

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH

STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-20

216-2022-CR- 2372

**MOTION FOR RELIEF DUE TO STATE'S EFFORT TO INFLUENCE KAYLA
MONTGOMERY'S TRIAL TESTIMONY**

Now comes Adam Montgomery, by and through his Public Defenders, Caroline L. Smith, Esq., and James T. Brooks, Esq., and hereby moves this Court to exclude the testimony of Kayla Montgomery. In the alternative, Montgomery moves this Court to (1) preclude the State from arguing during closing that there is no evidence to establish Kayla Montgomery was ever alone with Harmony Montgomery when the family lived in the car, and from arguing that there is no basis for the inference that Kayla was ever alone with Harmony prior to the discovery of her death, and (2) instruct the jury that the State attempted to influence Kayla Montgomery's trial testimony by requesting her attorney advise her of the contents of the defense's opening statement, deliberately withheld disclosing that conduct to the defense and Court, and all such conduct was improper. This motion is based on both New Hampshire Rule of Evidence 615 and Montgomery's constitutional rights, including the state and federal rights to due process, a fair trial, and present exculpatory evidence, including all proofs favorable, as guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

As grounds for this motion, the following is stated:

1. Adam Montgomery stands charged with second degree murder and related offenses in connection with the death of Harmony Montgomery. Joined with these charges is a charge of second degree assault.
2. The parties delivered opening statements on February 8. During its opening statement, the defense explained that Kayla Montgomery is lying about the circumstances of Harmony Montgomery's death, is the last person to see Harmony alive, and alone knows how Harmony died. Instead of Harmony being discovered dead at the intersection of Webster and Elm during the middle of the day of December 7, 2019, Harmony was discovered dead earlier, in the middle of the night, behind Colonial Village, after Adam returned to the car. The discovery provided by the State – including all of Kayla Montgomery's various statements to the police – does not foreclose the defense's assertions and the defense, based on information received, has a reasonable basis to believe that Kayla was left alone with the children as Adam Montgomery was off doing other things to provide for Kayla and the family and that Harmony's death occurred during one of these times.
3. After the defense delivered its opening statement, the State requested the evidentiary basis for the defense's contention and was informed by the defense that it anticipated establishing through Kayla Montgomery's cross-examination the facts necessary to make those reasonable inferences to the jury.
4. That afternoon, the State had its victim witness coordinator reach out to Kayla Montgomery's defense lawyer, Paul Garrity, by email or text message. The message requested that Garrity call Attorney Knowles, which Garrity did. During the ensuing telephone conversation, Knowles relayed the defense's claim that Harmony died while alone with Kayla and the other children. Knowles informed Garrity that Kayla being alone with Harmony would be "an area of attack by the defense" during cross-examination and asked Garrity to "discuss that with Kayla, to apprise her of it." The next morning, prior to Kayla's testimony, Garrity spoke with Kayla about those specific concerns.

5. The State did not notify the defense, prior to the beginning of cross-examination, that the State had in fact warned Kayla of the expected questioning focused on the defense that Harmony died alone with Kayla.

6. The cross-examination of Kayla, combined with the cross-examination of Anthony Bodero, who admitted that Adam had, at times, driven Bodero in Bodero's car, accomplished what the defense claimed, establishing facts sufficient to reasonably infer that Harmony could have died while alone in Kayla's care. The defense showed that there were times when Kayla would be alone with Harmony while the family was living in their car and that the family would be in places, together or separate, other than the car during the time period between eviction and December 7, 2019. In establishing these points, however, it became clear that Kayla was reluctant to even admit that the family even separated when Adam was receiving his medication at the clinic or visiting a men's restroom, or when the children were being cleaned up or when Kayla was taking Harmony to a restroom. Kayla acknowledged that Bodero did not want the family living in the car in his parking lot, but when asked about Adam driving Bodero in Bodero's Audi because Bodero lacked a valid driver's license, acknowledged that Adam had driven Bodero in Bodero's car but repeatedly stated, "but not when the family was living in the [Sebring]." This dividing line created by Kayla is absurd given the family's needs and the ability of Bodero to supply those needs, and the fact that Adam was readily available right outside in the parking lot. (Bodero testified that Adam had driven him in his car after his November 22, 2019 conviction but did not profess to know how often or when.). The reason for the reluctance in Kayla's responses would later become apparent - Kayla had been prepared for this line of cross-examination by Attorney Knowles on behalf of the State. He told her, through her attorney, to be ready for these questions, but he never told the defense that he had given her such a warning.

7. On redirect, the State introduced evidence that Kayla's plea agreement with the State obligated her to "tell the truth" and the agreement would be null and void if Kayla testified otherwise. The State also asked Kayla a series of questions as to whether Kayla was aware of the contents of the defense's opening statement. Kayla replied that she was aware of the defense's opening statement, including the defense's contention that "something happened in the middle of the night ... while [Adam] was not around." This moment, after the defense had completed its cross-examination of Kayla, was the first time the State revealed to the defense and Court that Kayla had been forewarned of the defense's planned cross-examination.

8. On recross, the defense immediately confirmed from Kayla that she was aware of what was said during the defense's opening statement and asked how she knew. Kayla replied that she was told by her lawyer. The State requested that the parties approach, and a bench conference ensued.

9. A transcript of the bench conference is not available, but the parties have received a copy of the official court recording. What follows is a summary of what transpired.

10. Defense counsel expressed concern that the State was aware of Kayla's knowledge of the defense's opening statement and, hence, the objective of its cross-examination. When asked by the Court, the State declared that it could "definitively say" that it had not made Kayla aware of the defense's opening statement. When the Court asked if the State knew that Kayla would answer in the affirmative to redirect questions that she was aware of the opening statement, the State responded, "no." The State did not inform the Court of the conversation the State had with Attorney Garrity asking him to alert Kayla of a line of attack on cross-examination.

11. The Court asked Attorney Garrity to approach the bench. It was only then that the defense and Court learned of the conversation between the State and Garrity from the Thursday prior. Attorney Knowles described the conversation by saying that "I think I described the concessions that were made in openings, and what was going on with the defendant not appearing. But I don't believe I asked anything of Attorney Garrity."

12. When hearing this, Attorney Garrity, asked, "are you asking me to respond?" "I was told about ... Kayla being alone with Harmony and that Adam wasn't present, and I was told that that's probably an area of attack by the defense, and would I discuss that with Kayla to apprise her of it. That's what I was told."

13. When recross resumed, Kayla again acknowledged that she had learned of the defense's opening statement. She also acknowledged that learning that information allowed her to prepare for the answers she would give.

14. Thus, unless the State contends that both Attorney Garrity and Kayla have lied to the Court, the State misrepresented the truth. The State said it could "definitively say" that the State had not alerted Kayla of the defense's opening. Yet the truth is the exact opposite. The State told Kayla about the opening through her attorney such that she was warned in advance of the defense's planned line of cross-examination.

15. Prior to trial, the Court granted an assented-to motion for sequestration order submitted by the defense. The motion relied upon, and tracked, the language of New Hampshire Rule of

Evidence 615. Rule 615 represents a codification of “a well-established common law tradition of sequestering a witness as a means of discouraging and exposing fabrication, inaccuracy, and collusion.” State v. Guild, 163 N.H. 475, 477-78 (2012)(quotation and citation omitted). New Hampshire Rule of Evidence 615(a) provides, in pertinent part, that “[a]t a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ *testimony*.” (emphasis added). New Hampshire Rule of Evidence 615(b)(1) informs New Hampshire Rule of Evidence 615(a) by stating that a sequestration order issued under subsection (a) prohibits a witness “from being present in the courtroom until after the witness has testified and is not subject to recall by any party[.]”

16. The text of this rule and its understanding has been augmented by years of practice in courtrooms throughout this state. To undersigned counsels’ knowledge, it has been the uniform practice of New Hampshire courts to prohibit those individuals subject to a sequestration order from being present for opening statements even though opening statements are not technically evidence or “testimony.” Such a practice makes sense, as any practice otherwise would serve to undermine a sequestration order’s very purpose. Though not evidence itself, opening statements reflect what the parties anticipate the evidence and testimony to be, and allowing a witness to become privy to those statements’ substance undermines the integrity of the proceedings and their truth-seeking objective. The undersigned are unaware of any New Hampshire superior court allowing witnesses otherwise subject to a sequestration order to observe opening statements.

17. The Court has ruled that Kayla Montgomery being advised of the defense’s opening statement does not constitute a violation of the sequestration order and the rule upon which it is based. The defense respectfully disagrees, asks the Court to reconsider, and requests that the Court exclude Kayla Montgomery’s testimony due to the State’s violation of the sequestration order and Rule 615, the evidentiary rule upon which the order is based.

18. Regardless of whether the State’s conduct constituted a violation of the order and Rule 615, however, the State’s affirmative act of influencing Kayla Montgomery’s testimony was nonetheless improper. It subverted the cross-examination of Kayla Montgomery and that was its purpose. Even if the State’s act did not technically violate Rule 615, it violated its spirit.

19. The State knows its conduct is improper. Whatever the State may say in its defense, there are times where actions speak louder than words. The State failed to inform the defense and court of its conversation with Attorney Garrity. Indeed, the only reason the defense and court are now

aware of the conversation is because of the disclosure by Attorney Garrity. The State's failure to inform the Court of the conversation in response to the Court's inquiries reveals that the State itself understood its conduct to be improper.

20. The State's conduct was not just improper, however. It also constitutes exculpatory evidence that explains Kayla's answers during cross-examination. As Kayla acknowledged during the resumption of recross, the State's conduct allowed her to tailor her responses in a manner calculated to thwart the defense's cross-examination designed to reveal evidence supporting its defense.

21. The State should not be allowed to reap any benefit from its conduct. Here, the prosecution improperly influenced a witness and then withheld that information from the Court and defense. The gravity of the conduct is compounded by the seriousness of the discovery violation. A criminal defendant has the fundamental constitutional right under Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments of the United States Constitution to confront and cross-examine the witnesses against him. State v. Kornbrekke, 156 N.H. 821, 824, (2008); State v. Etienne, 146 N.H. 115, 117 (2001).

22. As is well known, the State has a duty to provide the defense with exculpatory information regarding the State's witnesses. State v. Laurie, 139 N.H. 325, 327-28 (1995); Kyles v. Whitley, 514 U.S. 419 (1995); U.S. v. Bagley, 473 U.S. 667, 676-77 (1985); Giglio v. U.S., 405 U.S. 150 (1972).

23. The prosecution in this case deliberately withheld exculpatory impeachment information. Kayla did not come to the opening statements. She had no information from her own personal knowledge about the opening statements. Attorney Knowles took it upon himself to inform her, through her attorney, of the content of the defense's opening statements. Regardless of whether that violated the sequestration order, it was information which could be used to show that her answers were part of a preplanned defense of herself rather than her honest reaction upon being first questioned by the defense. The bottom line is that if the State is going to prep a witness for cross-examination by the defense by providing information to the witness, the State has a duty to tell the defense that the witness was forewarned so that the defense may impeach the witness.

24. A mistrial would be appropriate if requested. See, e.g., State v. Turcotte, 173 N.H. 401, 404-05 (2020)(basis for granting mistrial is circumstances indicating that justice may not be done if trial continues to verdict). Montgomery does not make that request at this time, however,

because such a remedy would only allow the State to benefit from its own misconduct. The appropriate remedy, instead, is the exclusion of Kayla Montgomery's testimony and an instruction to the jury that it should disregard it. The New Hampshire Supreme Court has held that where the State commits a discovery violation that directly impairs the ability of the accused to prepare for trial, the trial court should strike the testimony of that witness. See State v. Smalley, 148 N.H. 66, 69-71 (2002).

25. In the alternative, the defense requests that the Court preclude the State from arguing during closing that there is no evidence to establish Kayla Montgomery was ever alone with Harmony Montgomery when the family lived in the car, and from arguing that there is no basis for the inference that Kayla was ever alone with Harmony prior to the discovery of Harmony's death.

26. It is also respectfully requested as an alternative to exclusion of Kayla Montgomery's testimony that the Court include as part of its final instructions an instruction specifically addressing the State's conduct. The jury should be instructed that the State attempted to influence Kayla Montgomery's testimony by the request it made to Attorney Garrity after opening statements, withheld disclosing that action to the Court and defense, and all such conduct was improper.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court:

- (a) Exclude the entirety of Kayla Montgomery's testimony and instruct the jury to disregard it;
- (b) In the alternative, prohibit the State from arguing that there is no evidence to establish Kayla Montgomery was ever alone with Harmony Montgomery when they lived in the car, and from arguing that there is no basis for the inference that Kayla was ever alone with Harmony prior to the discovery of her death; and
- (c) Also as part of the alternative relief, instruct the jury that the State attempted to influence Kayla Montgomery's trial testimony by having her defense attorney apprise her of the defense's opening statement, deliberately withheld disclosing that communication to the defense and Court, and all such conduct was improper; and

(d) Grant such other and further relief as deemed fair and just.

Respectfully submitted,

/s/ Caroline L. Smith
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this pleading has been forwarded to Senior Assistant Attorney General Benjamin J. Agati and Assistant Attorney General R. Christopher Knowles on this 18th day of February 2024.

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