as follows:
 - a. Charges of two counts of receiving stolen property: 2016-2022-CR-0652;
 - b. Charge of theft by deception: 216-2022-CR-00039; and
 - c. Uncharged crime of dealing/possession of prescription drugs - 9/9/2022 offense date.
11. Though Ms. Montgomery has not been convicted of the receiving stolen property and theft by deception charges, those charges were all pending when she made her first statement to police implicating Mr. Montgomery in the death of Harmony Montgomery. They were also pending as Ms. Montgomery continued to purportedly cooperate with the police in their investigation. Ultimately, when Ms. Montgomery pled guilty to perjury, the charges were dropped, provided Ms. Montgomery continued her cooperation.
12. Mr. Montgomery asserts that the charges pending at the time Ms. Montgomery was purportedly cooperating with police and up to her plea on the perjury charges gave motive for her to curry favor with the police for both issues of bail and the ultimate outcome of the then pending charges.

13. To appropriately assess Ms. Montgomery's credibility, the jury should hear of her motive to curry favor with the police. Thus, while not resulting in conviction, the then pending receiving stolen property and theft by deception charges are admissible pursuant to Rules of Evidence 401, 402, 403 and 404(B), as well as the constitutional right to confrontation. See, Davis v. Alaska, 415 U.S. 308, 316-17 (1974)(recognizing that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination" afforded by Sixth Amendment)(citation and footnote omitted); State v. Etienne, 146 N.H. 115, 118 (2001)(right to confront adverse witnesses under Part I, Article 15 necessarily includes right to cross-examine regarding motive and bias).
14. Ms. Montgomery's criminal record also reflects prior convictions for theft of lost or mislaid property in 2009 and theft by misapplication in 2016. These convictions do not appear to be qualifying offenses under Rule 609. However, Mr. Montgomery reserves the right to introduce such evidence should Ms. Montgomery's testimony open the door to admissibility.
15. Ms. Montgomery also committed a theft at her place of employment, Dunkin' Donuts. She admitted to theft and was fired, but no charges were brought. This occurred prior to the Montgomery family's eviction from Gilford Street in Manchester on November 27, 2022. Nevertheless, Kayla Montgomery told Manchester police and testified to the grand jury that she was at work at Dunkin Donuts on November 30, 2019 when, she claimed to them, Adam Montgomery took Harmony to her mother, Crystal Sorey, and that was the last time she saw Harmony. Kayla Montgomery subsequently changed her story and now claims that she was with Harmony Montgomery up until December 8, 2019, when, she claims, Adam caused her death. The admitted theft from her employer, Dunkin Donuts, is not only a crime of dishonesty but also intrinsically intertwined with Kayla Montgomery's ongoing lies in this case.

WHEREFORE, Mr. Adam Montgomery, by and through his undersigned defense counsel, respectfully requests that this Honorable Court:

- A. Grant the Defendant's *Motion in Limine* to admit Kayla Montgomery's prior convictions described in paragraph 3, charged and uncharged crimes in paragraph 3, and theft from her employer described in paragraph 15;
- B. Schedule a hearing on this matter should the Court find it necessary, and
- C. Grant such further relief as may be deemed just and proper.

Respectfully submitted,

/s/ Caroline L. Smith
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION IN LIMINE has been forwarded to Senior Assistant Attorney General Benjamin J. Agati and Assistant Attorney General R. Christopher Knowles on this 22nd day of December 2023.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.