

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH  
STATE OF NEW HAMPSHIRE

Clerk's Notice of Decision  
Document Sent to Parties  
on 09/13/2022

V.

ADAM MONTGOMERY

216-2022-CR-20

216-2022-CR-577


**MOTION RE; ALLEGATIONS OF PRIOR or SUBSEQUENT BAD ACTS**

Now comes Adam Montgomery, by and through his Public Defenders, Caroline L. Smith, and Paige Montgomery, and respectfully moves this Court to issue an order precluding the State from introducing evidence of other alleged bad acts by Montgomery. This motion is made pursuant to NHRE 402, 403 and 404(b).

In support of this Motion, the following is stated:

1. The defendant is charged in docket 216-2022-CR-20 with Second Degree Assault, two counts of Endangering the Welfare of Child or Incompetent, and Interference With Custody. In a separate docket, 216-2022-CR-577, he is charged with two counts of Armed Career Criminal; two lesser included charges of Felon in Possession; two counts of Theft; and two counts of Receiving Stolen Property (hereinafter, the gun charges).
2. At the State's request, the gun charges have been scheduled for trial in November, 2022, prior to docket 216-2022-CR-20.
3. Discovery for the gun charges has been provided separate from the discovery provided in 216-20 22-CR-20. Both sets of discovery include allegations of prior or subsequent bad acts unrelated to the gun charges. The State has not filed a motion to introduce these allegations of bad acts and, presumably, the State has no intention of doing so. However,

In accordance with the request of the defendant as asserted at the September 7, 2022, the Court holds this motion in abeyance pending substantive motions which may be filed in the future on the 404(b) issues.



Honorable Amy B. Messer

September 13, 2022

in the interests of caution, Mr. Montgomery files this motion. The allegations include, but are not limited to:

- a. Allegations of conduct underlying the charges in 216-2022-CR-20;
- b. Allegations Montgomery abused, misused, or caused harm to Harmony Montgomery outside the allegations in 216-2022-CR-20;
- c. Allegations of domestic violence;
- d. Allegations of assaults and/or other assaultive behavior;
- e. Allegations of involvement with illegal drugs;
- f. Allegations of involvement with deadly weapons other than the weapons charged offenses;
- g. Allegations of theft other than the charged offenses;
- g. Prior convictions other than those included in the amended indictments.

4. “The purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs. Evidence of other wrongs is inherently prejudicial and increases the likelihood that a jury will decide the case on an improper basis. The concern that a defendant might be convicted because of his character is the gravamen of Rule 404(b). “State v. McGlew, 139 N.H. 505 (1995)( citations omitted). For such evidence to be admitted, the proponent of the evidence must show that a) the evidence is relevant for purposes other than proving character or disposition; b) there is clear proof the evidence is true; and c) the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant. Id. at 507. Bad act evidence includes acts prior to, and subsequent to, the charged acts. See, State v. Richardson, 138 N.H. 162 (1993).
5. “The State must state the specific purpose for which the evidence is offered and must articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity.” McGlew at 509-510. In articulating the State’s burden, the Supreme Court stated that the proponent of such evidence cannot simply give

a mechanical recitation of 404(b) as a basis for admissibility. The State may not merely parrot the grounds set forth in the rule. Rather, it must articulate precisely how the fact of consequence may be inferred from the evidence sought to be admitted. Id. at 509.

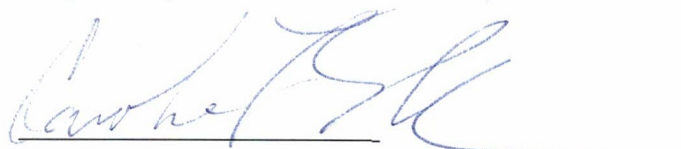
6. In addition to proving an issue without relying on the prohibited character inferences, the evidence sought to be introduced must relate to an issue that is actually disputed. Specifically, the State must articulate how the evidence will tend to prove an issue in dispute without relying upon “forbidden inferences of predisposition, character or propensity.” Id. at 510. Thus, evidence tending only to prove an issue not actually in dispute is irrelevant and inadmissible under rule 402. Id.
7. If the State meets its burden, the Court must then balance the probative value against the prejudice admitting such evidence has to the defendant. Id. “Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.” Id. (citations omitted).
8. In this matter, the State clearly has not met the McGlew criteria, as it has not noticed an intent to introduce any other bad acts evidence pursuant to the Rule of Criminal Procedure 12(b)(1)(F), requiring notice 45 days after not guilty plea, nor can it meet its burden under any of the three factors necessary for admission. Thus all allegations of prior or subsequent bad acts must be precluded pursuant to NHRE 402, 403 and 404(b).
9. If the State should be seeking to introduce any bad acts evidence, it should be required to state with specificity the evidence it seeks to introduce and the McGlew criteria for admissibility as soon as possible so that the matters may be researched, investigated and challenged well in advance of trial.

10. The State currently has an extended response deadline to recently filed defense motions of August 25, 2022. Mr. Montgomery requests that any such notice, with the attendant McGlew factors, be filed by September 6, 2022 and that any bad acts not contained in the notice be precluded at trial. Of the alleged conduct contained in any such notice, Mr. Montgomery requests a hearing.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court,

- A. Preclude evidence of prior or subsequent bad acts or conduct; or
- B. Preclude evidence of prior or subsequent bad acts or conduct not noticed by the State by September 6, 2022;
- C. Hold a hearing on any prior or subsequent bad acts or conduct noticed by the State; and
- D. Grant any other relief the Court deems just and proper.

Respectfully submitted,



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**CERTIFICATE OF SERVICE:**

I hereby certify that a copy of this MOTION TO PRECLUDE has been forwarded to the Office of the Attorney General on this 24 day of August, 2022.



Caroline L. Smith, Esq.