

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0217

State of New Hampshire

v.

John Miller

**Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court**

BRIEF FOR THE DEFENDANT

**Christopher M. Johnson
NH Bar #15149
Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
(603) 228-9218**

(5 Minutes 3JX Panel Oral Argument)

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QUESTIONS PRESENTED

1. Whether the court erred in failing to declare a mistrial after the State elicited testimony that Miller asserted his right to silence after receiving the Miranda warnings.

Issue preserved by motion for a mistrial, and the trial court's ruling denying the motion. T. 44-46.*

2. Whether the State introduced sufficient evidence to convict Miller of witness tampering.

Issue preserved by motion to dismiss, and the trial court's ruling denying the motion. T. 199-204.

*Citations to the record are as follows:
"T" refers to the consecutively-paginated transcript of the four-day trial held on December 15-18, 2008;
"App." refers to the Appendix filed with this brief.

STATEMENT OF THE CASE

In 2008, the State charged John Miller with a felony count of witness tampering and a misdemeanor count of resisting arrest. App. 1-2. The witness tampering indictment alleged that in Farmington, on June 30, 2008, John Miller "stat[ed] to Matt Roy 'Matt you're a rat' and 'I will murder your family' in retaliation for Matt Roy being a witness in a criminal case involving John Miller's brother William Miller," committed while John Miller was released on bail conditions. App. 1. The resisting arrest information alleged that on July 2, 2008, Miller interfered with Farmington police officers when they tried to arrest him. App. 2.

Miller stood trial in the Strafford County superior court in December 2008, and was convicted as charged. T. 329. The trial court (Brown, J.) sentenced Miller to a stand-committed term of one and a half to seven years for witness tampering and to a concurrent twelve-month term for resisting arrest. App. 3-4.

STATEMENT OF THE FACTS

On June 30, 2008, Matthew Roy ("Roy") and his wife Sarah were doing chores at their home in Farmington, while their next-door neighbor, John Miller, was chopping wood in his yard. T. 120, 208-09. While working in a barn attached to his house, Roy heard Miller singing a rap song with the following lyrics:

Matt, you rat. Thought you were our
friend.... I bought your motorcycle. Matt,
..., you rat. You think they got our guns.
I got six more. I don't care if you're two
or eighty, I'll kill you mother fuckers.
Matt, you fucking rat.

T. 126. Sarah also came into the barn, and heard Miller's rap.

T. 186-87. Roy testified that he sat and listened to the lyrics as they continued in the same vein for five or ten minutes. T. 128.

The State contended that Miller's lyrics threatened retaliation for Roy's anticipated testimony in a then-pending prosecution of Miller's brother, William Miller ("William"). Although the record speaks with less than perfect clarity as to the precise nature of William's charges, it indicates that the State had brought two charges against William. One alleged that, while at city hall, William had threatened the Farmington police chief.** T. 220, 227, 261-62. William's second charge, described rather more ambiguously at Miller's trial, seems to

**This brief refers to that allegation as "the city hall event."

have involved some kind of misconduct in which William hit some trash and a tree on the Miller property with a shovel while in the presence of, and under circumstances deemed threatening to, the police.*** T. 172, 228-29, 260-61.

In support of its theory that Miller's rap referred to Roy in his role as a witness in William's case, the State introduced evidence that Roy had been subpoenaed by the prosecution in that case. T. 116-17. Also, the State established that Miller had attended a number of hearings in the case, including a hearing held on the morning of June 30. T. 39, 116-17, 129-30, 138-39, 227, 232. Finally, the State noted that the word "rat" can refer colloquially to a police informant or prosecution witness. T. 242.

At trial, Miller denied having any purpose to threaten or intimidate Roy. T. 226. Moreover, he denied having any knowledge of Roy's status as a witness in William's pending case. T. 220. Both Roy and Miller testified that other sources of tension existed between the neighbors, and Miller attributed the references in his lyrics to Roy to those sources. T. 49, 163, 206-08, 242, 247-48. The tension had its roots primarily in boundary disputes, as provoked in diverse ways by land use, dogs, and children. T. 164-66, 173-76, 206-08, 226, 234-36, 244.

***This brief refers to that allegation as "the Miller tree event."

In further explanation of his lyrics, Miller testified that at the moment in question he had been listening to, singing along with, and improvising on, a tape by the rapper Haystak. T. 210, 216, 240-41. At trial, the defense played selections from a recording of Haystak's music, to show that a number of the words and themes in Miller's overheard rap closely tracked words and themes present in Haystak's music. T. 214-16. The prosecution, in turn, elicited testimony from Roy that he heard no music in the background when he heard Miller sing. T. 129.

The defense also contended that the State had not proved that Miller knew or believed that Roy could hear him as he sang to Haystak's music while chopping wood. Roy testified that he could not hear Miller's words while inside his house. T. 154. Only while in a barn attached to their house and closer to Miller's woodpile could the Roys make out Miller's words. T. 154-55, 194. Because words cannot be intended to communicate a threat if the speaker does not know, or at least believe, that the threatened person will hear those words, it became crucial to the State's case to establish that Miller knew or believed the Roys to be in their barn, at the time he sang.

Uncontradicted testimony established that the Roys entered the barn through their house, that the barn's external door was closed at the relevant time, and that the barn windows facing the Miller property were painted so as to make them opaque. T. 51,

120-22, 152-54, 194. Citing those circumstances, Miller contended that he did not know that the Roys were in the barn and could hear him as he chopped wood and sang. T. 226, 243.

The State countered that only ten feet separated the barn from Miller's woodpile, and that the barn's walls created no formidable barrier to the transmission of sound. T. 126, 140. Finally, the State asserted that the Roys made sufficient noise while in the barn to make evident their presence. T. 168. Roy testified that during Miller's rap Sarah audibly wound up an extension cord, a claim that led to an in-court demonstration of the noise produced by her method of winding such a cord. T. 168, 177-81, 188, 195-96.

On the night of July 1, the police arrested Miller. T. 63. Two of the arresting officers testified that, after answering the door, Miller attempted to evade his arrest by re-entering his house. T. 65-67, 78. According to the police, Miller did not submit to arrest until threatened with a taser. T. 67, 80. Miller testified that he had not resisted. T. 225. As Miller's claim of insufficient evidence relates only to the witness tampering charge, this brief dispenses with any more comprehensive statement of the events surrounding Miller's arrest.

SUMMARY OF THE ARGUMENT

1. After the State improperly elicited evidence of Miller's post-Miranda assertion of his right to silence, the defense moved for a mistrial. In denying that motion, the trial court erred. This Court has indicated that when the State improperly elicits a defendant's post-Miranda invocation, a mistrial should follow if the State's conduct constituted prosecutorial misconduct, or if curative instructions could not remedy the harm. Here, the prosecutor was culpably negligent in eliciting the evidence. Also, and in the alternative, the curative instruction alone was inadequate to remedy the harm. Thus, the court should have granted the request for a mistrial.

2. In order to convict Miller of witness tampering as charged here, the State had to prove certain contested elements. First, the State had to prove that Miller knew of Roy's role as a witness in William's case. Moreover, the State had to prove that Miller made the charged statements because of Roy's role as a witness, rather than for any other reason. Second, the State had to prove that Miller knew or believed that Roy could hear the statements. At trial, the State failed to present sufficient evidence on either point. The court therefore erred in denying Miller's motion to dismiss the witness tampering charge.

I. THE COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER THE STATE ELICITED EVIDENCE OF MILLER'S POST-ARREST ASSERTION OF HIS RIGHT TO SILENCE.

As its first witness, the State called Farmington police officer Christopher Labreque. In the course of questioning Labreque about the circumstances of Miller's arrest, the prosecution elicited the following testimony:

Q. ... What part did you actually handle during [Miller's] arrest?

A. I was staged in the proximity of the home.

Q. Did you end up doing any further procedures involving the defendant, John Miller?

A. Yes.

Q. And upon doing that, did he provide you with any statement about what had happened?

A. No, he did not. He refused to give statements on him [sic] Miranda form.

T. 44-45. Upon hearing that testimony, the defense objected and moved for a mistrial. T. 45.

Counsel contended that no instruction could cure the damage. Id. Moreover, noting that Labreque gave a responsive answer to the question, counsel blamed the prosecutor who "new [sic] full well that it was improper to ask such a question." Id. The prosecutor responded that she had sought to elicit testimony about statements made by Miller later, during the booking process, to the effect that he saw Roy at his home on the day of

the rap. Id. On its re-direct of Labreque, the State elicited testimony that, during the booking process, Miller said, "I looked at him, didn't say anything to him for being a witness." T. 57.

The court denied the motion for a mistrial. T. 45. The court did, though, give the following curative instruction:

Ladies and gentlemen of the jury, there was a response by this officer regarding statements. You should disregard the question and the answer and you should not consider it in your deliberations at all. Mr. Miller would have no obligation to give a statement. So, again, I instruct you not to consider that question nor the officer's response to it at any point in this case.

T. 46. In refusing to declare a mistrial, the court erred.

This Court and the United States Supreme Court have long recognized that principles of due process bar the prosecution from introducing evidence of a defendant's post-Miranda silence. See, e.g., State v. Brown, 128 N.H. 606, 611-12 (1986); Doyle v. Ohio, 426 U.S. 610 (1976). Two features of the post-Miranda setting combine to make unconstitutional the use of such evidence. First, a defendant's post-Miranda silence is "insolubly ambiguous," in the sense that silence may reflect either a consciousness of guilt or an intention to assert the right to silence. Brown, 128 N.H. at 612. Second, the use of silence would violate two representations implicit in the Miranda warnings: first that the "defendant will not be penalized for

invoking the privilege," and second that "the defendant will not be required to waive his right to silence at trial in order to explain his constitutionally protected silence before trial."

Id.

Here, both the prosecutor and the trial court acknowledged that Miller's post-Miranda assertion of his right to silence was inadmissible. T. 45-46; App. 5-6 (state motion *in limine*, seeking admission only of booking statement). The issue on appeal, therefore, concerns whether the improper presentation of that evidence required a mistrial. The grant of a mistrial is the proper remedy where "the evidence or comment complained of was not merely improper, but also so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions." State v. Ellsworth, 151 N.H. 152, 154 (2004) (quotation omitted). On appellate review of a claim of error in the denial of a mistrial, this Court applies the unsustainable exercise of discretion standard. Id.

On a few occasions, this Court has addressed the question of whether the improper introduction of the defendant's post-Miranda silence requires a mistrial. See, e.g., State v. Munson, 126 N.H. 191 (1985); State v. Cote, 126 N.H. 514, 531 (1985); State v. Seeley, 116 N.H. 831, 834 (1976). Those cases establish that, "in the absence of prosecutorial misconduct or comment that cannot be cured by a cautionary instruction to the jury, an

instruction to disregard the reference to silence is generally sufficient." Cote, 126 N.H. at 531; see also State v. Remick, 149 N.H. 745, 747 (2003) ("when evidence of a defendant's silence is erroneously admitted at trial, that error is generally cured by instructions to the jury to disregard the testimony"). Thus, where the evidence comes before the jury as a result of prosecutorial misconduct, or where a comment cannot be cured by a cautionary instruction, a trial court should order a mistrial.

Here, this Court should find prosecutorial misconduct, within the meaning of the standard applicable to due process claims. Officer Labreque gave the inadmissible testimony as a direct and responsive answer to the prosecutor's question. This case thus differs from those in which a witness gives inadmissible testimony in a non-responsive answer. See, e.g., State v. Gordon, 148 N.H. 710, 718 (2002) (noting, in support of denial of mistrial, that problematic answer was not responsive to prosecutor's question); State v. Ellison, 135 N.H. 1, 4 (1991) (same). While the prosecutor may have hoped to elicit testimony about Miller's statements during booking, the prosecutor did nothing to direct the officer's attention to the booking setting. At the very least, the prosecutor's failure to focus the question on the booking statement constituted serious negligence, given the prosecutor's, and the officer's, knowledge that Miller had,

after getting the Miranda warnings, asserted his right to silence.

In other due process contexts, this Court has held that a defendant need not show purposeful prosecutorial misconduct in order to prevail on a claim of a due process violation. See, e.g., State v. Knickerbocker, 152 N.H. 467, 469-70 (2005) (in context of due process claim alleging delayed indictment, defendant need not show purposeful prosecutorial bad faith); State v. Dowdle, 148 N.H. 345, 349 (2002) (in context of claim of loss of evidence, defendant prevails not merely on showing of bad faith, but also on showing of "culpable negligence"). Thus, the trial court's apparent finding that the prosecutor had not intentionally elicited the inadmissible testimony does not foreclose a finding of prosecutorial misconduct. T. 46.

Second, and alternatively, Miller contends that the trial court's curative measures were inadequate to undo the harm caused by the presentation of the inadmissible evidence. While this Court has on several occasions rejected appeals claiming error in failing to order a mistrial after the introduction of evidence of a defendant's silence, those cases tend to involve one or more of three circumstances, none of which are present here. First, this Court has sometimes cited the ambiguity of the evidence of silence as supporting a finding that no mistrial was required. See, e.g., Remick, 149 N.H. at 747-48 (noting that jury could

have attributed Remick's silence to his falling asleep); State v. Spaulding, 147 N.H. 583, 587-88 (2002) (no mistrial required where witness never gave testimony clearly indicating invocation of right to silence); State v. Haley, 141 N.H. 541, 551 (1997) (citing ambiguity in support of finding of no need for mistrial). Here, however, Labreque's testimony unambiguously communicated that Miller had asserted his right to silence in response to Miranda warnings.

Second, in finding no necessity for a mistrial, this Court has sometimes noted the presence of curative measures other than, and in addition to, a jury instruction to disregard the evidence. For example, in Munson, this Court relied on certain steps taken by the trial court, in addition to the giving of an instruction telling the jury to disregard the evidence. First, the State introduced testimony that it was "normal" for arrestees to ask to call a lawyer and that lawyers "usually tell arrestees to remain silent." 126 N.H. at 193. Second, the court granted a defense motion to bar the introduction of Munson's prior convictions during his cross-examination. Id. Here, the court took no measures, other than the curative instruction, to remedy the harm.

Third, this Court has sometimes treated the matter as raising a question of harmless error, and affirmed the denial of a mistrial in part on finding overwhelming evidence of guilt.

See, e.g., Remick, 149 N.H. at 748-49; Munson, 126 N.H. at 193. To affirm a conviction on the basis of harmless error, this Court must find, beyond a reasonable doubt, that the information in question did not affect the verdict. Remick, 149 N.H. at 748. Here, the State did not present overwhelming evidence of Miller's guilt. Rather, the case depended to a substantial extent on Miller's credibility. He testified and defended principally on the ground that he did not know of Roy's presence within earshot, did not know of Roy's role as a witness, and thus was not motivated, in making his statements, by Roy's witness status. On this point, Miller incorporates herein by reference the points and authorities advanced in this brief in his claim of insufficient evidence. Because credibility thus mattered so crucially, the State's improper elicitation of Miller's post-Miranda invocation of his right to silence put before the jury evidence of just the sort the jury would want in order to resolve the case, and therefore of just the sort the jury would least likely be able to follow an instruction to disregard. See State v. Forbes, 157 N.H. 570, 574 (2008) (noting tendency of direct evidence of defendant's silence to "prejudice the jury").

Miller acknowledges that this Court has sometimes indicated that a curative instruction alone can avoid the need for a mistrial. See, e.g., Cote, 126 N.H. at 531 (no mistrial required where defense counsel declined court's offer to give curative

instruction); Seeley, 116 N.H. at 834 (no mistrial required where curative instruction given). Here, the clarity of the evidence of the invocation, the absence of any curative measures beyond the instruction, and the close nature of the case as to guilt combine to render inadequate the curative instruction, standing alone. This Court must accordingly reverse Miller's convictions.

II. THE STATE INTRODUCED INSUFFICIENT EVIDENCE TO CONVICT MILLER OF WITNESS TAMPERING.

RSA 641:5, II defines as witness tampering the commission of "any unlawful act in retaliation for anything done by another in his capacity as witness or informant." Although the statute does not specify the applicable *mens rea*, the indictment here alleged a purposeful mental state. App. 1. By way of specifying the requisite unlawful act, the indictment charged that Miller had committed criminal threatening. Id. With regard to Miller's retaliatory purpose, the indictment alleged that his statements referred to Roy's status as "a witness in a criminal case involving ... William Miller." Id.

The charge required the State to prove several contested elements. For example, the State had to prove that Roy had some role as a witness or informant, and that Miller knew of Roy's role. One does not commit witness tampering unless one knows of the victim's role as a witness. Moreover, the State had to prove that Miller's statements threatened Roy because of Roy's status and conduct as a witness. Miller's statements, even if intended as threats, would not support a witness tampering conviction if made for a reason unrelated to Roy's status and conduct as a witness. Finally, the State had to prove that Miller believed Roy could hear his words. One cannot intend words to communicate a threat unless one believes those words are heard.

After the State rested, the defense moved to dismiss the witness tampering charge, asserting a failure of proof with regard to several of the elements described above. T. 199-204. First, the defense argued that the State had introduced insufficient evidence that Miller was aware that Roy was a witness in the prosecution of his brother. T. 199, 201. Second, the defense asserted a failure of proof that Miller's words referred to Roy in his capacity as a witness, rather than in his capacity as a neighbor with whom the Millers had come into conflict for a variety of other reasons. T. 200. Third, the defense asserted a failure of proof that Miller knew that Roy could hear the words he spoke. T. 200-01. Fourth, the defense asserted a failure of proof that Roy had done anything in his capacity as a witness, and thus a failure of proof that Miller had acted in retaliation for such an action. T. 201.

The trial court denied the motion. T. 204. After referring to the standard of review applicable to such claims, the court reasoned that "you could infer that the statement Matt, you rat, equates to knowledge that Roy was a witness. And ... my notes indicate that Matt Roy testified that he believed that [Miller] was aware of his presence." T. 204. In so ruling, the court erred.

To prevail on appeal when raising a challenge to the sufficiency of evidence, "the defendant must show that, viewing

the evidence in the light most favorable to the State, no rational trier of fact could have found guilt beyond a reasonable doubt." State v. Fuller, 147 N.H. 210, 213 (2001). At no time did Miller admit to knowing of Roy's status as a witness or to knowing that Roy heard his words. To prove that he did know, therefore, the State had to rely on circumstantial evidence. "When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict." State v. Silva, 158 N.H. 96, 99 (2008).

On appeal, Miller advances two of the arguments made below in support of the motion to dismiss. First, the State failed to prove that Miller's statements threatened Roy because of Roy's status as a witness. Second, the State failed to prove an intent to threaten, for failure to prove that Miller knew Roy could hear the statements. This brief addresses each deficiency in turn below.

(A) Failure to prove Miller intended a threat because of Roy's status as a witness.

In order to prove that Miller threatened Roy because of Roy's status as a witness, the State had to prove two subsidiary points. First, the State had to prove that Miller knew of Roy's status as a witness. Second, the State had to prove that Roy's conduct as a witness, rather than some other source of conflict,

motivated Miller's statements. At trial, the State failed to introduce sufficient evidence on either point.

Viewed in the light most favorable to the State, the record establishes, with respect to the first point, that Roy gave the police a statement about the Miller tree event and was subpoenaed to testify. Miller knew that William faced a pending criminal prosecution. Miller had attended some hearings convened in connection with William's case, including one on June 30, to which Roy had been subpoenaed, but at which he had not testified. T. 219, 227. Miller's words included a reference to Roy as a "rat." T. 126. Finally, Miller saw Roy "standing next to some police officers" during the Miller tree event that gave rise to one of William's criminal charges. T. 229, 260.

Those circumstances, however, amounted at most only to circumstantial evidence of Miller's knowledge of Roy's status as a witness. Miller testified that he did not know that Roy had any role as a witness in William's case. T. 220, 259. Indeed, Miller testified that he was not aware, at the time he sang the rap, that the Miller tree event had led to any charge against William. T. 229-30, 261. Miller understood William's charges to relate only to the city hall event. T. 229-30, 261. Miller denied being present at any court hearing at which the names of witnesses in William's case were read aloud, and the State introduced no evidence that such a hearing had ever taken place.

T. 266-67. Roy did not testify that he and Miller had ever seen each other at any hearing in William's case.

Miller's statement at the time of booking tended to exculpate him on this ground. At his booking, upon learning that he faced a charge of witness tampering, Miller said that he had seen Roy that day, but had not said anything to him about being a witness. T. 57-58. That prompt denial, when confronted with the charge, tends more to show a lack of prior knowledge of Roy's status as a witness, than otherwise. It thus supports the defense that Miller did not know, at the time of the rap, that Roy had any role as a witness, but rather first learned of Roy's role when informed at booking of the nature of his charge.

Finally, Miller's use of the word "rat" in itself does not establish Miller's knowledge of Roy's status as a witness. That word, when used as an epithet, does not necessarily refer to a witness. Rather, it can refer to a person disliked for any of a variety of reasons. See, e.g., Webster's Third New International Dictionary 1884 (unabridged ed., 2002) (defining "rat" as "one who deserts his party, friends or associates (as in adversity or for selfish ends)" and as "a despicable or contemptible person"). Therefore, one can better account for Miller's choice of the epithet "rat" by reference to the fact that it rhymes with "Matt," than by assuming an intention to refer to Roy's conduct as a witness or informant.

Because at most only circumstantial evidence thus exists as to Miller's knowledge of Roy's status as a witness, this Court must consider the extent to which the evidence excluded all rational conclusions except guilt. Silva, 158 N.H. at 99. That standard invites an inquiry into the existence of any alternative explanations for Miller's rap, other than the witness tampering explanation urged by the prosecution. Here, the record reflects the existence of a plausible alternative explanation. As both Roy and Miller testified, other sources of tension afflicted the relationship between the neighbors. T. 163-66, 206-08. Miller testified that the sentiment underlying his introduction of Roy's name into his rap arose out of the neighbors' dog problem. T. 226, 247-48. Insofar as a jury could rationally conclude that the lyrics' references had nothing to do with Roy's status or conduct as a witness, the State failed to introduce evidence sufficient to convict Miller.

(B) Failure to prove Miller knew Roy could hear his statements.

Several considerations undermine the sufficiency of the State's evidence that Miller knew or believed that Roy could hear his words, and thus undermine the sufficiency of the proof of a purpose to tamper with a witness. Miller's booking statement and Roy's eye-contact testimony constituted at most evidence that Miller knew Roy was present on his property at the time in

question. Miller's awareness of Roy's presence on his property, though, could not alone support a finding on the critical point.

Roy testified that he could not hear Miller's words from within the house, but could only hear the words once he entered the attached barn. T. 154, 168-69. The State, thus, had to prove that Miller knew, or believed, that Roy was in the barn at the time of his rap. Several considerations in combination defeat the claim that the State introduced sufficient evidence on that point.

All of the witnesses agreed that one cannot see into the barn from Miller's location at the woodpile. T. 51, 153. Because the Roys entered the barn from the house without going outside, T. 152, Miller had no way either of seeing the Roys enter the barn, or of seeing them once they were inside it. Moreover, the rap seemed not to end when the Roy's re-entered the house from the barn. T. 157. The fact that the Roys' entrance into, and departure from, earshot neither triggered nor stopped Miller's rap, suggests that Miller did not act in response to, and thus was not aware of, their presence.

To prove Miller's knowledge of Roy's presence in the barn, the State asserted that the noises associated with Sarah's act of winding an extension cord would have alerted Miller to the presence of somebody within the barn. The act that winding an extension cord is unlikely to cause such a noise as to be heard

through a barn wall, and over the sounds Miller himself made while chopping wood and singing. For the reasons stated, the State failed to introduce sufficient evidence to support a conviction for witness tampering. This Court must accordingly reverse that conviction.

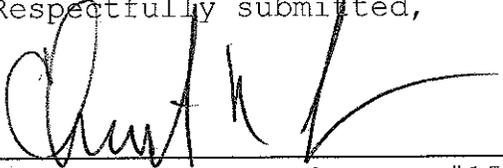
CONCLUSION

WHEREFORE, Mr. Miller respectfully requests that this Court vacate his conviction for witness tampering.

Counsel requests oral argument before a 3JX panel of this Court.

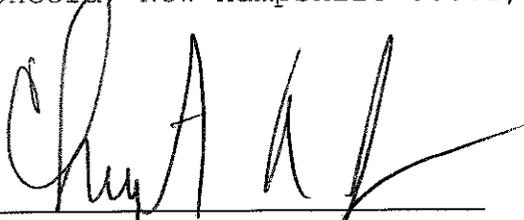
Respectfully submitted,

By


Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 14th day of October, 2009.


Christopher M. Johnson

DATED: October 14, 2009

APPENDIX

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The State Of New Hampshire

Strafford, SS.

Superior Court

Indictment

At the Superior Court, holden at Dover, within and for the County of Strafford aforesaid on the TWENTY-FIFTH day of JULY in the year of our Lord two thousand and EIGHT,

The Grand Jurors for the State of New Hampshire, upon their oath, present that:

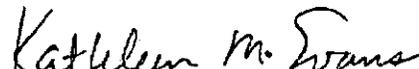
JOHN MILLER

of 1 Summer Street, Farmington, New Hampshire 03835, in the County of Strafford, on about the THIRTIETH day of JUNE in the year of our Lord two thousand and EIGHT at FARMINGTON in the County of Strafford aforesaid,

DID PURPOSELY COMMIT ANY UNLAWFUL ACT IN RETALIATION FOR ANYTHING DONE BY ANOTHER IN HIS CAPACITY AS A WITNESS OR INFORMANT IN THAT JOHN MILLER DID COMMIT THE UNLAWFUL ACT OF CRIMINAL THREATENING BY STATING TO MATT ROY "MATT YOU'RE A RAT" AND "I WILL MURDER YOUR FAMILY" IN RETALIATION FOR MATT ROY BEING A WITNESS IN A CRIMINAL CASE INVOLVING JOHN MILLER'S BROTHER WILLIAM MILLER; THIS OFFENSE HAVING BEEN COMMITTED WHILE JOHN MILLER WAS RELEASED ON BAIL CONDITIONS PURSUANT TO RSA 597:14-b

contrary to the form of the Statute, in such case made and provided, against the peace and dignity of the State.

This is a true bill.


Assistant County Attorney
Foreperson

JOHN MILLER DOB: JULY 4, 1983 POB: NH SSN: UNKNOWN

OFFENSE: TAMPERING WITH WITNESSES AND INFORMANTS CLASS: B FELONY

RSA: 641:5; 597:14-b

AMF

AI

MAX PENALTY 3 1/2 TO 14 YEARS NHSP, ENHANCED PENALTY

5

127 267 2880 10.00 003740433

The State Of New Hampshire

Superior Court

Strafford, SS

Information

At the Superior Court holden at Dover, within and for the County of Strafford, aforesaid, on the FIRST day of AUGUST in the year of our Lord two thousand and EIGHT,

Comes now the Strafford County Attorney, in the name of and on behalf of the State of New Hampshire, upon information, and complains that:

JOHN MILLER
DOB: JULY 4, 1983

of 1 Summer Street., Farmington, New Hampshire 03835 in the County of Strafford on or about the SECOND day of JULY in the year of our Lord two thousand and EIGHT at FARMINGTON in the County of Strafford, aforesaid,

DID KNOWINGLY PHYSICALLY INTERFERE WITH A PERSON RECOGNIZED TO BE A LAW ENFORCEMENT OFFICIAL SEEKING TO EFFECT HIS ARREST OR DETENTION; IN THAT JOHN MILLER DID PULL AWAY FROM OFFICER MICHAEL MCNEIL AND OFFICER BRIAN DRISCOLL OF THE FARMINGTON POLICE DEPARTMENT WHO WERE ATTEMPTING TO EFFECT HIS ARREST,

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the STATE.

PLEA: NOT GUILTY

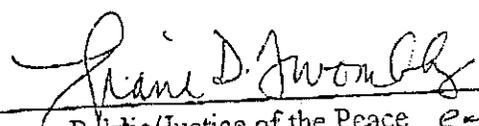
ATTY: Jeffco

8-4-08

A. Cote


Amy M. Feliciano, Esq
Assistant County Attorney

DATE 8-4-08 dep. CLERK A. Cote
Personally appeared the above named Assistant County Attorney on the SEVENTH day of NOVEMBER, two thousand and FIVE, and made oath that the above information by him subscribed is, to the best of his knowledge and belief, true.


Notary Public/Justice of the Peace exp. 11/2012

RESISTING ARREST OR DETENTION

CLASS: A MISDEMEANOR

RSA: 642:2

A2

08-S-880

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The State of New Hampshire

RECEIVED MAR 05 2009

Strafford County

Superior Court

No. 08-S-844

RETURN FROM SUPERIOR COURT

Name: JOHN MILLER #44353 C/O NHSP P.O. BOX 14 CONCORD, NH

DOB: 7/4/83

Indictment Waiver Information Complaint

Offense: TAMPERING W/WITNESSES & INFORMANTS RSA: 641:5

Date: 6/30/08

Disposition: Guilty By Plea Jury Court

T/N: N/A

Conviction: Felony Misdemeanor

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the New Hampshire State Prison for not more than 7 year(s), nor less than 1 1/2 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year. This sentence is to be served as follows: Stand committed. Commencing forthwith. Pretrial confinement credit: 237 days. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer. The defendant is ordered to be of good behavior and comply with all the terms of this sentence. No contact with Matt Roy, Sarah Roy, or their children.

2/24/09

Date

Hon. Kenneth C. Brown

Presiding Justice

Julie W. Howard

Clerk

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **NH State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

3/21/09

Date

Attest: _____

Julie W. Howard

Clerk

SHERIFF'S RETURN

delivered the defendant to the **NH State Prison** and gave a copy of this order to the **Warden**.

Date

Sheriff

cc: State Police
 Offender Recs

Dept. of Corr.
 SRB

Pros. Attorney
 Stephen T. Jeffco, Esq.

A3

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The State of New Hampshire

Strafford County

Superior Court

No. 08-S-880

RETURN FROM SUPERIOR COURT

Name: JOHN MILLER #44353 C/O NHSP P.O. BOX 14 CONCORD, NH

DOB: 7/4/83

Indictment Waiver Information Complaint

Offense: RESISTING ARREST OR DETENTION RSA: 642:2

Date: 7/2/08

Disposition: Guilty By Plea Jury Court

T/N: N/A

Conviction: Felony Misdemeanor

Sentence: A finding of GUILTY is entered. The defendant is sentenced to the House of Corrections for a period of 12 months. This sentence is to be served as follows: Stand committed. Commencing forthwith. The sentence is concurrent with 08-S-844. Other conditions of this sentence are: The defendant is ordered to be of good behavior and comply with all the terms of this sentence. No contact with Matt Roy, Sarah Roy, or their children.

2/24/09

Date

Hon. Kenneth C. Brown

Presiding Justice

Julie W. Howard

Clerk

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **County House of Correction**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

3/2/09

Date

Attest: _____

Clerk

SHERIFF'S RETURN

I delivered the defendant to the **County House of Correction** and gave a copy of this order to the Superintendent.

Date

Sheriff

cc: State Police
 SRB

Dept. of Corr.
 HOC

Pros. Attorney
 Stephen T. Jeffco, Esq.

A4

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THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

JOHN MILLER
08-S-0844 & 08-S-0880

STATE'S MOTION IN LIMINE TO ADMIT STATEMENTS OF THE DEFENDANT

NOW COMES the State of New Hampshire, by and through the Strafford County Attorney to obtain a ruling of the admissibility of statements made by the defendant in the instant case and in support thereof, states as follows:

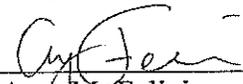
1. On July 1, 2008, the Defendant was arrested by the Farmington Police Department and returned to the station for booking procedures. The defendant was read his Miranda rights but refused to sign his Miranda form. He indicated he did not wish to answer any questions and no questions were asked of the defendant.
2. However, during the booking procedures the Defendant made several spontaneous statements which the state would seek to introduce as admissions of a party-opponent under NH Rule of Evidence 801(d)(2).
3. The specific statements are as follows: "I may seem calm to you now, but my head can explode"; "I will take the live free or die motto literally"; "I looked at him and didn't say anything to him for being a witness"; "This is not 'man shit' Matt Roy you cunt"; and stating that he saw Matt Roy on the 30th but never said anything.
4. Statements made by a defendant that are not the product of custodial interrogation are admissible in a criminal case. "Totally spontaneous statements of the accused in the absence of his attorney, not elicited by government action are admissible". State v. Scarborough, 124 NH 363, at 369 (1981) (citing United States v. Henry, 447 US 264, 276 (1980)).
5. A defendant's Miranda rights are not violated when said defendant makes statements to police that are not the result of custodial interrogation. Statements volunteered by the defendant that are not the product of custodial interrogation are admissible. Miranda v. Arizona, 384 US 436, at 478 (1966).

6. Even in circumstances in which a defendant is undeniably in custody at the time he makes the incriminating statements, if the statements are not elicited through interrogation or its functional equivalent, the statements are entirely voluntary and are admissible in evidence against him. United States v. Lynch, 813 F. Supp 911 D.N.H., at 915, (1993).
7. The statements made by the Defendant in this case were completely spontaneous and voluntary.
8. Further, The Defendant was never questioned by officers and none of the statements that are the subject of this motion were elicited by any interaction involving an officer questioning the defendant. The Defendant spontaneously made these statements in front of several police officers during booking procedure.
9. Therefore, these statements should be admitted as admissions of a party-opponent and as they are relevant to Defendant's state of mind; the probative value of which is not substantially outweighed by unfair prejudice under NH Rule of Evidence 403.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State's Motion;
- B. Conduct a pre-trial hearing on this matter if necessary; and
- C. Grant such other and further relief as may be just and proper.

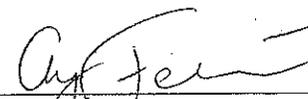
Respectfully submitted,



Amy M. Feliciano
Assistant County Attorney

Dated: December 2, 2008

I hereby certify that a copy of the State's Motion has been faxed this date, to Lincoln Soldati, Esq. for the Defendant.



Amy M. Feliciano