

HILLSBOROUGH, SS.
Northern District

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

Case Nos. 216-2022-CR-00020
216-2022-CR-00577

**STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS
FROM AFTERNOON OF DECEMBER 31, 2021**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's Motion to Suppress Statements from Afternoon of December 31, 2021. As grounds therefore, the State submits as follows:

1. On January 4, 2022, the defendant was arrested in Manchester on charges of second degree assault, endangering the welfare of a child (two charges), and interference with custody. All of the charges are related to his daughter, Harmony Montgomery, whose whereabouts are still unknown.

2. Four days earlier, on December 31, 2021, Manchester Police located and spoke with the defendant at two different times. The first was at approximately 8:45 A.M. in a parking lot. The defendant was not placed under arrest or transported to the Manchester Police Department after a brief conversation, and Manchester officers left him not soon after their conversation started. The defendant has moved to suppress Mr. Montgomery's statements that he had not seen Harmony Montgomery since he dropped Harmony off with her biological mother over two years earlier in Thanksgiving of 2019, and then that he knew as of then-recently that she was well. As stated in its response to the Defendant's initial Motion to Suppress

Statement from December 31, 2022, the State does not intend to introduce the defendant's statements made during the morning encounter with law enforcement in its case-in-chief, unless such evidence becomes admissible as a result of the doctrine of "opening the door," *see generally State v. Wamala*, 158 N.H. 583, 589 (2009) (discussing both the "curative admissibility" and "specific contradictions" doctrines), or for impeachment purposes.¹

3. On that day, the defendant was still the court-ordered custodial parent for Harmony. Later in the day, the Division of Children Youth and Families (DCYF) became the lawful custodians of Harmony Montgomery pursuant to an order of the Court. Manchester Police attempted to find the defendant, serve him with a copy of the order, and locate Harmony. The defendant was found around 4:00 P.M. on a public street in Manchester without Harmony. Officers stayed with the defendant on that street until detectives could arrive to serve him with a copy of the Court's custody order. During this time, the defendant was found in possession of a cellphone, which was seized in order to obtain a search warrant to search its contents for evidence of Harmony's location. At this time, the defendant was not read a copy of the Department's *Miranda* rights form.

4. Detectives Dunleavy and Riley arrived to serve the defendant with the court order. Det. Riley gave the defendant a copy of the order. The defendant asked if he was being arrested, and Det. Riley said he was not arresting the defendant and that the defendant had to comply with the court order. The defendant said, "either arrest me or I am leaving. I am not answering any questions." Det. Riley asked the defendant to tell them where Harmony was located, and the defendant repeated, "I am not answering any questions."

¹ Likewise, the State may seek to introduce the statements in rebuttal, should they become so admissible and relevant.

5. One of the detectives who arrived was Detective Dunleavy. While holding the copy of the order, the defendant asked the detective, “What exactly is this?” Det. Dunleavy explained that it the Court order stated that he no longer had lawful custody of Harmony. The defendant then asked, “Do I have to sign this?” Det. Dunleavy said he did not, but he had to produce where Harmony was. Det. Dunleavy then said that they would be taking the cellphone found on him, to which the defendant replied, “That’s not my phone.” Det. Dunleavy then asked whether the defendant knew how to get in touch with him should he choose to talk about Harmony, to which the defendant replied “Yep.” Det. Dunleavy then told him that the search for Harmony was not going away, to which the defendant replied, “Alright.” Det. Dunleavy stated that the investigation was not going away and that it would not look good if the defendant was on the wrong side of it, to which the defendant replied, “Ok”, and “Yep.” Det. Dunleavy ended their interaction on the street by saying that the defendant had been down this road before and asked whether the defendant knew how to get a hold of him, to which the defendant replied, “Yep.” The defendant then walked away from the officers.

6. The defendant’s Motion to Suppress concerning this afternoon interaction on December 31, 2021, argues that Det. Dunleavy’s interaction with the defendant, *supra*, ignored the defendant’s assertion of his right to silence, and that his verbal responses to those questions should therefore be suppressed. The State objects in that the defendant was not questioned and/or only asserted his right to silence, the assertion of which the State does not seek to introduce in its case-in-chief.

7. It is well settled that “Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution afford individuals a privilege against self-incrimination. To protect this privilege, statements obtained through

custodial interrogation cannot be used unless the procedural safeguards outlined in *Miranda* are followed.” *State v. Thelusma*, 167 N.H. 481, 484 (2015) (citations omitted). Here, the State does not contest that the defendant was in custody during the interaction. The problem with the defendant’s characterization of these questions is that they were not interrogation nor the functional equivalent thereof.

8. “Interrogation for *Miranda* purposes occurs when a person in custody is subjected to either express questioning or its functional equivalent.” *State v. Gribble*, 165 N.H. 1, 11 (2013). The “functional equivalent” of interrogation means “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The “functional equivalent” inquiry “focuses primarily upon the perceptions of the suspect, rather than the intent of the police,” and officers “cannot be held accountable for the unforeseeable results of their words or actions.” *Id.* at 301–02. Given this focus, “the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” *Id.*

9. The defendant’s statement “either arrest me or I am leaving” to Det. Riley was not the product of interrogation or its functional equivalent. Det. Riley did not ask any question that produced that response; he merely explained to the defendant that he was not being arrested and he had to comply with the court’s order. That was not a statement Det. Riley should have known was reasonably likely to elicit an incriminating response. Furthermore, the statement “either arrest me or I am leaving” is not an invocation of the right to remain silent. Therefore, the statement should not be suppressed.

10. Just because a statement is made to police from a subject in custody does not mean that there is a violation of Miranda rights:

Volunteered statements of any kind” are not affected by *Miranda*. In addition, courts have recognized that certain types of police conduct do not constitute interrogation for purposes of *Miranda*. For example, there is no need for police to provide warnings before asking a person under arrest routine booking or administrative questions. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990); *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983). Police can inform individuals about charges against them or about evidence. *State v. Guajardo*, 135 N.H. 401, 403–04 (1992); *United States v. Collins*, 683 F.3d 697, 703 (6th Cir.2012). **Police also may respond to direct questions asked by defendants.** *Gribble*, 165 N.H. at 12; [*State v.*] *Spencer*, 149 N.H. [622], 625 [2003]; *United States v. Briggs*, 273 F.3d 737, 740–41 (7th Cir.2001) (collecting cases); *United States v. Conley*, 156 F.3d 78, 83 (1st Cir.1998).

Thelusma, 167 N.H. at 485 (emphasis added). In the case at bar, the defendant asserted his right to silence, and then asked two short, focused questions, “What is this?”, referring to the Court order he had been handed, and “Do I have to sign this?” Responding to those questions is not interrogation or the functional equivalent in violation of the defendant’s *Miranda* rights. Indeed, Det. Dunleavy’s answers are short, focused in response: the document was a copy of the Court’s order for the defendant to produce Harmony Montgomery and cede custody of her, and he did not have to sign it.

11. Det. Dunleavy’s additional statements similarly do not constitute the functional equivalent of interrogation. Interrogation for Miranda purposes occurs where a person in custody is subjected to either express questioning or its functional equivalent. “The functional equivalent of interrogation includes ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *State v. Spencer*, 149 N.H. [622], 625 [2003] at 625 (quoting *Innis*, 446 U.S. at 300-301). Here, Det. Dunleavy told the defendant they would be taking the phone found on his person, to which the defendant replied, “That’s not my

phone.” An officer informing an individual that a piece of evidence was being seized is not interrogating the person; it is informing them of the police’s current action: that the phone was not being returned. The remaining statements were ensuring the defendant knew how to contact Det. Dunleavy should he change his mind about talking about this investigation that would be continuing. The defendant’s answers of “Yep”, “Alright”, and “Ok”, are not incriminating. Here, the exchange about contact information – a question to assess whether the defendant knew that Manchester Police would continue working this matter and whether he knew how to contact them – did not call for an incriminating response, did not elicit an incriminating response, and had no likelihood of eliciting an incriminating response. Thus, the defendant’s responses were not born of “interrogation” for the purposes of a *Miranda* inquiry.

12. Should the Court desire additional evidence on the matter, the State stands ready to submit the relevant body camera footage of this interaction with the Court for its review.

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

- (A) Deny the defendant’s Motion to Suppress Statements from the Afternoon of December 31, 2021;
- (B) In the alternative, schedule a hearing on the matter; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Attorney General

Date: August 29, 2022

/s/ Benjamin J. Agati
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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to counsel for the defendant via the electronic case filing system.

/s/ Benjamin J. Agati
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