THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0849, State of New Hampshire v. Stephen Mann, the court on July 30, 2007, issued the following order:

The defendant, Stephen Mann, appeals his conviction for first degree murder. He argues that the trial court erred in: (1) denying without a hearing his request for an in camera review of the counseling and DCYF records of his two children; (2) permitting a State witness to testify while wearing a ski mask; (3) permitting the State to play portions of a 911 call; and (4) denying his motion to appoint new counsel. We affirm.

We review a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. State v. Amirault, 149 N.H. 541, 543 (2003); see State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard.) To trigger an in camera review of confidential or privileged records, a defendant must establish a "reasonable probability that the records contain information that is material and relevant to his defense." Amirault, 149 N.H. at 543. In other words, the defendant bears the burden to establish that there is a "realistic and substantial likelihood that evidence helpful to his defense would be obtained from the records." Id. at 543-44. To meet this threshold requirement, a defendant must present a plausible theory of relevance and materiality sufficient to justify review of otherwise protected documents. Id. at 544.

In his pleading entitled "Gagne motion," the defendant requested an in camera review of counseling and DCYF records of his two older children. In support of his request, he cited inconsistencies between the children's versions of events occurring on the night of the murder and argued that it was reasonable to assume that there were more inconsistencies in the material requested. Without citing more than the alleged inconsistencies, the defendant failed to articulate how the information sought was relevant and material to his defense. See State v. Hoag, 145 N.H. 47, 49-51 (2000) (declining to adopt rule requiring trial court to conduct in camera review of witness's confidential records whenever witness makes pretrial statement that differs from pretrial statement of victim).

The defendant next argues that the trial court erred in allowing a State witness to testify while wearing a ski mask. A review of the trial transcript, however, reveals that the defendant stated that he had "no problem" with this ruling when he was informed that the witness was an undercover police officer and the purpose of the ski mask was to prevent disclosure of his physical features, rather than his identity. Accordingly, the defendant has waived this

argument. Cf. Hudon v. City of Manchester, 141 N.H. 420, 422 (1996) (agreement by plaintiffs that claims against two defendants could be dismissed waived plaintiffs' ability to attack court's order granting motion to dismiss).

The defendant also argues that the trial court erred in allowing the State to play portions of a 911 tape made by the defendant's daughter in which she reported that "my dad killed my mom." Absent an unsustainable exercise of discretion, we will not reverse a trial court's ruling on the admissibility of evidence. State v. Cochrane, 153 N.H. 420, 421 (2006). The defendant contends that the admission of the excerpted tape was error because the daughter's statement was speculative, cumulative of other evidence and unduly prejudicial.

We note that the trial court limited the admission of the tape to those portions that it found were the result of an excited utterance. See N.H. R. Ev. 803(2). Given the daughter's observations prior to calling 911, we find no error in the trial court's ruling. The statement was based upon those observations and she testified to her observations at trial. As the trial court noted, her description of the events was necessarily emotional. The admission of the tape was the best contemporaneous evidence of the murder; given the daughter's trial testimony, the trial court's finding that the excerpted tape was not so unduly emotional as to inflame the jury is sustainable. See State v. Jordan, 148 N.H. 115, 118 (2002).

The defendant also challenges the trial court's denial of his motion to appoint new counsel. A review of the record indicates that the trial court conducted a detailed colloquy with the defendant to support its finding that he had knowingly, voluntarily and intelligently waived his right to counsel. The court advised the defendant against proceeding pro se and further, that he could either represent himself or continue with his appointed counsel. When the defendant opted to proceed pro se, the trial court appointed his defense counsel as standby counsel and advised the defendant that they could provide such assistance as he desired.

Given the defendant's request for new counsel as trial was about to commence and the grounds he enunciated, the trial court was not required to grant his request. See United States v. Proctor, 166 F.3d 396, 402 (1st Cir. 1999) (defendant is not entitled to "choreograph special appearances by counsel" or repeatedly alternate his position on counsel to delay trial or otherwise obstruct orderly administration of justice). The record supports the trial court's finding that any breakdown in communication between the defendant and his attorneys was the result of his refusal to communicate with them.

Affirmed.

Dalianis, Duggan and Galway, JJ., concurred.

Eileen Fox,

Clerk