

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 OBJECTION TO DEFENDANT'S MOTION IN LIMINE: MARITAL PRIVILEGE**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's Motion In Limine: Marital Privilege ("Def.'s Mot.") pursuant to N.H. Evid Rule 504. The defendant seeks to preclude the introduction of statements conversations, letters, text or Facebook Messenger messages or any other communications made to his estranged wife, Kayla Montgomery ("Kayla") in private, or "to any other person regarding those private communications" Def.'s Mot at A. The defendant also asks this Court to order the State to identify communications made in private during the marriage that it seeks to introduce. The defendant is mistaken as to both of these premises and his motion should be denied.

1. The defendant is facing multiple charges of Armed Career Criminal, Felon in Possession, Theft, and Receiving Stolen Property. These charges relate to allegations of the defendant stealing/possessing a rifle and a shotgun ("Frain firearms") in approximately September/October 2019. It is anticipated that at trial multiple individuals will testify that they

witnessed the defendant with the two firearms at his residence on Gilford Street in Manchester in approximately October 2019. Jury selection is scheduled for May 31, 2023.

2. One individual, Kevin Labelle (“Labelle”), told police that he believed Kayla definitely knew the defendant had the stolen firearms. Labelle said that Kayla was walking in and out of living room while he and the defendant were talking about the firearms. He said that Kayla clearly saw the firearms, and the defendant was openly talking about the firearms being “hot” (which can be a slang term for stolen). Labelle told police that he purchased the stolen 12-gauge shotgun from the defendant and that they went to the woods and shot the firearm. Labelle also reported that several months later, he sold the shotgun back to the defendant in exchange for drugs.

3. Another individual, Michael Sullivan (“Sullivan”), told police that Kayla was present in the room at 77 Gilford Street with Sullivan and the defendant when the defendant had a rifle and a shotgun. Sullivan said the defendant was openly talking about firearms and how he had stolen them from the Frain home.

4. A third individual, Tarah Hilbert (“Hilbert”), told police that the defendant had spoken to her about selling firearms, including a rifle, out of his house, which she believed was 77 Gilford Street. Hilbert said that Kayla was present for one of these conversations.

5. Kayla made initial statements regarding her purported knowledge of the defendant and firearms in March and May 2022. In contrast to the information from multiple individuals described above, Kayla initially disclaimed any knowledge of the defendant having firearms.

6. On June 3, 2022, Kayla was arrested for two charges of Perjury based on statements she had made in prior testimony before the Grand Jury for Hillsborough County

Northern District. That same day she agreed to be interviewed by law enforcement. During her June 3, 2022, interview Kayla provided new information about the defendant and firearms which was contrary to her initial statements, and which inculpated the defendant with respect to the instant case. Kayla subsequently provided two additional interviews. One on June 23, 2022, and another on March 16, 2023. In her recent statements, Kayla corroborated Sullivan, Labelle, and other witness accounts of observing the defendant with the stolen firearms, attempting to sell them to other witnesses, and his admissions to stealing the Frain firearms.

7. Additionally, during the March 16, 2023, interview, Kayla described suffering a year of physical abuse by the defendant because of the threat she posed to him as a witness to his crimes. *See Motion in Limine to Admit Evidence of Past Abuse by the Defendant Against Kayla Montgomery*.

8. As previously mentioned, the State anticipates that at trial multiple witnesses will testify that Kayla was present during the defendant's attempts to sell the stolen firearms, as well as the defendant's admissions to stealing the firearms. In this case, as in *Wilkinson*, spousal privilege was waived by the defendant when he told a third party what he had done.

9. N.H. Evid Rule 504 provides that a husband and wife "shall [not] be allowed to testify against each other as to any statement, conversation, letter, or other communication made to the other or to another person, nor ... allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence." The New Hampshire Supreme Court has considered the issue of marital privilege on several occasions. In *Clements v. Marston*, 52 N.H. 31, 38 (1872), the Court found that marital privilege did not create "a blanket immunity" but rather protected marital confidences. *Id.* (citing *Corson v. Murinane*, 51 N.H. 92 (1871)).

10. More recently, the Court upheld the *Clements* decision as requiring a trial court to find “a violation of marital confidence” before excluding spousal testimony. *State v. Wilkinson*, 136 N.H. 170, 177-178 (1992). In *State v. Pelletier*, 149 N.H. 243 (2003), the Court stated that to be a violation of marital confidence “the communication at issue must be something confided by one spouse to the other, as husband and wife, and not what would be communicated to any other person under the same circumstances.” *Id.* at 247. The Court stated that the marital privilege extends to acts which are “attributable to the husband-wife relation, i.e., that which might not be spoken or done openly in public as tending to expose personal feelings and relationship or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation.” *Id.*

11. Kayla’s knowledge of the acts and statements of the defendant related to the stolen Frain Firearms, occurred in the presence of third persons and are not attributable to the husband-wife relation “which might not be spoken or done openly in public as tending to expose personal feelings and relationship or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation.” *Id.*

12. All of the statements made to, or in the presence of Kayla, during and in furtherance of the defendant’s crimes against Kayla (See Motion in Limine to Admit Evidence of Past Abuse by the Defendant Against Kayla Montgomery) and Christopher and Kimberly Frain, should be admitted as statements by a party opponent. *See* N.H. R. Evid. 801(d)(2). Furthermore, these statements should not be excluded as statements of marital privilege. N.H. R. Evid. 504. “The marital privilege is not a blanket immunity, *Corson v. Murinane*, 51 N.H. 92 (1871) (note); rather, it is a privilege protecting marital confidences,” *State v. Wilkinson*, 136 N.H. 170, 177 (1992). “The determination of whether the marital privilege under Rule 504

applies is intensely factual and rests within the sound discretion of the trial court.” *State v. Pelletier*, 149 N.H. 243, 247 (2003) (citing *Cook v. Bennett*, 51 N.H. 85, 92 (1871); *Key Bank of Maine v. Latshaw*, 137 N.H. 665, 673 (1993)). “[T]he trial court must find a violation of the marital confidence before it can exclude a spouse’s testimony.” *Id.* “[T]he marital privilege may, for reasons of public policy, be appropriately limited.” *Id.* at 249.

13. In *Pelletier*, the New Hampshire Supreme Court wrote:

[We] will not cloak the sexual activity between a husband and wife with the marital privilege when, as here, disclosure would provide relevant information concerning the alleged sexual abuse of a child of one of the spouses who is living with them. Cf. RSA 161–F:48 (exception to marital privilege in proceedings involving abuse and neglect of the elderly); RSA 546:22 & RSA 546-A:9 (exception to marital privilege in support proceedings).

*Id.* at 249. The Court concluded that the trial court “did not err in finding that Linda Pelletier’s testimony would not violate the marital privilege” as public policy appropriately limited the privilege to testify to relevant information relating to the sexual assault of a child. *Id.*

14. Similar to the approach taken by the New Hampshire Supreme Court with regard to sexual abuse of a child, this Court should take the same approach with regard to the defendant’s statements made while committing crimes against his spouse, and statements made to his spouse or in his spouse’s presence, in furtherance of criminal conduct in this state. Just as marital privilege is not a “cloak” for the evidence in *Pelletier*, it should not cloak the defendant’s statements, where disclosure would otherwise provide highly relevant and probative evidence about his repeated assaults of his wife Kayla, or his theft and possession of the Frain firearms.

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

(A) Deny the defendant’s motion; 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 19, 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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