

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 OBJECTION TO DEFENDANT'S MOTION IN LIMINE: MARITAL
PRIVILEGE**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's Motion In Limine: Marital Privilege ("Def.'s Mot.") pursuant to N.H. Evid Rule 504. The defendant seeks to preclude the introduction of statements conversations, letters, text or Facebook Messenger messages or any other communications made to his estranged wife, Kayla Montgomery ("Kayla") in private, or "to any other person regarding those communications" Def.'s Mot. The defendant also asks this Court to order the State to identify communications made in private during the marriage that it seeks to introduce. The defendant is mistaken as to both of these premises and his motion should be denied. In support thereof, the State submits the following:

FACTS

1. The defendant was indicted for one count each of second-degree assault, second-degree murder, witness tampering, and falsifying physical evidence. The defendant is also charged with abuse of a corpse. The charges are based on the December 7, 2019, murder of the defendant's 5-year-old child, Harmony Montgomery ("Harmony"), and the March 4,

2020, disposal of her corpse. The charges of falsifying physical evidence and abuse of a corpse are alleged to have occurred between approximately December 7, 2019, and March 4, 2020. The charge of second-degree assault is based on the defendant's July 2019 assault on Harmony. Finally, the defendant is alleged to have tampered with Kayla Montgomery between December 7, 2019, and January 4, 2022. It is anticipated that at trial multiple individuals will testify that they witnessed Harmony with a black eye following the July 2019 assault. It is also anticipated that multiple witnesses will testify regarding the abuse perpetrated upon Kayla. Kayla is an eyewitness to Harmony's murder and the defendant's actions that followed the murder.

2. One individual, Kevin Montgomery ("Kevin"), the defendant's uncle, reported when he visited the defendant's home in late July 2019, he observed Harmony with a black eye. When Kevin asked what happened, the defendant told him that he "bashed her around the house." He also told Kevin that he "punched her in the face." This conversation was overheard by Kayla who was in another room of the residence listening. Following the defendant's conversation with Kevin, she confronted the defendant with the information she heard and the defendant told her that he caused the injury to Harmony. The defendant previously told her that the injury occurred while Harmony played with her younger brother.

3. Kayla made initial statements regarding her purported knowledge of the July assault, she also made statements regarding Harmony's murder and the defendant's extensive coverup. On June 3, 2022, Kayla was arrested for two charges of Perjury based on statements she had made in prior testimony before the Grand Jury for Hillsborough County Northern District. That same day she agreed to be interviewed by law enforcement. During her June 3, 2022, interview Kayla provided new information about the defendant concerning the July assault and Harmony's subsequent murder that was contrary to her initial statements, and

which inculpated the defendant with respect to the instant case. Kayla subsequently provided two additional interviews; on June 23, 2022, and another on March 16, 2023. In these statements, Kayla corroborated Kevin's account and provided information regarding Harmony's murder and coverup, including allegations that the defendant tampered with her.

4. In her June 23, 2022 proffer, Kayla disclosed the following:

Det. Dunleavy: Now, what was -- what conversation did you have after she died? I mean, did you just carry about your day like nothing happened? Because it sure seems like that.

Kayla: I didn't know what to say or what to think because it (Crying) -- I didn't -- didn't -- I couldn't like believe anything that was happening, and I was scared (Sniffing) and scared of him, and it was like very traumatic, that whole thing, ah -- that -- that whole situation. (Crying/Sniffing)

Det. Dunleavy: But did you have any conversations that day or the following days about what happened?

Kayla: Um -- Like when I asked him like, "What -- What do we do? What is going to hap-- like what is going to happen?" Um -- And he's like, "Don't worry. Everything is going to be fine. I'm going to take care of it." (Crying) And it never really got brought up. But we would like -- It never got brought up unless he like was high and was he was accusing me of cheating on him (Sniffing) or trying to kill him, or telling on him. And I'm like, "I haven't said anything to anybody." (Sniffing) And that's been the only time it would get brought up. (Crying/Sniffing)

Det. Dunleavy: And what would he bring up? Like what would he say? When you say, "He brought it up," what do you mean?

Kayla: It's like he would just say um -- he's like -- every time like he was just saying, "Like I know you said something," or "I know you're talking to the cops,"

or “I know that like -- because he was -- Like after um (Sniffing) we got into the family shelter and we still had her at that time (Crying), and we got our apartment, um -- he thought that I like had cameras in my house, like in the lights and like the outlets or something like that. So, he thought that I was like working with the cops and trying to like tell on him and everything. And I’m like, “I haven’t done anything.” That’s when he was starting to be very abusive and everything like that. (Sniffing)

Kayla’s June 23, 2022, Proffer at Pages 40-41.

As the interview progressed, the following exchange occurred:

Det. Rahill: You guys knew that that was going to happen. What was the plan after that?

Kayla: I didn’t know. Like he’s the one that would start bringing things up to me, and then I just went along with whatever he said because --

Det. Rahill: So, what was he bringing up?

Kayla: -- he scared the crap out of me.

Det. Rahill: What was he bringing up? So, like after you guys put her back in the bag -- put her in the freezer --

Kayla: The only time -- The only time he would bring anything up was when he accused me of telling on him, and he’d be like, “I know you told them something.” And like he wouldn’t say -- he wouldn’t say anything about it.

Det. Rahill: Um-hm.

Kayla: He would just say, “You know what I’m talking about. I know that you told, and I know you’re working with the cops.” And he wouldn’t say what it was about.

Det. Rahill: Um-hm.

Kayla: But I knew what he was talking about, and he would give me this look like he was going to do something (Sniffing) to me, and sometimes he did. Sometimes he hit me. Sometimes he didn't. Sometimes he just ah -- bitched, and he just scared the shit out of me. (Sniffing)

Kayla's June 23, 2022, Proffer at Pages 96-97.

5. As discussed *supra*, the State anticipates that at trial multiple witnesses will testify that Kayla was present and observed Harmony's black eye. Additionally, Kayla disclosed being present during the defendant's confession to Kevin. In this case, as in *Wilkinson*, spousal privilege was waived by the defendant when he told a third party what he had done.

6. N.H. Evid Rule 504 provides that a husband and wife "shall [not] be allowed to testify against each other as to any statement, conversation, letter, or other communication made to the other or to another person, nor ... allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence." The New Hampshire Supreme Court has considered the issue of marital privilege on several occasions. In *Clements v. Marston*, 52 N.H. 31, 38 (1872), the Court found that marital privilege did not create "a blanket immunity" but rather protected marital confidences. *Id.* (citing *Corson v. Murinane*, 51 N.H. 92 (1871)).

7. More recently, the Court upheld the *Clements* decision as requiring a trial court to find "a violation of marital confidence" before excluding spousal testimony. *State v. Wilkinson*, 136 N.H. 170, 177-178 (1992). In *State v. Pelletier*, 149 N.H. 243 (2003), the Court stated that to be a violation of marital confidence "the communication at issue must be something confided by one spouse to the other, as husband and wife, and not what would be

communicated to any other person under the same circumstances.” *Id.* at 247. The Court stated that the marital privilege extends to acts that are “attributable to the husband-wife relation, i.e., that which might not be spoken or done openly in public as tending to expose personal feelings and relationship or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation.” *Id.* The defendant’s statements that he seeks to preclude, are not attributable to his relationship with Kayla. Rather, they are direct evidence of his crimes of witness tampering, falsifying, murder, assault, and abuse of a corpse.

8. Kayla’s knowledge of the acts and statements of the defendant related to his assault on Harmony occurred in the presence of others (children), other third persons, or are not otherwise attributable to the husband-wife relation “which might not be spoken or done openly in public as tending to expose personal feelings and relationship or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation.” *Id.*

9. Regarding general admissibility, all of the statements made to, or in the presence of Kayla, during and in furtherance of the defendant’s crimes against Harmony (See State’s Partial Objection to Motion in Limine Allegations of Prior or Subsequent Bad Acts) and Kayla, should be admitted as statements by a party opponent. *See* N.H. R. Evid. 801(d)(2).¹ Furthermore, these statements should not be excluded as statements of marital privilege. N.H. R. Evid. 504. “The marital privilege is not a blanket immunity, *Corson v. Murinane*, 51 N.H. 92 (1871) (note); rather, it is a privilege protecting marital confidences,” *State v. Wilkinson*,

¹ See also, State’s Motion in Limine: To Preclude the Defendant’s Use of His Own Statements.

136 N.H. 170, 177 (1992). “The determination of whether the marital privilege under Rule 504 applies is intensely factual and rests within the sound discretion of the trial court.” *State v. Pelletier*, 149 N.H. 243, 247 (2003) (citing *Cook v. Bennett*, 51 N.H. 85, 92 (1871); *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 673 (1993)). “[T]he trial court must find a violation of the marital confidence before it can exclude a spouse’s testimony.” *Id.* “[T]he marital privilege may, for reasons of public policy, be appropriately limited.” *Id.* at 249.

10. In *Pelletier*, the New Hampshire Supreme Court wrote:

[We] will not cloak the sexual activity between a husband and wife with the marital privilege when, as here, disclosure would provide relevant information concerning the alleged sexual abuse of a child of one of the spouses who is living with them. Cf. RSA 161–F:48 (exception to marital privilege in proceedings involving abuse and neglect of the elderly); RSA 546:22 & RSA 546-A:9 (exception to marital privilege in support proceedings).

Id. at 249. The Court concluded that the trial court “did not err in finding that Linda Pelletier’s testimony would not violate the marital privilege” as public policy appropriately limited the privilege to testify to relevant information relating to the sexual assault of a child. *Id.*

11. Similar to the approach taken by the Court in *Pelletier*, this Court should take the same approach with regard to the defendant’s statements made while committing crimes against his spouse, and statements made to his spouse or in his spouse’s presence in furtherance of criminal conduct while perpetrating it upon Harmony, Harmony’s body, and later, on Kayla in her status his victim and as an eye witness to his crimes. Just as martial privilege is not a “cloak” for the evidence in *Pelletier*, it should not cloak the defendant’s statements, where disclosure would otherwise provide highly relevant and probative evidence about Harmony’s murder, the mutilation of Harmony’s body, and his crimes that followed, along with his repeated assaults on his wife Kayla in furtherance of tampering with her.

WHEREFORE, the State respectfully requests this Honorable Court:

- A. Deny the defendant's motion to preclude; and
- B. Order such other and further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: January 15, 2024

/s/ Benjamin J. Agati
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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