

**STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.  
NORTHERN DISTRICT**

**SUPERIOR COURT**

State of New Hampshire

v.

Adam Montgomery

Docket No. 216-2022-CR-00577

**OMNIBUS ORDER ON PENDING MOTIONS IN LIMINE**

The defendant is charged with two counts each of theft by unauthorized taking, receiving stolen property, felon in possession, and armed career criminal. The charges arise out of the alleged theft of two firearms, a rifle and a shotgun, from the residence of Christopher Frain. Presently before the Court are numerous motions *in limine*. The Court held a hearing on the pending motions on May 23, 2023. For the reasons set forth below, the Court finds and rules as follows.

**I. Defendant's Motion *in Limine* for Evidence of Other Firearms (Doc. 71); State's Response (Doc. 98); State's Further Response (Doc. 147/148); Defendant's Reply (Doc. 164)**

The defendant's initial motion *in limine* seeking to exclude evidence of other firearms sought to exclude evidence related to the reported sale of a Hi-Point firearm from Mark Reed to the defendant in 2019, the purchase of an AK-47 by the defendant in March 2020, and more generally a reference to other evidence within discovery of the defendant "being involved with firearms." (Doc. 71 ¶ 2). With respect to the Hi-Point firearm exchange with Mark Reed, the State argued that the video related to this firearm is necessary to show the identity of the Facebook messaging account that was used by the

defendant in communicating with Reed regarding the Frain firearms. Subsequent to the hearing, the defendant filed a stipulation regarding the identity of the Facebook account, thereby obviating the need to introduce evidence related to the Hi-Point firearm. Therefore, the defendant's motion to preclude evidence of the Hi-Point firearm is **GRANTED**.

With respect to the AK-47 sold to the defendant by "Britney," the State does not contest that this evidence should be excluded. Therefore, defendant's motion with respect to this evidence is **GRANTED**.

The defendant argues that Josh Zimmerman's testimony that the defendant bragged to him about selling firearms, specifically an AK-47, in 2021 is entirely unrelated to the firearms in this case and should be excluded. The State makes no argument that the statements by the defendant relate to the Frain firearms except to suggest that defendant's "admission to selling firearms in general is direct evidence of the [d]efendant possessing firearms." (Doc. 98 ¶ 3.) The Court finds that the State has set forth no non-propensity reasons for the admission of this evidence and the Zimmerman testimony on this issue is precluded pursuant to Rule 404(b)(2). Accordingly, the defendant's request is **GRANTED** as to the Zimmerman firearm testimony.

Finally, the defendant properly acknowledges that should the proper foundation be laid by the witness, the testimony of Tarah Hilbert regarding the defendant bragging about an AR-15 while living at 77 Gilford Street is direct evidence related to the instant charges and would therefore be admissible. Accordingly, the defendant's request to preclude this evidence is **DENIED**.

**II. Defendant's Motion *in Limine* for Prior Bad Acts of Witnesses (Frain, Peterson, Ramirez, Sullivan, Garcia) (Doc. 73); State's Partial Objection (Doc. 97)**

The defendant seeks to introduce at trial evidence properly characterized as “[e]vidence of other crimes, wrongs or acts” pursuant to Rule 404(b), arguing that the evidence is admissible for a purpose other than to prove the character of the person in order to show that the person acted in conformity therewith. Here, the State does not object to defendant’s request to admit evidence of drug use, sales or arrests of Kimberly Frain, Ismael Garcia, or Michael Sullivan. The parties agree that this evidence is inextricably intertwined with the other evidence in the case. Accordingly, that request is **GRANTED**.

The defendant also seeks to admit evidence that Hector Rivera used a shotgun in the commission of a robbery. The State argues that the defendant has not set forth evidence to show that Rivera used the stolen Frain shotgun in a robbery and that at best the evidence shows that Rivera may have used a gun, any gun, in a robbery. The State argues that this evidence is irrelevant, and if it has any relevance, it is purely character evidence. The Court agrees. Therefore, the Court finds that for the reasons set forth in the State’s objection, (Doc. 97 ¶¶ 14, 15,) the request to admit evidence of the Rivera robbery with a shotgun is **DENIED**.

Finally, the fact section of the defendant’s motion mentions that Kimberly Frain admitted that she pawned a wedding band on August 5, 2019, for 50 dollars. (Doc. 73 ¶ 8.) The defendant makes no argument regarding the admissibility of this evidence, nor does the defendant seek admission of this evidence in his prayer for relief. The Court notes, however, that further argument is presented in the defendant’s motion to admit

evidence of alternative suspect and exculpatory evidence (Doc. 157), and this evidence is therefore addressed in the Court's order on that motion.

**III. Defendant's Motion *in Limine* to Admit Impeachment Evidence Re: Kayla Montgomery (Doc. 81); State's Partial Objection (Doc. 102); Defendant's Supplemental Pleading to Admit Kayla Montgomery's Perjury Conviction (Doc. 171)**

In the defendant's motion filed prior to his previously scheduled trial, the defendant moved to admit evidence of Kayla Montgomery's "pending charges." Since the filing of that motion, Kayla Montgomery has resolved all of the charges and has been convicted of two counts of perjury. The State entered a *nolle prosequi* on all other charges. The defendant argues the convictions are relevant as they show that Kayla Montgomery had a motive to provide information to the police in order to gain some benefit in dealing with her own charges. Defendant also contends that the perjury convictions are admissible pursuant to Rule 609, and their probative value is not substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. N.H. R. Ev. 609.

The State agrees that the convictions are admissible as relevant to the issue of motive, but argues that the jury should only be permitted to hear that Kayla Montgomery was convicted of "felonies" and not the particular offenses at issue. After consideration of the arguments presented, the Court finds that neither the evidence of the types of felonies that were pending, nor the felony convictions present any unfair prejudice. Therefore, the motion to admit the impeachment evidence is **GRANTED**.

**IV. Defendant's Motion to Stipulate Status as a Felon (Doc. 81); State's Partial Objection (Doc. 101); Stipulation (Doc. 100)**

On May 24, 2023, the defendant filed an agreed-upon stipulation that at the time of the allegations in this case, the defendant had been previously convicted of a felony against the person or property of another, and that he had been previously convicted of a combination of three or more qualifying felonies listed under RSA 159:3-a, I. Accordingly, no further action is needed on this motion.

**V. Defendant's Motion Regarding Supplemental Voir Dire, Peremptories, and Attorney Conducted Voir Dire (Doc. 104)**

Per the final pretrial conference, the Court will select three alternates, the parties will have three peremptory challenges each, a joint request for supplemental voir dire questions has been submitted to the Court, and each side will have twenty minutes for panel voir dire.

**VI. Defendant's Motion *in Limine* Re: Allegations of Prior or Subsequent Bad Acts of Defendant (Doc. 151; duplicate at Doc.153); State's Partial Objection (Doc. 167); Defendant's Response (Doc. 182)**

Defendant's motion seeks to preclude the State from introducing the following evidence:

- a. Allegations of conduct underlying the charges in 216-2022-CR-20 and 216-2022-CR-2372, as well as general allegations that Mr. Montgomery abused, misused, or caused harm to Harmony Montgomery;
- b. Allegations of conduct underlying the charges in 216-2023-CR- 507 and 216-2023-CR-509, as well as general allegations that Adam sold other guns or had guns other than the ones specifically alleged in the indictments in this case.
- c. Allegations of domestic violence;
- d. Allegations of assaults and/or other assaultive behavior; including allegations of an assault on Corey Watts;
- e. Allegations that Mr. Montgomery sold illegal drugs;
- f. Allegations that Mr. Montgomery used illegal drugs;
- g. Allegations of theft other than the charged offenses;
- h. Evidence of prior convictions, except the reference in jury instructions to the stipulation to the requisite convictions for the status offenses.

The Court addresses each of the requests as follows:

a. This request seeks to exclude evidence related to allegations that the defendant abused, harmed, and caused the death of Harmony Montgomery. By way of separate motion, the defendant seeks to introduce evidence related to the investigation related to Harmony Montgomery during cross examination of certain witnesses in the case without “opening the door” to other information. (Doc. 152.) As the request in this motion is significantly impacted by the request in the defendant’s other motion, the Court will address both together in its ruling on Doc. 152.

b. The Court’s finds and rules on this request consistent with its orders *supra* on Defendant’s Motion *in Limine* Re: Evidence of Other Firearms (Doc. 71) and Defendant’s Motion to Stipulate Status as a Felon (Doc. 81). Additionally, the State does not object to the defendant’s request to exclude general allegations that the defendant sold guns or had guns other than those specifically addressed in this case. Therefore, this request is **GRANTED**.

c. With respect to the defendant’s request to preclude allegations of domestic violence, the parties are directed to the Court’s order on the State’s Motion *in limine* Re: Abuse of Kayla Montgomery (Doc. 144/145.)

d. The defendant seeks to exclude evidence of prior assaultive conduct by the defendant. The State does not object except to the extent necessary to prove the defendant’s prior convictions as they relate to the predicate offenses of the armed career criminal charges. As noted *supra*, the parties have informed the Court that they have agreed to a stipulation regarding predicate offenses. Accordingly, the request is **GRANTED**.

e. and f. The defendant seeks to preclude evidence that the defendant sold and/or used drugs, except that the defendant concedes that certain narrowly defined evidence of drug use is admissible. The Court finds that while not all evidence related to the defendant's drug use or sales would be admissible, the defendant's assessment of admissible evidence is too narrow. As noted by the State, certain evidence related to sales and barter of drugs, as well as drug use, is intrinsic to the case and therefore not Rule 404(b) evidence. When the evidence of the other act and the evidence of the crime charged are "inextricably intertwined" or part of the same "criminal episode" there is a causal connection with the charged crime and the uncharged offenses. Such evidence that is a prelude to the charged offense is directly probative, arises from the same events, forms an integral part of a witness's testimony, or completes the story of the charged offense. State v. Papillion, 173 N.H. 13, 24-25 (2020).

Here, the connections between people who know each other because they use drugs together may be an integral part of the case. For example, the connection between the defendant and Kimberly Frain would fall into this category. All discussions and evidence related to the disposition of the firearms at issue in this case as they relate to drug sales or exchanges would be intrinsic. This does not, however, mean that the State can introduce evidence of drug use or sales unrelated to the facts in this case. Based on the foregoing, the defendant's motion is **GRANTED in part and DENIED in part** consistent with this order and subject to contemporaneous objection by the defendant.

g. and h. The defendant seeks to exclude evidence of thefts other than the charged conduct and evidence of prior convictions other than those referenced in the parties'

stipulation related to predicate offenses. In light of the stipulation entered into by the parties, the State does not object to this. Accordingly, the request is **GRANTED**.<sup>1</sup>

**VII. Defendant's Motion *in Limine* for Ruling that Reference to the Existence of the Harmony Montgomery Investigation does not Open the Door to the Underlying Facts of the Investigation (Doc. 152); State's Objection (Doc. 166)**

At the hearing, the defendant represented that he does not intend to elicit testimony regarding the Harmony Montgomery investigation beyond providing context for why the police were speaking to certain witnesses in the first instance. The State agreed that this limited use would not open the door to the details of the Harmony investigation. Accordingly, the defendant's motion is **GRANTED**. At trial, should the State believe that the defendant has exceeded the scope of the foregoing and opened the door to additional information, it shall approach the bench and make an argument before introducing any such evidence.

**VIII. Defendant's Motion *in Limine* for Authorization to Disclose and Use Transcripts at Trial (Doc. 154); State's Partial Objection (Doc. 191)**

The parties have agreed to the use of the grand jury transcripts at trial. Therefore, that request is **GRANTED**. As to the defendant's request for permission to have transcripts while at the jail, at the hearing the parties agreed to confer and attempt to craft a protective order that would address the State's concerns. The Court will therefore hold a ruling on this motion in abeyance until such time as the parties notify it that they have failed to reach an agreement.

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<sup>1</sup> Pursuant to New Hampshire Rule of Evidence 609, should the defendant choose to testify, convictions may be admissible for impeachment purposes.

**IX. Defendant's Motion *in Limine* Re: Marital Privilege (Doc. 155); State's Objection (Doc. 192)**

At the hearing, both parties agreed that neither intends to introduce details of any private conversations between the defendant and Kayla Montgomery that would be subject to the marital privilege in Rule 504. Accordingly, the defendant's motion is GRANTED unless the defendant opens the door at trial.

**X. Defendant's Motion for a View (Doc. 156); State's Objection (Doc. 190)**

On May 24, 2023, the parties reached an agreement regarding this issue and the defendant withdrew this motion.

**XI. Defendant's Motion *in Limine* to Admit Evidence of Alternative Suspect and Exculpatory Evidence (Doc. 157); State's Partial Objection (168); Defendant's Reply (Doc. 181)**

The defendant seeks to introduce evidence about other individuals in support of his claim that Kimberly Frain traded or sold the missing firearms in exchange for drugs and/or money. The New Hampshire Supreme Court has "previously applied [Rule 404(b)] to determine the admissibility of evidence of another person's other 'bad acts' offered by the defendant to show that the person was an alternative perpetrator of the crimes." State v. Gay, 169 N.H. 232, 246 (2016). "[W]hen a defendant seeks to introduce evidence of an alternative perpetrator, to meet the relevance requirement of Rule 404(b), the defendant must show a clear connection, i.e., a nexus, between the purposes for which he seeks to introduce the evidence and the person's other bad acts." Id. at 247. Here, the defendant seeks to introduce the following:

1. Ismael Garcia and Kimberly Frain used and exchanged drugs with one another.
2. When Chris Frain first reported the missing firearms, he identified other items that were missing from the house, including a silver wedding band. He expressed concern to the police that Kimberly had sold or traded the ring for

drugs. Kimberly denied having anything to do with it and said it must have been stolen. The police later discovered that Kimberly had pawned the wedding ring on August 5, 2019.

3. The missing .380 was found in Omari Peterson's possession. Omari said he received it from Ismael Garcia. Michael Sullivan told police that Ismael obtained the .380 from Kimberly Frain. In a recent deposition, Michael testified that Ismael stated he obtained two of the missing firearms from Kimberly in exchange for drugs.<sup>2</sup>

As noted *supra*, the State does not object to the introduction of evidence relating to the use or sale of drugs, conceding that drug use and sales are inextricably intertwined with the charged offenses. However, the State does object to the introduction of the other two categories of evidence.

With respect to the wedding band, the State argues evidence of Kimberly Frain pawning the ring constitutes propensity evidence, as the defendant proposes to use it to show that Kimberly also sold or traded the missing firearms to Ismael Garcia. The State maintains that the defendant is not charged with theft of the ring, and its disappearance has no relevance to the instant case. The defendant responds that the ring was reported stolen at the same time as the guns, and that Kimberly at the time stated that the ring "must have been stolen too." The defendant maintains that evidence of the ring is directly exculpatory as it indicates Kimberly lied to the police. The defendant also argues that the ring is a specific instance of conduct that is probative of Kimberly's character for truthfulness or untruthfulness pursuant to Rule 608(b). The Court agrees with the defendant that evidence regarding the ring directly bears on Kimberly's credibility and is probative of her character for truthfulness or untruthfulness.

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<sup>2</sup> The defendant represented that this testimony does not constitute hearsay because Ismael's statements are statements against interest, as he is a convicted felon. See Rule 804(b)(3). The State did not contest this.

With respect to the .380, the State again argues this evidence should be excluded per Rule 404(b). Specifically, the State argues that the defendant has failed to present clear proof that Ismael committed the alleged act. The State also argues the evidence is irrelevant as the defendant is not charged with the theft of the .380 and the purported connection between Kimberly Frain and Ismael Garcia is based on speculation or conjecture.

The defendant responds that while the defendant was not charged with theft of the .380, it was nevertheless stolen from the Frains at the same time as the charged firearms and is thus “part and parcel of the inconsistent stories by Kimberly Frain of how and when they must have been stolen.” (Def.’s Reply ¶ 6.) In other words, he maintains that the circumstances of the missing .380 are inextricably intertwined with the other missing firearms. The defendant distinguishes Gay on the grounds that this is not “other bad acts” evidence, but rather evidence that Ismael committed the crimes with which the defendant is charged.

Relevant to the arguments above, there are some significant discrepancies in the witness testimony regarding the .380. Specifically, Chris Frain reported to the police that before he left town shortly before the alleged theft, he confirmed the presence of all three missing firearms in his residence. This testimony supports a finding that all three firearms were removed from the residence at the same time, which would make the theft or exchange of the .380 intrinsic to the charged crimes. On the other hand, Michael Sullivan’s deposition testimony appears to suggest that Ismael claimed he acquired the .380 from Kimberly approximately one month before the other firearms were allegedly stolen.

Even assuming that evidence of the .380 was not intrinsic to the charged crimes, the defendant has articulated a non-propensity purpose for its use. First, Ismael Garcia's alleged acquisition of the .380 from Kimberly Frain demonstrates that, at a minimum, Garcia had the opportunity to acquire or steal the other two firearms. The statements of Omari Peterson and Michael Sullivan provide "clear proof" under the Rule that Ismael Garcia was in possession of the .380 and acquired it from Kimberly Frain. Finally, there is no risk of unfair prejudice, as the evidence is similar to the charged crimes. See State v. Clark, 174 N.H. 586, 594 (2021) ("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.").

Based on the foregoing, the defendant's Motion *in Limine* to Admit Evidence of Alternative Suspect and Exculpatory Evidence is **GRANTED**.

**XII. State's Motion *in Limine* to Admit Evidence of Past Abuse by the Defendant Against Kayla Montgomery (Doc. 144); Defendant's Objection (Doc. 163); State's Reply (Doc. 174); Defendant's Surreply (Doc. 185).**

The State seeks to admit the following evidence derived from Kayla Montgomery's testimony before a grand jury in May 2022: (1) from February 2020 onward the defendant became very aggressive toward her and started being abusive towards her; (2) the defendant punched her in the face a couple times in 2020 and she was afraid of him at the time; and (3) she believed the defendant had the ability at that time to cause serious injury to her. The State argues that this evidence would explain differences between Kayla's anticipated testimony at trial and prior statements she made in March and May 2022. Specifically, Kayla told the police and the grand jury that she had never seen the

defendant in possession of firearms at their house. Approximately one month later, she made a proffer to the police that she did, in fact, see the defendant in possession of firearms—a shotgun and a rifle—shortly after the alleged theft in this case.

The State argues the evidence of the defendant’s alleged past abuse is admissible pursuant to Rule 404(b) to explain why Kayla’s testimony would change. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The New Hampshire Supreme Court has established a three-part test for assessing the admissibility of such evidence: “(1) the evidence must be relevant for a purpose other than proving the defendant’s character or disposition; (2) there must be clear proof that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant.” State v. Kim, 153 N.H. 322, 326 (2006). “The State bears the burden of demonstrating the admissibility of the prior bad acts.” Id. at 327.

In support of its position, the State relies heavily on State v. Beltran, 153 N.H. 643 (2006). In that case, the defendant murdered someone with a firearm that had been loaded by his girlfriend. Id. at 646. After the murder, the girlfriend withheld information from the police on the defendant’s instruction. Id. The trial court permitted the State to introduce evidence of the defendant’s abuse of his girlfriend as a means of explaining her conduct. Id. at 648. On appeal, the Supreme Court found that this evidence was relevant to rebut the defendant’s claim that his girlfriend was lying and to explain her conduct on

the night of the murders and why she initially lied to the police. Id. The Supreme Court therefore concluded the evidence was relevant for purposes other than proving the defendant's character or disposition and was highly relevant to the girlfriend's credibility. Id. at 648–49.

The State claims that it anticipates Kayla will testify that she provided false statements due to the abuse and conditioning she allegedly suffered at the defendant's hands. The defendant objects, arguing that the State has failed to establish a nexus between the alleged abuse and Kayla's testimony. Here, the alleged abusive conduct occurred over a year before Kayla's allegedly false statements to the grand jury. Kayla was also no longer in a relationship with the defendant at the time. At the grand jury, Kayla was specifically asked if she was afraid of the defendant at that time and she said no. The State has offered no evidence that the defendant was abusive to Kayla or made any threats to her in close proximity to her initial statements to the police.

At the hearing, the defendant agreed that Kayla would be permitted to claim that she initially lied to the police because she was afraid of the defendant due to past abuse, but argues that if she does so the defendant is entitled to impeach her with (1) the staleness of the abuse in question; and (2) Kayla's own statement that she was not afraid of the defendant before the grand jury. The Court agrees that the defendant would be entitled to impeach Kayla on these grounds. With respect to the details of the abuse that Kayla would testify to, the State maintained that it wants Kayla to have the opportunity to explain the abuse but recognized that certain limitations would be appropriate. Because the defendant does not appear to contest that the abuse occurred, the Court finds that specific details, including extrinsic evidence of the abuse such as photographs, are not

admissible. The State may, however, elicit the fact that Kayla was abused if she testifies that she gave false statements to the police and grand jury because she was fearful of the defendant.


Consistent with the foregoing, the State's motion is **GRANTED in part and DENIED in part.**

**XIII. Defendant's Supplemental Motion to Admit Impeachment Evidence Re: Kevin Labelle**

On October 19, 2022, the Court granted the defendant's prior motion to admit a number of prior criminal convictions as impeachment evidence against Kevin Labelle. The defendant now moves to also admit a new charge for failure to comply with the terms of Labelle's registration as a sex offender from Docket No. 216-2023-CR-542. The State offers no objection. Accordingly, the defendant's motion is **GRANTED.**

**SO ORDERED.**

May 25, 2023  
Date

  
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Amy B. Messer  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 05/25/2023