

THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH SUPERIOR COURT
SOUTHERN DISTRICT

MAY TERM

STATE OF NEW HAMPSHIRE

V.

DANIELLE DAUPHINAIS

226-2021-CR-944

RESPONSE TO STATE'S MOTION IN LIMINE #6 – TO ADMIT CONTENTS OF FACEBOOK RECORDS INCLUDING FACEBOOK MESSAGES (FACEBOOK)

NOW COMES the defendant, Danielle Dauphinais, by and through counsel, Attorney Tracy A. Scavarelli and Attorney Benjamin Falkner and respectfully requests this Honorable Court to deny the State's Motion in Limine #6 for the reasons listed below.

In support of this Motion, the following is asserted:

1. Danielle Dauphinais is charged with first- and second-degree murder, witness tampering (three counts) and endangering the welfare of a child (two counts).
2. A Final Pretrial Conference is scheduled for September 27, 2024, and Jury Selection on October 7, 2024.

FACTS

3. For the limited purpose of this Response, the defense shall adopt the facts as outlined by the State in its Motion in Limine #6.

LEGAL ANALYSIS

4. The State did not include all communications that it is seeking permission to admit.
5. The State has not provided proper notice of the exact information it seeks to introduce

and did not include any photographs or videos in its Motion. Therefore, the defense will limit its response to the specific examples included in the State's Motion.

6. The defense reserves the right to object to all other communications until such time notice is provided and introduction is sought.

Party Opponent Statements

7. Hearsay is not admissible unless an exception exists. *NHRE 802*.

8. A party-opponent statement is not hearsay if made by the party in an individual capacity. *NHRE 801 (d) (2)*.

9. While party opponent statements are generally admissible, the evidence must be relevant and its probative value must be outweighed by the danger of unfair prejudice or misleading the jury. *NHRE 403*.

10. In order to be relevant, the evidence must have a "(1) tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action." *NHRE 401*.

11. Even if relevant, the Court can exclude "relevant evidence if it's probative value is substantially outweighed by a danger of...: unfair prejudice, confusing the issue, misleading the jury or needlessly presenting cumulative evidence." *NHRE 403*.

12. Therefore, not all party-opponent statements are admissible as suggested by the State.

13. Specifically, the State asserts in paragraph 17 of its Motion that "all statements of the defendant contained in Facebook records of the defendant and Stapf are admission of a party-opponent." This assertion is overly inclusive and inconsistent with the requirements of the NH Rules of Evidence.

Co-Conspirator Statements

14. Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *NHRE 801(d)(2)(E)*.

15. "[O]ut-of-court statements by co-conspirators are admissible as exceptions to the hearsay rule when [the statements are] made during the pendency of the criminal enterprise and in furtherance of the criminal object, as long as the existence of the conspiracy is sufficiently proved by independent evidence." (*Emphasis added*). *State v. Batchelder*, 144 N.H. 249, 251 (N.H. 1999); quoting *State v. Gonzalez*, 136 N.H. 354, 356, (1992).

16. The co-conspirator exception to the hearsay rule does not apply to post-arrest statements. *State v. Rodrigues*, 164 N.H. 800, 809 (2013)

17. Again, the State asserts "All of the statements contained in these conversations between the defendant and Stapf are admissible" as co-conspirator statements. This too is overly inclusive and inconsistent with the requirements of the NH Rules of Evidence particularly in light of the facts that the State has not provided proper notice of all statements it seeks to introduce.

18. While conditional admissibility of co-conspirator statements may be admissible under NH law, given the anticipated nature of the communications if the State fails to "connect up" the admissibility of the statements, a curative instruction would be insufficient to undue the potential harm these statements would create. Therefore, the likely remedy would be a mistrial. Given the nature of the case and anticipated length of trial, the defense notes its objection to conditional admissibility as a violation of Danielle Dauphinais right to a speedy trial and due process rights. *US Const. Amends. 6 and 14 and NH Const. Article 15.*

Intrinsic Evidence

19. Evidence of other acts is intrinsic only when the evidence is “inextricably intertwined” or both acts are part of a single criminal episode.” *State v. Papillon*, 173 NH 13, 25 (2020).

20. “Intrinsic or inextricably intertwined evidence must have a causal, temporal, or spatial connections with the charged crime.” *Id.* Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arising out of the same events as the charged offense, forms an integral part of the witness’s testimony, or completes the story. *Id.*

21. A sequence of acts resembling a design when examined in retrospect is insufficient to make a finding of plan or intent on the part of the defendant. *State v. Melcher*, 140 NH 823, 825 (1996). The Court rejected the State’s argument that the acts “demonstrated a plan by the defendant to condition the victim through an escalating series of assaults...” (i.e. tickling, fondling of breasts and genitals and sitting naked on the couch with the defendant). *Id.*

22. Absent evidence that the charged and uncharged acts were mutually dependent one “cannot find that a defendant had in mind an overarching scheme of which each of the prior acts was but a part of.” *Id.* Furthermore, context evidence is merely a synonym for propensity and therefore inadmissible. *State v. Davidson*, 163 N.H. 462, 471 (2012) Lastly, intrinsic evidence must be more probative than prejudicial to be admissible. *Thomas at 79.*

Specific Communications

23. Paragraph 14 – April 15 and April 20, 2021 FaceBook Messenger Communications

- a. The State must be required to lay a proper foundation and context prior to admissibility under party-opponent statements. The defense reserves the right to object on all other available grounds at time introduction is sought.
- b. The State has failed to establish this communication was made during the pendency of a criminal act and in furtherance of a criminal object to satisfy the co-conspirator exception to the hearsay rule.

WHEREFORE, for the above-stated reason, it is respectfully requested this Honorable Court deny the State's Motion in Limine #6 for the reasons listed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion has been forwarded to Attorneys Hagaman and Durand on May 17, 2024.

Tracy A. Scavarelli

Tracy A. Scavarelli, Esq.