**THE STATE OF NEW HAMPSHIRE**

**CARROLL, SS.** **SUPERIOR COURT**

State of New Hampshire

v.

William Kelly

Docket No. 212-2023-CR-337

**ORDER ON DEFENDANT'S MOTION IN LIMINE TO EXCLUDE INVOCATION OF RIGHT TO SILENCE**

Defendant has moved the Court to prohibit the State from offering evidence in its case-in-chief of his declination to answer a question from emergency medical providers about what had happened to Ms. Falzone's eye because "he did not want to incriminate himself." (Doc. 95, ¶ 10.) The State objects. (Doc. 96.) After hearing oral argument, the Court **DENIES** the defendant's motion.

The Court agrees with the State that the motion is untimely. The motion seeks to exclude the defendant's own statement and should have been filed sooner, whether as a motion to suppress or as a motion *in limine*. The lateness of the motion leaves the Court with little time to address what are difficult constitutional issues not clearly governed by any controlling New Hampshire precedent. While this is a sufficient reason to deny the motion, the Court proceeds to consider the defendant's argument in order to avoid what counsel candidly admitted at the hearing would otherwise be a colorable claim of ineffective assistance.

The evidence challenged here is relevant to show consciousness of guilt, since an innocent person could reasonably be expected to assist emergency medical providers seeking to render care to a friend or loved one by providing them with requested information. Because the evidence is relevant, it is admissible unless there is a legal basis to exclude it. NHRE 402.

The Court has not been made aware of, nor has it found, any legal authority that precludes the State from making evidentiary use of the defendant's remark to the EMT. The New Hampshire Supreme Court has clearly held that "silence towards private parties is not constitutionally protected," State v. Neeper, 160 N.H. 11, 14-15 (2010) (citing State v. Brown, 128 N.H. 606, 613 (1986)), and it has upheld the evidentiary use of such silence in the State's case-in-chief when relevant. Specifically, in Brown, the court upheld admission of the defendant's silence toward the victim on the State's direct examination of the victim. See Brown, 128 N.H. at 609-10. The court also cited with

approval the decision in United States v. Nabors, 707 F.2d 1294 (11th Cir. 1983), where "the government introduced evidence of [the] defendant's silence [toward a private party] in its direct case in a trial in which [the] defendant never testified." Id. at 1298 (cited in Brown at 128 N.H. at 613).

Here, there is no contention that the EMT was acting as anything other than a private party. Defendant concedes that the police did nothing that violated his legal rights, nor did they do anything to elicit his remark to the EMT. On these facts there is no basis to exclude the evidence since "neither the Miranda warnings nor the fifth and fourteenth amendments provide a defendant with a privilege of silence that may be asserted against another individual acting in his private capacity." Brown, 128 N.H. at 613. See also Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("[T]he sole concern of the Fifth Amendment . . . is governmental coercion.").

Defendant argues that allowing the State to make substantive use of this evidence would violate the prohibition against commenting on a defendant's silence, as recognized in State v. Remick, 149 N.H. 745 (2003), State v. Reid, 161 N.H. 569 (2011), and State v. Boudreau, 176 N.H. 1 (2023). The critical distinction between those cases and the present case is that in all of the cited cases the defendant's silence was directed to the police, and not to private third parties as was the case here. Defendant acknowledges this distinction but argues it should not matter because even though the police did nothing to prompt his response, they were nevertheless present at the time, if not in the same room then at least somewhere nearby ("within earshot"). Thus, according to the defense, the logic of the cited cases requires that their protection be extended to the situation here. The Court disagrees.

First, the defendant's argument conflicts with Brown. In Brown, the defendant's silence toward the victim could reasonably have been construed to reflect his apprehension that the police would eventually learn of any apology he might make and use it against him in a subsequent prosecution. Thus, if a defendant's fear that police might learn of his statements to a private party were sufficient reason to forbid the State from commenting on his silence to that party, then the holding in Brown would effectively be overturned.

Moreover, while it is possible to imagine a case where the New Hampshire Supreme Court might consider extending the rule in Remick to a defendant's silence toward a private party—for example, if the private party were to directly accuse the defendant of a crime while both he and the private party were in the immediate presence of a police officer—this does not strike the Court as being that case. The remark at issue here was not only pre-arrest and pre-Miranda (as the defendant acknowledges, Mo. ¶ 22), but, as far as the Court can tell, it was made before any accusation had even been made against him; the EMT's question was not an accusation but rather an effort to obtain medically relevant information. Nor did the defendant simply stand mute; rather he explained his silence to the EMT (he did not wish to incriminate himself). In these circumstances, the defendant's response has greater probative value and does not have the same level of ambiguity as was present

in the cases on which he now relies. See Brown, 128 N.H. at 611-12 (discussing Doyle v. Ohio, 426 U.S. 610 (1976)).

Extending the Remick rule as Defendant now proposes would also present a difficult question of how to define exactly when a police officer is "present" and when not.[1] If the officer's presence somewhere nearby were sufficient to preclude the State from making use of a defendant's silence toward a private party (as Defendant now argues), would they also be considered present if they were not yet on the premises but the defendant knew they were on their way there? Or if they were not yet dispatched but certain to be dispatched very shortly? In any of these scenarios, a defendant could reasonably assume that anything he said to the private party would quickly be learned by the police. In short, if Defendant's argument for extension of the Remick rule were accepted, it would be difficult or impossible to draw a meaningful line between those cases governed by Remick and its progeny and those governed by Brown.

For these reasons, the Court does not believe that the New Hampshire Supreme Court would extend the Remick-Reid-Boudreau rule to exclude the evidence at issue here in derogation of Brown. Surely, the EMT's question confronted the defendant with a difficult choice—either to answer the question and supply information that might be used against him or decline to answer and risk that his declination would be construed as evidence guilt. (See Mo. ¶20.) But that choice was not imposed on him by the police or by the State. In this situation, his decision "requires no constitutional vindication beyond the opportunity to explain it to a finder of fact." Brown, 128 N.H. at 613. That is something which can and no doubt will be done by his attorneys at trial, even if he chooses not to testify.

For these and the other reasons stated in the objection, the Defendant's motion in limine (Doc. 95) is **DENIED.**

November 5, 2025

Hon. Mark D. Attorri

Clerk's Notice of Decision
Document Sent to Parties
on 11/05/2025

[1] It is not at all clear that the statement in this case was made within the hearing of the police officer; the fact that it does not appear in his report (Obj. ¶ 12) strongly suggests that it was not.