

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
Northern District

JANUARY TERM 2024

THE STATE OF NEW HAMPSHIRE

v.

ADAM MONTGOMERY

Case No. 216-2022-CR-02372

**STATE’S MOTION IN LIMINE: TO PRECLUDE THE DEFENDANT’S USE
OF HIS OWN STATEMENTS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General (“the State”), and hereby files this motion to preclude the defendant from offering into evidence, eliciting information of the substance of, or referring to statements – either in their entirety or portions thereof – that he made to investigators and others as to the murder and disposal of Harmony Montgomery. If offered by the defendant rather than the State, those self-serving statements are hearsay and thus inadmissible. In support of this Motion, the State submits the following:

1. The defendant is charged with one count each of second-degree assault, second-degree murder, falsifying physical evidence, tampering with a witness, and abuse of a corpse. The charges relate to the assault, murder, and disposal of the defendant’s 5-year-old daughter, Harmony Montgomery. The defendant’s trial is scheduled to begin with jury selection on February 6, 2024.

2. After the murder, the defendant made several statements about the events to various people. These included, but were not limited to: statements to police officers,

statements to his friends and family members during his incarceration, and statements to other inmates during his incarceration.

3. Of course, were the State to decide in its case-in-chief to elicit any or all of these various statements made by the defendant for its substance, the State would be able to do so within the ordinary rules of admissibility. In that evidentiary context, the defendant's statements would constitute the statements of a party opponent, "offered against the party," and thus would not constitute hearsay under the pertinent rules of evidence. N.H. R. Evid. 801(d)(2); *State v. Belonga*, 163 N.H. 343, 359 (2012).

4. In contrast, without that elicitation, any of those very same statements being offered by the defendant would not be offered not "against [the] party," but by the party, and are not admissible under any of the non-hearsay definitions contained within New Hampshire Rule of Evidence 801(d)(2). Indeed, with respect to the defendant himself as the proponent of any statements that he made, those statements constitute inadmissible hearsay. N.H. R. Evid. 801(c) & 802; *see, e.g., State v. Botelho*, 165 N.H. 751, 761 (2013) ("[T]he excluded portions of the interview that the defendant sought to introduce were not admissible as non-hearsay because these statements were offered by the defendant rather than against her.") (emphasis in original); *State v. Addison*, 165 N.H. 381, 497 (2013) ("The value of hearsay evidence rests upon the credibility of the out-of-court asserter [S]elf-serving statements or conversations between a defendant and third parties subsequent to the commission of the crime are not competent evidence. The rationale underlying this exclusion is that the credibility

of the defendant is suspect, and his statements are not reliable in light of the defendant's motive to fabricate testimony favorable to his innocence.") (citation omitted).¹

5. Because the defendant's various statements generally outlined in ¶ 2 *supra*, constitute inadmissible hearsay, not only can he not elicit any of them in the first instance, but also his counsel cannot make any reference in the defendant's opening statement as to what the defendant said. Because what the defendant said as noted in ¶ 2 *supra*, is inadmissible by the defendant, it would be improper and prejudicial to the State for the defendant to make mention of such inadmissible evidence in its opening statement. N.H. R. Evid. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.")

¹ More generally, the State would object to elicitation of any evidence from the defense in the first instance that the defendant spoke to investigators or the circumstances of such. The basis for such objection is not hearsay, but relevance. *State v. Bennett*, 144 N.H. 13 (1999), is on point. The defendant in *Bennett*, charged with homicide, sought to elicit evidence that he waived his *Miranda* rights and voluntarily gave a statement to investigators, arguing that such evidence was relevant to his state of mind of innocence. *Id.* at 15. The New Hampshire Supreme Court determined that the proffered evidence was not relevant, and inadmissible:

We conclude that the circumstances surrounding the defendant's taped statement were not relevant. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of [an] action more probable or less probable than it would be without the evidence. Absent evidence of the substance of the defendant's statement, the circumstances surrounding it were not probative of the defendant's innocence.

Even assuming that the defendant voluntarily made the statement, the trial court did not abuse its discretion in excluding such evidence because of its potential to mislead the jury. Evidence that the defendant waived his Miranda rights and voluntarily spoke to the police would allow him to project a cooperative and candid image, while avoiding the substance of his statement and the rigors of cross-examination concerning it. With only a part of the puzzle before it, the jury could not have reasonably determined whether the defendant was being cooperative and honest or merely protecting his self-interest when he spoke to the police. Accordingly, we conclude that the circumstances surrounding the defendant's statement were not relevant to his asserted innocence, or if relevant, potentially misleading, and therefore properly excluded by the trial court.

Id. at 15-16 (internal citations and quotation marks omitted).

(emphasis added). Such fundamental unfairness and prejudice would not be remedied by a then-curative instruction from the Court that the parties' opening statements are not evidence, especially given the deliberateness of any mention of inadmissible evidence that affirmatively puts forth a defense that may otherwise not be supported by any evidence introduced in the State's case-in-chief. Moreover, to the extent that the defendant uses his opening argument in order to attempt to assert a claim of nonculpable mental state, any such claim cannot be advanced through reference to the defendant's inadmissible statements but rather must come his own testimony or from other, admissible, evidence.²

6. As to whether the State might seek to elicit any or all of the statements made by the defendant noted in ¶ 2 *supra*, at this point the State is uncertain. By this motion, the State does not seek to curtail its available trial tactics and the admissible evidence at its disposal. In that regard, whether and to what extent the State would seek to elicit what the defendant said to others depends largely on how other evidence develops during the trial and/or during continued trial preparations. Just as the State does not seek notice from the defense of what particular strategies and tactics it may employ at trial, neither can the State affirmatively aver what it may do with potential admissible evidence without that necessary context.

² Although the focus of this particular motion is the defendant's various statements noted in ¶ 2 *supra*, the same evidentiary principles apply to any similar statements that the defendant made, including any such statements of which the defense is aware and did not provide to the State by his reciprocal discovery deadline, which has passed. The State objects at this time to the use of any such statements without reasonable disclosure beforehand.

7. To the extent that the State may seek to elicit statements that the defendant made to investigators and others, as referenced in ¶ 2 *supra*, the State may or may not offer such statements as substantive admissions under New Hampshire Rule of Evidence 801(d)(2). That is, the State may seek to offer such statements not to prove the truth of the matters asserted, but rather as false exculpatory evidence, and thus circumstantial evidence of the defendant's guilt. *See generally State v. Evans*, 150 N.H. 416 (2003). The choice is the State's as the offering party, not the defendant's. Were the State to elicit such evidence for a nonsubstantive purpose, the State would seek an immediate limiting instruction from the Court that informs the jurors that the evidence is not being offered for its truth and cannot be considered by them as substantive evidence. N.H. R. Evid. 105 ("If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court on timely request must restrict the evidence to its proper scope and instruct the jury accordingly."). Were the State to offer such evidence nonsubstantively, the defense of course could not in closing argument attempt to use it for its inadmissible purpose.

8. The defendant may choose to argue that certain statements, namely those made to other inmates during his pretrial detention or to investigating officers, by the defendant were "excited utterances," *See* Rule 803(2). The State, in the first instance, objects to the admission of any statement of the defendant being admitted as an excited utterance. None of the defendant's various statements, including those made to officers more than two years after his daughter's murder, constitute excited utterances under New Hampshire Rule of Evidence 803(2) as they were not "a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still

in a state of nervous excitement produced by that event and before [s]he had time to contrive or misrepresent.” *See State v. Pepin*, 156 N.H. 269, 274 (2008).

9. Based upon the foregoing, the State asks the Court to preclude the defendant from offering into evidence, eliciting information of the substance of, or making reference to statements—either in their entirety or portions thereof— that he made to investigators and/or others as to the assault and murder of Harmony Montgomery or the associated events.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Grant the State’s Motion; and

(B) Grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: January 8, 2024

/s/ Benjamin J. Agati
Benjamin J. Agati, Bar # 16161
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the State of New Hampshire e-filing system to Carrie Smith and Jamie Brooks, Esqs., counsel of record in this matter.

/s/ R. Christopher Knowles
R. Christopher Knowles