

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 RE: ALLEGATIONS OF PRIOR
OR SUBSEQUENT BAD ACTS**

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 Re: Allegations of Prior or Subsequent Bad Acts. As grounds therefore, the State submits as follows:

1. The defendant has filed a motion wherein he asks the Court to preclude the State from introducing evidence of prior or subsequent bad acts or conduct at trial in the above-captioned cases. Case number 216-2022-CR-00577 ("the 577 case") is scheduled for trial in November; case number 216-2022-CR-00020 ("the 20 case") has been severed into two trials, neither of which has a scheduled date at this time.

2. The admissibility of evidence regarding other crimes, wrongs, or acts is governed by Rule 404(b) of the New Hampshire Rules of Criminal Procedure. Rule 404(b) prohibits the use of such evidence as so-called "propensity" evidence; however, evidence of other crimes, wrongs, or acts may be admissible if 1) the evidence is relevant for a purpose other than proving the actor's character or disposition; 2) there is clear proof that the other acts occurred and that the person in question committed them; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

3. The New Hampshire Supreme Court has made a distinction between two types of other crimes, wrongs, or acts: intrinsic and extrinsic. *State v. Wells*, 166 N.H. 73, 77–78 (2014). “Other act evidence is intrinsic, and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are inextricably intertwined” *Id.* at 77 (internal quotations omitted). “Typically, [intrinsic other act evidence] is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness’s testimony, or completes the story of the charged offense.” *Id.* at 77–78.

4. The defendant’s motion makes specific reference to eight “categories” of bad acts evidence that he is seeking to preclude. (Def.’s Mot. ¶ 3a–h.¹) As described below, the State is not intending to introduce other acts evidence in some of these eight categories; however, there are other categories where the State will seek to introduce other acts evidence, either under Rule 404(b) or as intrinsic evidence not subject to Rule 404(b). Complicating the State’s response is that the defendant’s motion was filed under both case numbers, and in some instances the State may seek to introduce other acts evidence in one case but not the other; therefore, the State has tried to be as clear as possible in its response below as to which case the State is referring to:

5. The defendant seeks to preclude evidence of bad acts in the following eight categories:

a. “Allegations of conduct underlying the charges in 216-2022-CR-20”: The State does not intend to introduce this evidence in the 577 case. However, the State fails to see in what way evidence of the conduct underlying the charges in the 20 case would

¹ The State notes that the defendant, in what is apparently a typo, used the “g” designation twice in paragraph 3 of his motion. For clarity, the State will refer to the item designated with the second “g”—“prior convictions other than those included in the amended indictments—as item “h.”

be inadmissible in the 20 case, as this apparently refers to the conduct that makes up the second degree assault, the two endangering charges, and the interference charge. This evidence is either directly probative of elements of the specific bad acts with which the defendant has been charged, or at a minimum is intrinsic evidence that is inextricably intertwined with the crimes charged in the 20 case. Either way, such evidence would not be subject to Rule 404(b) in the 20 case.

b. “Allegations [the defendant] abused, misused, or caused harm to Harmony Montgomery outside of the allegations in 216-2022-CR-20”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, the State may seek to introduce this evidence, in the event Kayla Montgomery testifies, to explain her behavior or the lack thereof. *See State v. Beltran*, 153 N.H. 643, 647–50 (2006).²

c. “Allegations of domestic violence”: In both the 20 case and the 577 case, the State may seek to introduce this evidence, in the event Kayla Montgomery testifies, to explain her behavior or the lack thereof. *See id.*³

d. “Allegations of assaults and/or other assaultive behavior”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, the armed career criminal and felon in possession charges require the State to prove that the defendant was previously convicted of certain offenses; as listed in the indictments, these prior convictions include first degree assault, assault and battery with a dangerous weapon, and armed robbery. Because the State is required to prove the predicate convictions as

² Should the State intend to admit such evidence, it will file a motion *in limine* with a complete argument within the deadline set by the Court in the Dispositional Conference Order (15 days prior to the final pretrial hearing). Currently, the State’s only obligation is that of notice and discovery. *See* N.H.R. Crim. P. 12(b)(1)(F).

³ Should the State intend to admit such evidence, it will file a motion *in limine* with a complete argument within the deadline set by the Court in the Dispositional Conference Order.

elements of the armed career criminal and felon in possession charges, evidence that the defendant was convicted of these prior crimes would not be other acts evidence and would not be subject to Rule 404(b).

e. “Allegations of involvement with illegal drugs”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, the State may seek to introduce this evidence as intrinsic other acts evidence that is not subject to Rule 404(b). *See Wells*, 166 N.H. at 77–78. Specifically, the State anticipates that multiple witnesses will testify that the defendant offered to sell them the stolen firearms for drugs and money, and one witness will testify that he personally observed the defendant sell one of the stolen firearms for drugs. Evidence that the defendant was attempting to sell the stolen firearms (and did, in fact, sell one of the stolen firearms) is directly probative of the defendant possessing the stolen firearms. Furthermore, this evidence forms an integral part of the witness’s testimony and completes the story of the charged offenses in the 20 case. Therefore, it is admissible not as extrinsic other acts evidence subject to Rule 404(b), but as intrinsic other acts evidence not subject to Rule 404(b).

f. “Allegations of involvement with deadly weapons other than the weapons charged offenses”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, the armed career criminal and felon in possession charges require the State to prove that the defendant was previously convicted of certain offenses; as listed in the indictments, these prior convictions include assault and battery with a dangerous weapon and armed robbery. Because the State is required to prove the predicate convictions as elements of the armed career criminal and felon in possession charges, evidence that the

defendant was convicted of these prior crimes would not be other acts evidence and would not be subject to Rule 404(b).

g. “Allegations of theft other than the charged offenses”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, one of the predicate convictions for the two armed career criminal charges is a conviction for armed robbery, which includes an element of theft. In addition, the predicate convictions for the two felon in possession charges include the same armed robbery conviction, as well as a conviction for larceny from a person. Because the State is required to prove the predicate convictions as elements of the armed career criminal and felon in possession charges, evidence that the defendant was convicted of these prior crimes would not be other acts evidence and would not be subject to Rule 404(b).

h. “Prior convictions other than those included in the amended indictments”: The State does not intend to introduce this evidence in the 20 case. In the 577 case, the armed career criminal and felon in possession charges require the State to prove that the defendant was previously convicted of certain offenses. At the time the defendant filed his motion the State had amended the original armed career criminal and felon in possession indictments to include three prior felony convictions. However, since then the State has obtained new indictments which bring the prior convictions in line with the evidence the State intends to introduce at trial. Because the State is required to prove the predicate convictions as elements of the armed career criminal and felon in possession charges, evidence that the defendant was convicted of the prior crimes as alleged in the new indictments would not be other acts evidence and would not be subject to Rule 404(b).

6. Typically, Rule 404(b) issues would be resolved via motion *in limine*, filed in accordance with the deadline set either by rule or by the Court. In this case, the State sees no reason to deviate from standard procedure. Therefore, as noted previously, to the extent the State seeks to admit any of the above-referenced evidence under Rule 404(b), the State will file a motion with a complete argument by the deadline set in the Dispositional Conference Order of 15 days before the final pretrial hearing.

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

- (A) Deny the defendant's Motion Re: Allegations of Prior or Subsequent Bad Acts;
- and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

John M. Formella
Attorney General

Date: September 6, 2022

/s/ Jesse O'Neill
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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/ Jesse O'Neill
Jesse O'Neill