

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

RESPONSE TO STATE’S OBJECTION TO MOTION IN LIMINE
RE: ALTERNATIVE SUSPECT AND EXCULPATORY EVIDENCE

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court rule that evidence implicating an alternative suspect and exculpatory evidence is admissible.

1. It is the defense to the theft charges that Mr. Montgomery did not steal Chris Frain’s missing guns, but rather, Ismael Garcia took the missing guns from the Frain residence.

2. The defendant filed a motion seeking a pre-trial ruling that evidence that Ismael Garcia acquired Chris Frain’s missing .380 pistol from Kimberly Frain in exchange for drugs and/or money for drugs was admissible as evidence inextricably intertwined with the charged offenses against Mr. Montgomery—that he acquired all three of Chris Frain’s missing guns from Kimberly Frain in exchange for drugs and/or money for drugs. He also sought a pre-trial ruling that because the currency for the conveyance involved drugs, that evidence of drugs use and sale was inextricably intertwined with the allegations of theft. The defendant further asserted that as the evidence was intrinsic to the charged offenses of theft against Mr. Montgomery, the Rule 404(b) analysis was not applicable.

3. The State objected asserting that evidence of sale of Christopher Frain’s Ruger. 380 to Omari Peterson by Ismael Garcia and Other firearm Evidence related to Peterson and Garcia, are other bad acts subject to the Rule 404(b) analysis, noting that the defendant filed a prior motion for admission based upon Rule 404(b).

4. First, the defendant filed this motion as an alternative ground on admission. Second, the defendant does not intend to introduce other firearm evidence related to Peterson and Garcia.

5. The defendant is merely seeking a pre-trial ruling that evidence of who removed Chris Frain's .380 Ruger from his residence on October 2, 2019 is part and parcel of the evidence of how all three of Chris Frain's missing guns were taken – that all three were taken at the same time by the same person or persons during the same transaction. Mr. Montgomery seeks to introduce evidence of the removal of the .380 as part of the evidence of the removal of all three missing guns, and not limit the evidence to the two guns he is alleged to have stolen.

6. The State located the missing .380 and spoke to the person who possessed it, Omari Peterson. Mr. Peterson told law enforcement that he acquired the gun from Ismael Garcia in the fall of 2019. Subsequently, Mr. Montgomery was not charged for the missing .380 but was only charged with the other two missing guns. That strategic charging, however, does not remove the missing .380 from the equation. The three are part and parcel of the same report of stolen guns by Chris Frain and part and parcel of the inconsistent stories by Kimberly Frain of how and when they must have been stolen. Thus, in introducing evidence that Mr. Garcia stole/bartered or traded Kim Frain for the missing guns, he should be able to include evidence that Mr. Garcia stole/bartered or traded Kim Frain for the missing .380.

7. The State cited to State v. Gay, 169 N.H. 232 (2016) to support its assertion that the 404(b) analysis must be met before introduction of evidence of that Ish Garcia removed at least one of the three missing guns from the home. Gay involved evidence of “allegedly has gang affiliations, owns weapons, has committed other crimes, or is generally a ‘scary’ person”. The evidence was precluded because the defendant could not demonstrate “that such ‘bad acts’ have any nexus to the crime charged. Here, the evidence at issue is evidence that Mr. Garcia committed the crime charged. It is not evidence of other bad acts.

8. Similarly, in State v. Durgin, 165 N.H. 725, the Court precluded alleged other bad act evidence of motive when there was no evidence connecting the witnesses to the crime. Here, the defendant will be producing evidence connecting Mr. Garcia to the crime. This issue is whether that “crime” includes the missing .380 Ruger for which Mr. Montgomery has not been charged. Because the circumstances of the missing Ruger are inextricably intertwined with the missing shotgun and rifle, it should be admissible.

9. The State did not object to the evidence of drugs, although for different reasons than offered by Mr. Montgomery.

10. The State also objected to the introduction of exculpatory evidence showing that Kimberly Frain lied to the police, also under Rule 404(b) grounds. That Kimberly Frain lied to the police is not an ‘other bad act,’ it is part of the report to the police of the theft.

11. Chris Frain called the police on October 3, 2019 to report his guns stolen. He included in his report a list of other items he noted were missing. That list included a wedding ring. When the officer asked Ms. Frain about the other items, she stated “They must have been stolen too.” The police discovered that the wedding ring had been pawned by Ms. Frain over a month prior to it being reported stolen, and in December, Ms. Frain admitted that she had pawned the ring. That she pawned the ring is exculpatory evidence that she lied to the police, that she didn’t want her husband or the police that she had pawned at least one of the items that she told the police must have been stolen.

12. In addition to being exculpatory evidence, it is a specific instance of conduct that the Court may allow on cross examination as probative of the truthfulness or untruthfulness of the witness under New Hampshire Rule of Evidence 608(b).

WHEREFORE, Adam Montgomery respectfully requests respectfully requests this Honorable Court rule that evidence of the transactions between Kimberly Frain and Ismael Garcia is admissible and as evidence intertwined with the missing firearms for which Adam Montgomery is charged. In addition, he requests this court rule that exculpatory evidence that Kimberly Frain pawned her wedding ring and later lied to the police is an integral part of the investigation and admissible, as well as admissible under NHRE Rule 608.

Respectfully submitted,

/s/ Caroline L. Smith

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION IN LIMINE has been forwarded to the Office of the Attorney General on this 17th day of May, 2023.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.