

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* –
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 in part to the defendant’s Motion *in Limine* – Allegations of Prior or Subsequent Bad Acts (“Def.’s Mot.”).

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 case. This case is scheduled for trial in late May.

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) 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.

3. 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.

4. 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.

5. “Motive has been defined as supplying the reason that nudges the will and prods the mind to indulge in criminal intent.” *State v. Kim*, 153 N.H. 322, 328. In *State v. Costello*, the Court addressed whether a defendant’s drug addiction is relevant to show motive to steal as an issue of first impression. *See State v. Costello*, 159 N.H. 113, 119. In *Costello*, the Court upheld the admittance of evidence of the defendant’s heroin addiction and that he was “usually broke” as providing a sufficient nexus between his addiction and his motive to steal. *See Id.* at 122.

6. 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.) 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).

7. First, the defendant asks this Court for an order precluding allegations of the conduct underlying the charges in case no. 216-2022-CR-20 and 216-2022-CR-2372 as well as any allegations that “Mr. Montgomery abused, misused, or caused harm to Harmony Montgomery.” See Def.’s Mot. ¶ 3. The State has no intention of using this evidence in its case-in-chief and does not object to the requested order. However, the State notes that the defendant filed, concurrently with Def.’s Mot., his Motion in Limine – Evidence Regarding Existence of Investigation into the Whereabouts of Harmony Montgomery noting his intention to question witnesses regarding their “concerns that they may be implicated in the Harmony Investigation and sought favor from the State by providing false information in the investigation gun investigation.” See *Motion in Limine – Evidence Regarding Existence of Investigation into the Whereabouts of Harmony Montgomery* ¶ 6. As fully addressed in its *Objection*, the State is opposed to such a line of inquiry by the defense.

8. With respect to the motion to preclude allegations of conduct underlying the charges in case no. 216-2023-CR-507 and 216-2023-CR-509, as well as general allegations that the defendant sold other guns or had other guns, the State objects in part. The State directs the Court to its Amended Response in Partial Objection to Defendant’s Motion in limine: Evidence of Other Firearms, filed on May 1, 2023. In its *Partial Objection*, the State noted that it does not object to the preclusion of evidence of the AK-47 (the firearm identified in case no. 216-2023-CR-509); however, for the reasons fully addressed in its pleading, the State seeks the admission of evidence from case no. 216-2023-CR-507 (evidence of the Hi-Point firearm). In its pleading, the State also opposed the defendant’s request to preclude relevant, direct

evidence of the instant charges. In November 2022 the parties discussed a stipulation to the predicate offenses, but no stipulation was made. Again, on May 5, 2023, the State attempted, via email, to revisit a stipulation regarding the predicate offenses. As of the filing of this pleading, no response has been received. Without a stipulation to the predicate offenses, the armed career criminal and felon in possession 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).

9. With respect to the motion to preclude allegations of domestic violence, the State objects. On May 1, 2023, the State filed its Motion *In Limine* to Admit Evidence of Past Abuse by the Defendant Against Kayla Montgomery. By way of its motion, the State is seeking a pretrial ruling on the admission of evidence of domestic violence perpetrated upon Kayla Montgomery by the defendant to explain her behavior or lack thereof. *See State v. Beltran*, 153 N.H. 643, 647–50 (2006).

10. With respect to the motion to preclude allegation of assaults and/or other assaultive behavior, including allegations of an assault on Corey Watts the State objects in part. The State has no intention of introducing evidence of the assault on Corey Watts in its case-in-chief; however, the defendant is charged with armed career criminal and felon in possession which 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 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).

11. With respect to the motion to preclude allegations that the defendant sold illegal drugs and used illegal drugs the State objects. The State seeks 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. One witness will testify that he personally observed the defendant sell one of the stolen firearms for drugs. Another witness will testify that he purchased a firearm from the defendant for drugs and later sold the firearm back to the defendant for drugs. Several witnesses will testify that the defendant gained entry into Christopher and Kimberly Frain’s home under the guise of using drugs with Kimberly and thereby had access to the stolen firearms. Evidence that the defendant was attempting to sell the stolen firearms and, did sell one of the stolen firearms is directly probative of the defendant possessing the stolen firearms. As articulated in prior pleadings in this case, the State sees the defendant’s involvement with illegal drugs around the time of the charged offenses as an integral part of the testimony of various anticipated witnesses, which completes the story of the charged offenses in the instant case. The State expects that the evidence at trial would be that the defendant, together with Kimberly Frain, Ishmael Garcia, Michael Sullivan, and likely others, formed a loose association of friends/acquaintances/associates connected to each other by drug use and drug sales. This evidence also forms an integral part of the witness’s testimony and completes the story of the charged offenses. Evidence of drug use and sales would be 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).

12. Generally, evidence of other crimes would have to be admitted under Rule 404(b); however, the NH Supreme Court held in *Papillion* that evidence which is intrinsic to the case at hand is not 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 which is a prelude to the charged offense is directly probative, arises from the same events, forms an integral part of a witness’ testimony or completes the story of the charged offense. *State v. Papillion*, 173 N.H. 13, 24-25 (2020). The Court in *Papillion*, cited to *Wells* where it had previously found that other act evidence could be intrinsic to a case under the rationale that “events do not occur in a vacuum and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act” in order to conduct a realistic evaluation of the evidence. *State v. Wells*, 166 N.H. 73, 78 (2014).

13. In order for intrinsic evidence to be admissible, the trial court would follow the Rule 403 balancing test. *See State v. Nightingale*, 160 N.H. 569 (2010) and *State v. Dion*, 164 N.H. 544 (2013). Under Rule 403, evidence may be excluded if the probative value is substantially outweighed by unfair prejudice, confusion of the issues, is misleading to the jury, presents cumulative evidence, causes undue delay or wastes time. The Court in *Ainsworth*, advised that evidence would be unfairly prejudicial where its primary purpose was to appeal to sympathy or cause the jury to base its decision on something other than the evidence in the case. *State v. Ainsworth*, 151 N.H. 691 (2005). Here, the evidence of narcotics crimes sought

to be admitted goes directly to the relationship of the parties, the knowledge of the defendants concerning the victim and the circumstances surrounding the charged event; it is intrinsic.

14. Assuming *arguendo*, that Rule 404(b) does apply to the defendant's drug use and sales, the evidence should be admitted under Rule 404(b) as it is relevant to charged offenses to provide context and to show the defendant's motive to steal. *Costello* stand for the general proposition that "before evidence of a defendant's drug addiction is admissible, the State must first establish a nexus between the defendant's financial motive to commit the theft offense and his ongoing need to purchase drugs to satisfy his addiction." *State v. Costello*, 159 N.H. 113, 122. The State anticipates that multiple witnesses will testify that in late 2019 the defendant, who was unemployed, had begun to sell many of his household possessions including his family pet to support his drug habit. Additionally, several witnesses will testify that the defendant offered to sell them the stolen firearms for drugs and money. The evidence supports the nexus between the defendant's drug addiction and the theft and sale of the stolen firearms (i.e., that the defendant was addicted to drugs at or near the time of the offense (and, therefore, compelled to obtain the drug), and that he lacked sufficient income from legal sources to sustain his continuing need for the drug). This evidence will only be used for the purpose of demonstrating the defendant's motive to steal the firearms and to provide context and not in an effort to show action in conformity with his past behavior (?).

15. There is clear proof that the acts involving the defendant's drug use and drug sales occurred and the defendant committed them. Many of the transactions are documented via preserved social media messages between the defendant and witnesses. The defendant also offered to sell the stolen firearms for drugs and money, and did sell one of the firearms for drugs.

16. Finally, the danger of unfair prejudice to the defendant does not substantially outweigh the probative value of the evidence. Here, as established above, evidence that the defendant was addicted to illegal drugs, specifically crack cocaine, at the time of the charged offense was probative of his motive to steal. Additionally, the evidence would only be admitted on the issue of motive and to provide context and the court could provide a limiting instruction minimizing any possibility that the jury would misuse the evidence, and by doing so reducing any potential for unfair prejudice. *See State v. Pepin*, 156 N.H. at 279. The jury is presumed to follow the trial court's instructions, thus diminishing any potential for unfair prejudice from admitting evidence that the defendant was addicted to crack cocaine.

17. With respect to the motion to preclude allegations of theft other than the charged offenses the State objects in part. 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, absent a stipulation to the predicate offenses, 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).

18. Finally, with respect to the motion to preclude evidence of prior convictions, except the reference in jury instructions to the stipulation to the requisite convictions for the status offenses, the State objects. In November 2022 the parties discussed a stipulation to the predicate offenses, but no stipulation was made. Again, on May 5, 2023, the State attempted, via email, to revisit a stipulation regarding the predicate offenses. As of the filing of this

pleading, no response has been received. Without a stipulation to the predicate offenses, the armed career criminal and felon in possession charges require the State to prove that the defendant was previously convicted of certain offenses. 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).

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

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: May 10, 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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