

HILLSBOROUGH, SS.
Northern District

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

Case No. 216-2022-CR-00577

**STATE’S PARTIAL OBJECTION TO DEFENDANT’S MOTION *IN LIMINE* RE:
ALTERNATIVE SUSPECT AND EXCULPATORY EVIDENCE**¹

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects in part to the defendant’s Motion *in Limine* Re: Alternative Suspect and Exculpatory Evidence (“Def.’s Mot.”). On October 11, 2022, the defendant filed his Motion in Limine – Prior Bad Acts of Witnesses (“Prior Mot.”). On October 21, 2022, the State responded to the Prior Mot. in partial objection. The defendant did not file a reply to the State’s partial objection and did not withdraw his Prior Motion. The Prior Mot. is still pending before the Court. On May 1, 2023, the defendant filed Def.’s Mot. wherein he has requested the same relief and provided a similar factual summary.² In the Def.’s Mot., he has added passing reference to “due process and other constitutional protections, without providing argument or analysis. (Def.’s Mot. ¶ 14.) Also, in Def.’s Mot. the defendant argues that because the evidence is inextricably intertwined, it does not fall under Rule 404(b). (Def. Mot. ¶ 6.) In his Prior Mot., based on the same factual summation, and with the same requested

¹ Previously filed as Motion in Limine – Prior Bad Acts of Witnesses on October 11, 2022.

² In his new motion, Def. Mot., the defendant provided information from the recent deposition of Michael Sullivan. See Def. Mot. ¶ 13.

relief, the defendant argues that an analysis under Rule 404(b) is required. (Prior Mot. ¶ 18 – 26.) The defendant is mistaken as to both these premises and his motion should be denied.

1. In each of the filed motions, the defendant presents his alternative perpetrator theory that Kimberly Frain traded or sold the missing guns to Ismael Garcia for drugs or money. (Def.'s Mot. ¶ 5, Prior Mot. ¶ 20.) As the defendant correctly notes in his Prior Mot. (Prior Mot. ¶ 18), Rule 404(b) of the New Hampshire Rules of Evidence is applied to determine the admissibility of another person's "bad acts" that are offered by the defendant to forward a theory that the other person was, in fact, the perpetrator of the crimes with which the defendant is charged. *State v. Gay*, 169 N.H. 232, 246 (2016). *Gay* and its progeny apply specifically in cases "when admissibility of evidence of another person's other "bad acts" [are] offered by the defendant to show that the person was an alternative perpetrator of the crimes." *Gay*, 169 N.H. 232, 246 (citing *State v. Roy*, 167 N.H. 276, 290, (2015) (agreeing with trial court that Rule 404(b) applied to alternative perpetrator evidence at issue in that case); see also *State v. Durgin*, 165 N.H. 725, 729 (2013) (assuming, without deciding, that Rule 404(b) applies to alternative perpetrator evidence).

2. Rule 404(b) states:

(1) 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.

(2) Evidence of other crimes, wrongs or acts is admissible under this subsection only if:

(A) it is relevant for a purpose other than proving the person's character or disposition;

(B) there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and

(C) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

3. The concept of relevancy is explicit in Rule 404(b)(2)(A), as the other acts evidence must be relevant for a permissible purpose. Therefore, if potential evidence is irrelevant, it is inadmissible. *See also* N.H.R. Evid. 402.

4. In advancing his alternative perpetrator theory, the defendant focuses on three categories of alleged “overt” acts which he argues are admissible.

5. First, the defendant is seeking to admit evidence of prior drug use by Kimberly Frain’s and Ismael Garcia’s as well as evidence of prior drug sales by Garcia. The State does not object to this request. As articulated in several prior pleadings in this case, the State sees the defendant’s involvement with illegal drugs at and around the time of the charged offenses as an integral part of the testimony of various anticipated witnesses. This evidence completes the story of the charged offenses in the instant case and is inextricably intertwined with the evidence of the current case. The same is likely true for the evidence of prior drug acts by Kimberly Frain and Garcia. The State expects that the evidence at trial would be that the defendant, together with Kimberly Frain, Garcia, Michael Sullivan, and others were connected by drug use and drug sales. Evidence of drug use and sales thereby is inextricably intertwined with the facts and circumstances of the charged offenses; therefore, such evidence would be intrinsic other acts evidence not subject to Rule 404(b). *See State v. Wells*, 166 N.H. 73, 77–78 (2014).

6. As to evidence of the remaining two categories of alleged “overt” acts that the defendant seeks to admit, as discussed *infra*, the State objects to their admission. The defendant has not and cannot identify a permissible purpose for such evidence, and instead appears to be intending to use such evidence as impermissible character or propensity evidence.

A. Kimberly Frain Pawning a Wedding Band, a Movado Watch and Subwoofers

7. In each of the filed motions, the defendant discusses an alleged “overt” act in which Kimberly Frain pawned a wedding band on August 5, 2019. (Def.’s Mot. ¶ 7 and Prior Mot. ¶ 21). However, it is not clear to the State whether the defendant is seeking to admit this evidence as part of the alternate perpetrator theory because the defendant did not include this request in his prayer for relief in either filing.

8. To the extent the defendant is seeking to admit such evidence, the defendant has not and cannot identify a permissible purpose under Rule 404(b). The defendant appears to argue that because the wedding band that Kimberly Frain pawned on August 5, 2019, was reported stolen in October 2019, it is more likely that she, not the defendant, is the person who sold or traded the missing guns to Garcia. The State fails to see how that use would be anything other than impermissible character or propensity evidence wherein the defendant would argue that Kimberly Frain was acting in conformity with alleged prior behavior. Outside of the impermissible propensity inference, this evidence is irrelevant—the defendant’s charges do not relate to the wedding band, and he is not accused of anything having to do with the wedding band. Similarly, there is no evidence nor any suggestion that Kimberly Frain sold or traded a firearm similar to either of the charged firearms. Because the defendant cannot articulate a

permissible purpose under Rule 404(b), any evidence related to the pawning or theft of the wedding band must be excluded.

B. Sale of Christopher Frain's Stolen Ruger .380 to Omari Peterson by Ismael Garcia, and Other Firearm Evidence Related to Peterson and Garcia

9. In each of the filed motions, the defendant discusses an alleged “overt” act in which Ismael Garcia sold Christopher Frain’s stolen Ruger .380 (“the Ruger”) to Omari Peterson. (Def.’s Mot. ¶ 11, Prior Mot. ¶ 22.) In the prayers for relief, the defendant seeks to admit evidence of Garcia’s sales of firearms and Peterson’s illegal possession of guns.

10. The defendant’s argument appears to be that because Kimberly Frain is associated with Garcia, his sale of the Ruger to Peterson makes it likely that Kimberly Frain actually sold or traded the rifle and the shotgun to Garcia. The defendant has no clear proof and is attempting to use conjecture rather than facts as evidence to put forth the theory that Kimberly Frain or Garcia is the alternate suspect. Rule 404(b) requires not only legitimate purpose but also clear proof. The argument for excluding evidence of the sale of the Ruger to Peterson by Garcia is the same as the argument related to the pawned wedding band and other items, *supra*. As the defendant correctly stated in his Prior Mot., and as set forth in *Gay* and its progeny, Rule 404(b) applies to this type of evidence. The defendant has not and cannot articulate a legitimate purpose under Rule 404(b). The proffered evidence is nothing more than impermissible character or propensity evidence.

11. The Ruger is admittedly more related to the defendant’s current charges than are the items pawned by Kimberly Frain; the Ruger was apparently stolen at or around the time the same time as the rifle and shotgun with which the defendant stands charged. However, evidence about the Ruger is irrelevant in the instant case in that the defendant is not charged

regarding the Ruger. Further it is irrelevant to the defendant's alternative perpetrator theory as nothing about the sale from Garcia to Peterson implicates Kimberly Frain beyond speculation, conjecture, or rumor – none of which would overcome a hearsay objection, let alone the test required for admission of evidence under 404(b). Because evidence of the sale of the Ruger from Garcia to Peterson is not relevant for any permissible purpose under Rule 404(b), then it must be excluded.

12. Regarding any additional sales of firearms by Garcia or illegal possession of guns by Peterson, such evidence would also be irrelevant for any permissible purpose in the instant case and would only serve as impermissible propensity evidence. Therefore, such evidence must also be excluded.

C. Passing Reference to Due Process and other Constitutional Provisions

13. In the body of his motion, the defendant makes passing reference to “*Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Laurie*, 139 N.H. 325 (1995), as well as his right to a fair trial, due process, and right to all proofs favorable guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Part 1, Article 15 of the N.H. Constitution.” (Def. Mot. ¶ 14) The defendant does not further elaborate upon this argument and, as such, it should be deemed waived. *See State v. Chick*, 141 N.H. 503, 504 (1996). The New Hampshire Supreme Court has long held that “passing reference to ‘due process,’ without more, is not a substitute for valid constitutional argument.” *Id.*

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

(A) Deny the defendant's requests to admit evidence regarding Kimberly Frain pawning items in August 2019; the sale of Christopher Frain's stolen Ruger .380 to Omari Peterson by Ismael Garcia; and other firearm evidence related to Peterson and Garcia; and

(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: May 11, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the State of New Hampshire e-filing system to Carrie Smith, Esq., counsel of record in this matter.

/s/ R. Christopher Knowles
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