

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS

APRIL TERM, 2025

STATE OF NEW HAMPSHIRE
V.
DUSTIN MARK DUREN

214-2024-CR-00028

**STATE'S MOTION IN LIMINE # 2 - TO PRECLUDE THE DEFENDANT'S USE OF
THE AFFIRMATIVE DEFENSE OF DEFENSE OF OTHERS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and files this motion to provide notice to the Court of potential preclusion of the defendant's use of his filed affirmative defense of defense of others based on the discovery known to date. This defense is not currently available to the defendant in light of opinions that the defendant has indicated that he may elicit from his own expert witness. In support of the State's motion, the State submits the following:

1. The defendant is charged with alternative charges of first-degree murder, purposeful, second-degree murder, knowing, and second-degree murder, reckless for killing Caitlyn Naffziger on February 29, 2024, in Berlin, New Hampshire. The defendant is further charged with reckless conduct with a deadly weapon and child endangerment related to his actions in the homicide.

2. On October 3, 2024, the Court granted the assented-to structuring proposal which established deadlines for the case including the filing of motions and defenses. The Court's order established a deadline of December 1, 2024, for the filing of defenses, and a deadline of

February 1, 2025, for the filing of notice of defense expert witnesses. A deadline of April 30, 2025, was established for the filing of pretrial motions including motions *in limine*.¹

3. On November 14, 2024, the defendant filed an initial notice of defenses. This initial notice indicated that the defendant may rely on RSA 627:4, II(c) as an affirmative defense. RSA 627:4, II(c) provides, in relevant part, that “a person is justified in using deadly force upon another person when he reasonably believes that such other person is committing or about to commit kidnapping.” Essentially, this filing provided notice that the defendant could argue that he intentionally killed Caitlyn Naffziger as she was committing or about to commit a kidnapping of her (and the defendant’s) minor child, E.D. There, the defendant cited to *State v. Vassar*, 154 N.H. 370, 373 (2006), to set forth his position that the “trial court must grant a defendant’s requested jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense.” *Defendant’s Notice of Defense: Defense of Others*, ¶ 6 (November 14, 2024).

4. Three weeks after the deadline for filing of defenses, on December 31, 2024, the defendant late-filed a supplemental notice of defenses in which he indicated that he may also rely on “any and all” provisions of RSA 627:4, physical force in defense of a person. *Defendant’s Supplement to Notice of Defense* (December 31, 2024).

5. A little over one month later, on February 6, 2025, counsel for the defendant provided an expert witness disclosure which consisted of a “forensic psychiatric evaluation” written by Dr. Roger M. Pittman. The report opined on the defendant’s mental disorder of post-traumatic stress disorder (PTSD), his mental illness, and his level of rational thought during the

¹ Although the trial date was continued by the Court on February 28, 2025, the remaining dates and deadlines were not cancelled or otherwise altered.

homicide. The report was prepared for the purpose of trial to provide information purportedly in support of the noticed defenses.² On March 6, 2025, in a separate filing, counsel for the defendant identified Dr. Pitman as an expert in the area of PTSD.

6. Reading Dr. Pitman's report in conjunction with the defendant's noticed affirmative defenses of "defense of others" under 627:4, II(c), or 627:4, in general, it appears that the defendant intends to admit testimony of Dr. Pitman concerning the defendant's mental disorder of post-traumatic stress disorder (PTSD) in order to argue that the defendant was somehow acting in conformity with that diagnosis and thereby unable to form the requisite intent for the charged conduct.³ The State incorporates herein its arguments related to the previously filed motion to preclude Dr. Pitman's testimony.

7. In his report, Dr. Pitman opined that the defendant acted impulsively and irrationally when he shot and killed Ms. Naffziger. The fact that Dr. Pittman has declared that the defendant's belief was impulsive and irrational would appear to preclude the use of the defense of others in its entirety, since that argument requires that the defendant's belief was reasonable and rational.

8. The 1985 New Hampshire Criminal Jury Instructions related to the use of deadly force in defense of others would instruct the jury that they must find that a defendant utilizing this defense was acting reasonably. Those same jury instructions require that the facts and circumstances of the charged conduct must provide reasonable grounds in support of the defendant's reasonable belief.

² As the Court is aware, on February 27, 2025, the State filed a Motion to Preclude the Testimony of Defendant's Expert Witness (Pittman) based on the content of his report and his anticipated testimony in this case. Arguments were heard on the filing on April 10, 2025. The State maintains that the testimony of Dr. Pitman should be excluded in its entirety as improper testimony concerning an unnoticed insanity defense and/or that any testimony of this witness should be severely limited.

³ As indicated in the report, to which the Court has access, while the defendant may have had one other diagnosis, Dr. Pitman found that mental health condition to be in "full remission" at the time of the murder.

9. With respect to the use of justifiable deadly force under RSA 627:4, II, the jury would be instructed that:

A person has the right to use deadly force on another person to defend himself (or a third person) if: (1) [h]e actually believed that the other person was about to use unlawful, deadly force against him. In other words, the defendant could use deadly force if he actually believed that he was in danger of death or serious bodily injury; (2) *[e]ven if the defendant actually believed that such danger existed, his belief must be reasonable. In other words, there must be reasonable grounds for the defendant to believe that the other person was about to use unlawful, deadly force against him.* Self-defense does not require an actual danger to the defendant. Rather, *the defendant must reasonably believe that the other person was about to use unlawful, deadly force;* and (3) *[t]he defendant must reasonably believe that the amount of force he used was necessary for self-defense.* A person is not permitted to use excessive force in self-defense, only a reasonable amount of force. The defendant can use the amount of force which he believed was necessary under the circumstances so long as, at the time, there were reasonable grounds for his belief.

N.H. Bar Assoc. Criminal Jury Instructions 3.11 (1985) (emphasis added)

10. With respect to the use of justifiable deadly force under RSA 627:4, II(c), specifically, the jury would be instructed that:

A person has the right to use deadly force on another person to defend himself (or a third person) if: (1) [h]e actually believed that the other person was committing or was about to commit the crime of kidnapping and (2) [e]ven if the defendant actually believed that the other person was committing or was about to commit the crime of kidnapping, *the defendant's belief must be reasonable. In other words, there must be reasonable grounds for the defendant to have believed at the time that other person was committing or was about to commit the crime of kidnapping.*

N.H. Bar Assoc. Criminal Jury Instructions 3.11 (1985) (emphasis added)

11. The New Hampshire Supreme Court has addressed the use of self-defense in multiple cases. In *Aldrich v. Wright*, the Court stated that “[d]efensive force, in its kind, degree, and promptness, is measured by the consequence of using it, and the consequence of not using it: it should be proportioned to the apparent danger, viewed in the light of those consequences

contrasted with each other.” 53 N.H. 398, 402 (1873). “When force, purely defensive at first, increases and becomes more than is reasonably necessary for defen[s]e, the excess is aggressive and not defensive.” *Id.* at 407. “[O]n the question of the reasonable necessity of his act, the insufficiency and impracticability of other more tardy and less vigorous kinds of defen[s]e are to be considered.” *Id.*

12. In *State v. Warren*, the Court stated that “we have looked to the common law for its balance of the right to defend oneself and the restrictions upon that right based upon the general principle that the law places great weight upon the sanctity of human life in determining the reasonable necessity of killing a human being.” 147 N.H. 567, 569 (1999). *See also State v. Etienne*, 163 N.H. 57 (2011).

13. In *State v. Vassar*, cited by the defendant – the Court held that because a jury could have concluded from the testimony that the defendant reasonably believed deadly force was necessary to stave off the threat of unlawful deadly force, the defendant was entitled to the instruction. 154 N.H. 370, 374 (2006). Defendant Vassar had shot and killed his brother. In that case, the Court found that evidence of the defendant’s reasonable belief included testimony about (1) the victim’s out of control rage, (2) repeated threats by the victim to kill the defendant and his mother, (3) testimony of the defendant that the victim had access to a handgun in his room, and (4) that when the shooting occurred the victim was inside of his room, crouched down and his hands were not visible. The New Hampshire Supreme Court found that the trial court erred by not instructing the jury as to self-defense or defense of another finding that the “evidence was sufficient to support a rational finding that the defendant reasonable believed that the brother was about to kill him or his mother.” *Id.*

14. In *State v. Gorham*, the defendant objected to the self-defense instruction given at his trial and argued that it did not adequately explain to the jury that the phrase “reasonably believes” could include that the defendant “need not have been confronted with actual deadly peril, as long as he could reasonably believe the danger to be real.” 120 N.H. 162, 163 (1980). The New Hampshire Supreme Court affirmed the trial court’s instruction stating that “[w]e agree with the defendant’s exposition of self-defense law, and add that if a person unreasonably, though honestly, believes himself in mortal danger, he loses the defense. *Id.* at 163 (internal citations omitted).

15. As discussed *supra*, the defendant has filed notice of his intention to proceed by way of some variation of defense of others to justify his intentional use of deadly force in the murder of Ms. Naffziger. If the defendant’s actions were in fact, impulsive and irrational, they cannot in addition be reasonable and rational. As such, given the opinions presented by the defendant’s own expert witness, the State avers that the defendant loses the defense.

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

- (A) Hold a hearing at the appropriate time; and/or
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: April 30, 2025

/s/ Bethany J. Durand
Bethany J. Durand, NH Bar ID #273943
Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place
Concord, NH 03301
(603) 271-3671

/s/ Charles O. Bucca
Charles O. Bucca, Bar #275327
Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was filed through the Court's electronic filing system and will be electronically served by the e-Filing system on counsel for defendant.

April 30, 2025

/s/ Bethany J. Durand
Bethany J. Durand