

**STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.  
NORTHERN DISTRICT**

**SUPERIOR COURT**

State of New Hampshire

v.

Adam Montgomery

Docket No. 216-2022-CR-00577;  
216-2023-CR-00507

**ORDER ON STATE'S MOTION TO JOIN**

In Docket No. 216-2022-CR-577, the defendant is charged with 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. In Docket No. 216-2022-CR-507, the defendant is charged with felon in possession and armed career criminal. These charges arise out of the defendant's alleged possession of a pistol he purchased from M.R. The State now moves to join the two cases for trial. The defendant objects. For the reasons set forth below, the State's motion is DENIED.

**Factual Background**

On March 1, 2022, Manchester Police Detective Jack Dunleavy and Deputy Tufts with the United States Marshals Service spoke to M.R. at the New Hampshire State Prison. M.R. told the police that the defendant had reached out to him via Facebook Messenger at random in July 2019, claiming that they had gone to high school together. M.R. met with the defendant and gave him drugs to sell. At some point, the defendant asked M.R. if he knew where to get a gun. M.R. told the defendant that he had a Hi-Point

pistol that was missing a firing pin. M.R. brought the pistol to the defendant's residence in Manchester. The defendant traded drugs and money for the pistol. The defendant's wife, Kayla, was present for this transaction, and she corroborated the foregoing to the police.

The defendant later sent two videos via Facebook Messenger that depicted him holding the pistol while attempting to pull the trigger. The defendant stated in the video that the trigger would not squeeze. The defendant's forearms, which are tattooed, are visible in the videos. The defendant later told M.R. that he had cleaned the gun and the trigger was working, but it needed a "clip pin." He asked M.R. if the gun was "clean" because he wanted to order the part from the manufacturer. M.R. told the defendant it was not stolen, and the defendant ordered the part from Hi-Point Firearms. The defendant's possession of the Hi-Point pistol gave rise to the charges in Docket No. 216-2023-CR-507.

During his interview with police, M.R. also stated that on October 3, 2019, the defendant had contacted him from the same Facebook Messenger account. The defendant was urgently trying to sell two firearms in exchange for drugs and money. From the messages it is clear that one of the guns was a shotgun. Ultimately, no sale occurred. The State alleges that the defendant had stolen the firearms—a rifle and a shotgun—the day before from Christopher Frain. The theft and resulting possession of the Frain firearms gave rise to the charges in Docket No. 216-2022-CR-577.

### **Analysis**

Pursuant to New Hampshire Rule of Criminal Procedure 20, either party may move to join multiple related offenses for a single trial. If the Court determines that the offenses

are related, it must join them for trial “unless it determines that joinder is not in the best interests of justice.” State v. Brown, 159 N.H. 544, 555 (2009). Offenses are related if they:

- (A) are alleged to have occurred during a single criminal episode; or
- (B) constitute parts of a common scheme or plan; or
- (C) are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

N.H. R. Crim. P. 20(a)(1)(A)–(C). Here, the State first argues that the offenses at issue were part of a common scheme or plan. Joinder of offenses under this theory does not, in all cases, require a finding that the success of later charged offenses depended upon the success of earlier ones. State v. Bell, 175 N.H. 382, 394 (2022). Instead, “the distinguishing characteristic of a common plan is the existence of a true plan in the defendant’s mind, which includes the charged crimes as stages in the plan’s execution.” Id. “This analysis ensures that the defendant was not merely taking advantage of opportunities as they arose, but instead was exhibiting forethought and premeditation in his scheming.” Id.

In its motion, the State briefly argues that the defendant’s course of conduct involved continued firearm exchanges for drugs and money. However, there is nothing in the facts offered by the State that supports the existence of a true plan in the defendant’s mind. Rather, the defendant’s acquisition of firearms in this case—one through a mutual transaction and the others through theft months later—are more indicative of the defendant taking advantage of opportunities as they arose. There does not appear to be any forethought and premeditation connecting the two events. Accordingly, the Court finds that the offenses are not part of a common scheme or plan.

The State also argues that joinder is appropriate under Rule 20(a)(1)(C). In Brown, the New Hampshire Supreme Court articulated a five-factor test to assist in determining whether multiple charges are related under this prong. The factors to be considered are: (1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant's mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony, and other evidence related to the offense. 159 N.H. at 551–52. “No single factor is dispositive on the question of relatedness.” Id. at 552. Rather, they must be applied in accordance with the purpose of joinder. That purpose is defined, in part, as follows:

The joint trial of offenses that share common factual circumstances enables the state to avoid the duplication of evidence required by separate trials, to reduce the inconvenience to victims and witnesses, to minimize the time required to dispose of the offenses, and to achieve a variety of other economies in connection with prosecutorial and judicial resources.

Id.

Here, there is no spatial or temporal proximity as the two transactions giving rise to the charged offenses occurred at different locations approximately three months apart. Moreover, the only common participant in both transactions was the defendant, and there were no victims in the Hi-Point transaction. Further, while the State argues the defendant's mode of operation was “nearly identical” in both cases, the Court disagrees. As noted above, the Hi-Point sale involved the defendant exchanging drugs and money for a gun in a mutual transaction. On the other hand, the defendant acquired the Frain guns through theft. Therefore, there was no similarity in the defendant's mode of operation. Accordingly, the first three factors weigh against joinder. The fourth factor,

however, weighs in favor of joinder, as there is a significant overlap in charges in the two cases.

The State places significant emphasis on the fifth factor. There would be duplication of some witnesses in separate trials of these two cases, as M.R. and Kayla could attest to the defendant's possession of all firearms at issue. The State also notes that both incidents were uncovered by the same investigating officers. However, the Frains would only offer testimony as to the theft case. The State has failed to identify any additional witness crossover. Therefore, while on balance the duplication of witness weighs in favor of joinder, it does so only slightly.

The State further maintains that evidence from each case will be admissible in the other for a non-propensity purpose. Pursuant to Rule of Evidence 404(b), "[e]vidence 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." Such evidence may be admissible, however, if it is used to show "proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." N.H. R. Evid. 404(b)(1). To introduce such evidence, the State must establish: (1) that the evidence is relevant for a purpose other than character or disposition; (2) that there is clear proof that the defendant committed the prior act; and (3) that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. N.H. R. Evid. 404(b)(2); State v. Roy, 167 N.H. 276, 287 (2015).

First, the State argues that the video message the defendant sent to M.R. after purchasing the Hi-Point pistol would be admissible in the theft case to establish the identity of the holder of the Facebook Messenger account that contacted M.R. after the

alleged theft. The video in question depicts the defendant's tattooed forearms and contains the defendant's voice. However, while the Court agrees that the video has a tendency to establish the identity of the Facebook account owner that sent it, the details of the Hi-Point transaction that preceded the video are entirely unrelated to proving identity of the Facebook account. The video evidence could be sanitized, either through redaction, editing, or jury instruction, to remove reference to the circumstances of defendant's possession of the Hi-Point pistol while still serving to identify the defendant as the owner of the Facebook account.

The State also argues that evidence of the theft of the Frain firearms would be admissible in the Hi-Point case for the purpose of showing the defendant's motive to obtain drugs and money for drugs. The Court disagrees, and notes that the State's argument is incompatible with the facts alleged in the Hi-Point case. In acquiring the Hi-Point pistol from M.R., the defendant *paid* money and *gave away* drugs. The defendant then apparently spent additional money acquiring a missing part from the gun manufacturer. While acquiring drugs and money may have been the defendant's motive in stealing and subsequently selling the Frain firearms, there is no indication of a similar motive in the Hi-Point transaction.

Based on the foregoing, the Court finds that evidence of each case is not wholly admissible in the other for a non-propensity purpose. Therefore, trying the cases separately would not result in any significant duplication of evidence. Accordingly, the fifth factor is at best neutral.


Considering the totality of the Brown factors, the two cases are not logically and factually connected in a manner that does not solely demonstrate that the accused has a

propensity to engage in criminal conduct. Therefore, the cases are not related and joinder is not appropriate. As a result, the Court need not consider whether joinder would be in the “best interest of justice.”

Accordingly, for the foregoing reasons, the State’s motion to join is DENIED.

**SO ORDERED.**

April 20, 2023  
Date

  
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Amy B. Messer  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 04/21/2023