

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY, SS.

JULY TERM, 2009

SUPERIOR COURT

State of New Hampshire

v.

Jesse Brooks

07-S-2885; 08-S-579; 09-S-319

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RECEIVED
ROCKINGHAM
SUPERIOR COURT

**STATE'S MOTION *IN LIMINE* SEEKING TO EXCLUDE EXCULPATORY
OUT-OF-COURT STATEMENTS MADE BY THE DEFENDANT AND ANY
NON-TESTIFYING CO-DEFENDANT**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby moves that this Court exclude numerous self-serving, out-of-court statements made by the defendant and his co-conspirators regarding their awareness of the conspiracy to murder Jack Reid. These statements are classic hearsay and may not be admitted at trial by the defendant. In further support of this motion, the State says as follows:

BACKGROUND

1. Jack Reid, Sr. was murdered with a sledgehammer at 145 North Road in Deerfield, New Hampshire on June 27, 2005. The investigation that ensued culminated in the arrest and incarceration of the defendant and his four co-defendants. Three of the defendant's co-defendants, as well as an undicted co-conspirator,

thereafter provided the State with multiple statements regarding their participation in Jack Reid's murder.

2. In their statements, the defendant's co-conspirators have, at various points, stated that they were present during the events underlying the conspiracy, but that they believed that the plan was merely to "talk to" Reid, or to "scare" Reid, and not to kill him. Robin Knight made out-of-court statements to the police along these lines when he was arrested in November 2006. John Brooks made similar out-of-court statements to a witness named Michael Connors in the days following the murder—in one instance claiming that Reid's death was an accident, and in another instance claiming that Michael Benton had gone crazy and killed Reid without forewarning. The State does not intend to call John Brooks at trial, and is unlikely to call Robin Knight.

3. Another of the defendant's co-conspirators, Andrew Carter, who was not indicted, has stated that the plan to kill Jack Reid dated back to 2003. However, Andrew Carter has also testified that on the November 2003 night during which the defendant and Michael Benton approached Jack Reid's trailer, the defendant stated that he was going there to "talk to" Reid. The State is, of course, unaware of the defendant's intentions with respect to whether he will testify regarding this statement at trial.

ARGUMENT

4. "Hearsay is not admissible except as provided by [the New Hampshire Rules of Evidence] or by other rules prescribed by the Supreme Court pursuant to statutory authority." N.H. R. Evid. 802. "Hearsay" is defined as "a statement, other

than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.H. R. Evid. 801(c).

5. Any out-of-court statement made by the defendant or his co-conspirators to other witnesses regarding their innocence would be “a statement, other than one made by the declarant while testifying at trial or hearing.” *Id.* Any such statement would also be offered to prove the truth of what the statement asserts (i.e. that the conspirators lured the victim to the location of his death because they wanted to “talk to” him). The defendant and his co-conspirators’ pre-trial statements of innocence are therefore classic hearsay and must be excluded from trial.

6. The defendant may counter that these statements are “admissions” not subject to the hearsay rule. However, under the New Hampshire Rules of Evidence, a “statement” is only admissible as an “admission” when “the statement is offered *against* a party...” N.H. R. Evid. 801(d)(2) (emphasis added). Self-serving, exculpatory statements are those offered by the defendant on his own behalf, and do not qualify as “admissions” under the applicable rule. *See State v. Bennett*, 144 N.H. 13, 15-19 (1999) (defendant’s inquiry to police: “[w]hat did [the victim] die from?” was inadmissible hearsay, as was the fact that the defendant waived his Miranda rights and agreed to talk to police); United States v. Rivera-Hernandez, 497 F.3d 71, 82-83 (1st Cir. 2007) (“The alleged statement made by Rivera-Hernandez is inadmissible under Rule 801(d)(2)(E) . . . because it was not offered ‘against’ his position at trial” but rather “as a means to exculpate him.”); United States v. Mack, 159 F.3d 208, 215 (6th Cir. 1998) (rejecting Mack’s request to introduce co-conspirator statements “on his own behalf”); *see also Lebrun v. Boston & M.R.R.*, 83

N.H. 293, 298 (1928) (“being extrajudicial statements, [self-serving statements] do not come within the exceptions to the hearsay rule.”) (citation omitted); see also Cook v. Rumsfeld, 429 F. Supp. 2d 385, 408 (D. Mass. 2006) (“a party’s prior extrajudicial statement is admissible as non-hearsay *only* when it is offered *against* the party... only when disadvantage flows from the person’s having made the statement.”); 5 Weinstein, Federal Evidence § 801.30 (2d ed. 2008) (“To be admissible under this rule, the party’s statements must be offered *against* that party. A party cannot use this provision to offer his or her own statements into evidence.”).

7. This is no less true with respect to any out-of-court, exculpatory statements made by co-defendants such as John Brooks and Robin Knight. Rule 801(d)(2) includes, under the list of party admissions not subject to the hearsay rule, statements by co-conspirators “made during the course of and in furtherance of the conspiracy.” However, this exception still requires that the statement be “offered against a party” and not by the party in an effort to exculpate the party. See Rule 801(d)(2) (emphasis added); see also Rivera-Hernandez, 497 F.3d at 82-83 (exculpatory statement by defendant’s father, when offered by the defendant, not subject to the co-conspirator exception because not offered against the defendant’s position at trial).

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

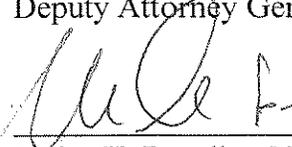
- A. Grant the State’s motion to exclude any self-serving, exculpatory statements made by the defendant and his non-testifying co-defendants; and

B. Grant further relief as may be deemed just and proper.

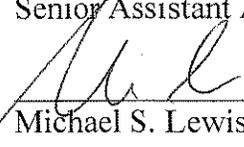
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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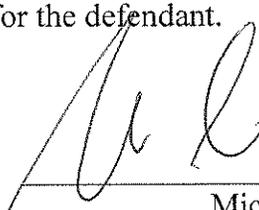


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CERTIFICATE OF SERVICE

July 31, 2009

I hereby certify that I have this day forwarded a copy of the foregoing Motion in Limine – Exculpatory Statements, by electronic mail and United States first class mail, postage prepaid, to William B. Kettlewell, Esq., Maria R. Durand, Esq., and Peter D. Anderson, Esq., counsel for the defendant.



Michael S. Lewis