

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Chad Evans

Docket Nos. 00-S-888-896, 00-S-934, 935

ORDER ON PENDING MOTIONS

The court conducted a hearing on November 26, 2001, to resolve pending motions. After considering the pleadings and the arguments presented, the following order is entered:

1. State's Motion to Consolidate

The State seeks to consolidate one simple assault charge, in which the State alleges the defendant choked Amanda Bortner, with the second degree murder charge, the two first degree assault charges and the six second degree assault charges in which the State alleges the defendant abused Kassidy Bortner. The defendant objects.

The court has broad discretion to consolidate charges which apparently involve a common scheme. Consolidation is proper when the evidence in support of each charge is brief, simple, unlikely to confuse the jury and easily referable to each crime. See State v. Hennessey, 142 N.H. 149 (1997). In this case, the defendant concedes that the facts surrounding the defendant's alleged simple

assault are inextricably connected to the underlying facts of the assault and murder charges involving Cassidy and would likely be admissible at trial. Thus, consolidation meets the test articulated in Hennessey and is proper.

The defendant argues that, while admissible, the evidence will ultimately prove the parties were engaged in mutual combat and by reading an information alleging a misdemeanor, the defendant suffers prejudice. The court disagrees. The jury is continually instructed that charges are not evidence and are merely the instrument required to bring the defendant to stand trial. The court must presume that the jury will follow its instructions and return verdicts not based on the existence of charges, but consistent with the evidence presented. Accordingly, the motion is GRANTED.

2. State's Motion in Limine to Admit Evidence of Contact between the Defendant and the Victim's Mother in Violation of Bail Conditions

As a condition of the defendant's bail, the court ordered that he have no contact with Amanda Bortner, the defendant's girlfriend and mother of the alleged victim. Shortly after his release, however, the defendant lived with Bortner and bought her groceries and other personal items in direct contravention of the court order. The State now seeks to introduce the defendant's contact with Bortner and, specifically that the contact violated a provision of the defendant's bail conditions.

The defendant's contact, especially in light of the court's order, is relevant to prove the defendant's consciousness of guilt and to demonstrate Bortner's bias. According to the State's theory, the defendant was willing to violate the no-contact order to exert influence over Bortner's testimony. Such evidence is highly relevant and is not substantially outweighed by the danger of unfair prejudice. Accordingly, the State's motion to introduce the fact of contact between the defendant and Bortner, and the fact that the contact violated the defendant's bail conditions is GRANTED.

3. State's Motion in Limine to Preclude Evidence of Jeff Marshall's Prior Acts

The State seeks to preclude the defendant from introducing evidence that Jeff Marshall, a State's witness, had prior disputes with ex-girlfriends and was convicted of criminal threatening in 1998. None of the anticipated evidence meets the criteria for admissibility under rules 404(a)(3), 607, 608 or 609. Accordingly, the State's Motion is GRANTED.

4. State's Motion in Limine to Admit Amanda Bortner's Excited Utterances

The court will conduct an evidentiary hearing, out of the presence of the jury, on the morning of Tracey Foley's testimony to determine whether an adequate foundation can be laid for introduction of Amanda Bortner's excited utterances.

5. State's Motion in Limine to Admit Statements of Amanda Bortner as a Co-conspirator under N.H. R. Ev. 801(d)(2)(E)

The State seeks to introduce numerous statements Amanda Bortner made to friends and family about her efforts to hide Cassidy's bruises and injuries. Specifically, the State claims Bortner's statements were made in furtherance of a conspiracy to commit the crime of endangering the welfare of a child.

Assuming the State has proven a conspiracy exists between the defendant and Bortner to endanger Cassidy or to hide the results of the defendant's alleged abuse, the court cannot find that Bortner's proffered statements were made in furtherance of the conspiracy. Indeed, almost all of the statements constituted explanations of Bortner's or the defendant's past behavior; they were not made to promote or facilitate the commission of any offense. Accordingly, the State's motion is DENIED.

The statements, however, may be admissible under other evidentiary rules and the court will rule on specific requests to admit the statements at the time of trial.

6. State's Motion in Limine to Exclude Evidence Relating to the Defendant's Good Character and/or Allegedly Good Treatment of Children other than the Victim

The defendant indicates he does not intend to introduce evidence in the form of opinion testimony that he is not the type of person to commit child abuse. To that extent, the State's motion is GRANTED.

The defendant, however, will be permitted to introduce evidence regarding his experience with caring for children to

explain why he could conclude that Kassidy was not well after being in the care of Jeff Marshall. In addition, the defendant may introduce evidence of others' observations of the defendant's parenting of Kassidy.

Finally, the defendant will not be permitted to introduce general testimony about his parenting style of any other child. Whether or not the defendant abused or did not abuse other children is not relevant to this issues of the defendant's guilt regarding the treatment of Kassidy Bortner.

7. State's Motion in Limine to Exclude Evidence Relating to the Possible Ingestion of Windex by the Victim

The State indicates it has withdrawn this motion.

8. Defendant's Motion to Delete Surplusage

The defendant seeks to strike as surplusage from the six second degree assault charges and two first degree assault charges, the following language: "Evans committed First Degree (or Second Degree) Assault against Kassidy with the intention of taking advantage of Kassidy's age or physical disability." The defendant argues that since the indictment already contains an allegation, which he does not dispute, that the victim was under the age of 13 at the time of the offense, the above-quoted language is unnecessary to subject the defendant to enhanced penalties. The court agrees.

While the court in Ouellette held that "any fact (other than

prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," State v. Ouellette, 145 N.H 489, 491 (2000), such is not the case where, as here, the defendant concedes to the proof of an alternate fact that will likewise trigger application of the enhanced penalty statute. Since the defendant concedes that a finding of guilty regarding the assaults will subject him to enhance penalties on the basis of Cassidy's age, there is no need for the State to allege the variant contained in the second paragraph of each indictment. If there were a dispute as to Cassidy's age, then the State would be permitted to seek a unanimous verdict as to either variant to ensure application of the enhanced penalty statute. Since there is no such dispute, the defendant's motion is GRANTED.

9. Defendant's Motion in Limine to Exclude Evidence Pursuant to New Hampshire Rules of Evidence, Rules 401-404

The defendant moves to exclude certain evidence as inadmissible character evidence. The court will consider each category in turn:

a. Evidence of the defendant's relationship with his former wife, Tristan Evans, is inadmissible. However, if the State believes the defendant opens the door to such evidence, counsel shall first approach the bench.

b. Evidence of the defendant's prior record and status on

probation is inadmissible. However, if the State believes the defendant opens the door to such evidence, counsel shall first approach the bench.

c. Evidence regarding the defendant's sex life is inadmissible. However, if the State believes the defendant opens the door to such evidence, counsel shall first approach the bench.

d. The defendant's motion to preclude the State from introducing evidence regarding the defendant's presence at an adult book store is GRANTED. While the evidence is relevant to corroborate Jeffrey Marshall's anticipated testimony that he refused the defendant's request to meet him at the book store because he did not want his company car seen there, its probative value is substantially outweighed by the danger of unfair prejudice. There is a high likelihood that the jury will draw unfavorable inferences about the defendant's character once they hear he is a customer of an adult book store. In addition, the State can achieve corroboration by testimony that Marshall did not want the company car used for anything but company business.

e. Evidence of the defendant's alleged drug use is inadmissible.

f. The court reserves ruling on whether evidence of domestic violence between the defendant and Amanda Bortner is admissible until trial testimony is further developed.

SO ORDERED.

Date: November 28, 2001

Tina L. Nadeau
Presiding Justice