

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

NOVEMBER TERM, 2001

SUPERIOR COURT

No. 00-S-888 – 00-S-896

No. 00-S-934 – 00-S-935

The State of New Hampshire

v.

Chad Evans

STATE'S MOTION IN LIMINE TO ADMIT EVIDENCE OF CONTACT BETWEEN THE DEFENDANT AND THE VICTIM'S MOTHER IN VIOLATION OF BAIL CONDITIONS

NOW COMES the State of New Hampshire, by and through counsel, the Office of the Attorney General, and in support of its Motion In Limine To Admit Evidence Of Contact Between The Defendant And The Victim's Mother In Violation Of Bail Conditions, says as follows:

I. OVERVIEW

On November 16, 2001, the defendant was arrested on a manslaughter charge for causing the death of 21-month-old Cassidy Bortner. On November 17, 2001, the defendant was arraigned in Rochester District Court and the court set bail in the amount of \$50,000 cash or corporate security. The Rochester District Court also imposed a condition that the defendant have no contact with Amanda Bortner, Cassidy's mother.

On December 14, 2001, the Strafford County Grand Jury handed up several indictments against the defendant. The defendant was charged with Second Degree Murder,

two counts of First Degree Assault, and six counts of Second Degree Assault. He was also charged by information with endangering the welfare of a child and simple assault for having unprivileged contact with Amanda Bortner.

On January 2, 2001, the defendant waived arraignment on the charges. Pursuant to an agreement of the parties, this Court ordered that the defendant could be released on \$100,000 corporate surety. The Court further ordered that the defendant have "NO CONTACT WITH AMANDA BORTNER, HER FAMILY, OR JEFFREY MARSHALL."

On August 20, 2001, the Court (O'Neill, J.) revoked the defendant's bail based on evidence, as described in more detail below, that the defendant had been living with Amanda Bortner, more or less continuously, from shortly before Christmas 2000 until his bail was revoked. This contact was a clear violation of the conditions of the defendant's bail that were designed to prevent his influence over an important witness for the State. The defendant's contact with Amanda Bortner was also evidence that the defendant influenced, or attempted to influence Bortner's testimony. The defendant has arranged for housing for Amanda Bortner, has paid for groceries and other household items while they lived together, and has arranged for Amanda Bortner to have a car. In fact, the defendant lived with Amanda Bortner in a tent in Vermont for a period of time before his bail was revoked.

Bortner has written to this Court requesting appointment of counsel. In the letter, Bortner indicated that portions her prior statements to the police in which she provided damning evidence against the defendant, may not have been true. Bortner wrote this letter while the defendant exercised financial and personal influence over her. Moreover, Bortner has dramatically minimized portions of her version of the events surrounding Cassidy's death

and the defendant's abuse of both Cassidy and Bortner. Evidence of the defendant's contact with Bortner in violation of his bail conditions is admissible both to explain changes in Bortner's statements and to provide evidence of the defendant's consciousness of guilt.

II. FACTUAL BACKGROUND

A. Amanda Bortner's Prior Contact and Statement to the Police

Amanda Bortner was the defendant's live-in girlfriend beginning around August 2000. Bortner was 18 years old at that time. The defendant was 29 years of age. She and the defendant lived together with Bortner's young daughter, Cassidy. On November 9, 2000, 21-month-old Cassidy Bortner was pronounced dead at York Hospital in Maine. Cassidy died as a result of multiple trauma to the head and abdomen. On November 9, 2000, Amanda Bortner was interviewed about Cassidy. Bortner was interviewed again on November 12 and November 16, 2000. During those interviews, Bortner told police that the defendant had disciplined Cassidy by grabbing her by the face and making her look the defendant in the eye. The defendant would cause bruising on Cassidy's face. Bortner told police that the defendant was "really, really rough" with Cassidy. The defendant would throw Cassidy on the bed and into the corner. Cassidy would hit the wall with a bang. The defendant would press on Cassidy's throat and make her gag. She told police that the defendant would get very upset when Cassidy cried. He would swear at Cassidy and call her a bitch. The defendant told Amanda Bortner something to the effect of "I wish she [Cassidy] were not born" or "I wish she wasn't here." Bortner told police: "I saw him hurt her." "It's my fault because I didn't leave." Bortner also told police that the defendant told her that Cassidy could not be left in day care because of the bruises on her face. She informed police that the

defendant was concerned about taking Cassidy out in public with the bruises on her face. She also related how the defendant made up excuses for Cassidy's bruises. She told police: "When Cassidy had bruise[s] on her face from [Chad's grabbing], Chad was all paranoid about it. He made up an excuse that Cassidy fell off the trampoline and Chad grabbed her." Although Bortner was working at the time Cassidy sustained the injuries that ended her life, Bortner also provided the police with information that corroborated other witness statements and evidence establishing that the defendant was responsible for Cassidy's death.

Shortly after Thanksgiving, Amanda Bortner left New Hampshire to live with a friend in Texas. She remained in contact with New Hampshire State Police and the victim/witness advocate at the Attorney General's Office during this time. On about December 18, 2000, Bortner returned to New Hampshire. She met with representatives of the State about the death of her daughter the following day. She reiterated her earlier statements and provided further information about the defendant's abuse of Cassidy. She also related that the defendant had abused her in the past. She recounted occasions when the defendant had grabbed her by the throat and when the defendant had head-butted her. She also told police that on the night before Cassidy's death, the defendant was not in a good mood. She and he argued about work. During that argument, the defendant grabbed her by the throat.

After the December 18, 2000 meeting, she was dropped off at a friend's house in Maine. She informed the police that she would likely be moving back to San Antonio, Texas soon. Bortner provided Sergeant James White and Allison Vachon, a victim/witness advocate, with her contact information in Texas and indicated her willingness to continue assisting in the State's investigation into Cassidy's death.

B. State Police Investigation of Contact Between Defendant and Amanda Bortner

At the beginning of January 2001, the State received an anonymous call from an individual claiming that Amanda Bortner was together with Chad Evans over the New Year holiday. Based on this information, the State became concerned that the defendant was engaged in witness tampering by contacting Amanda Bortner. Consequently, the State subpoenaed telephone records to determine whether the defendant had been in contact with Amanda Bortner. The telephone records did not indicate any direct calls between the defendant and Amanda Bortner. However, the records indicated that there were three calls from Chad Evans to San Antonio, Texas in December. Those calls, however, did not correspond to any telephone number or address that Amanda had provided the State as contact information. Bortner had informed the State that she was living with her friend Cathy Nuernberg in San Antonio, Texas.

During the Spring of 2001, Sergeant White made several attempts to contact Amanda in San Antonio, Texas at Cathy Nuernberg's home. On April 6, 2001, Bortner contacted Sgt. White, and told him that she was still in Texas. During her conversation with Sgt. White, Bortner explained that she had moved out of Nuernberg's home and offered a new Texas address. Subsequent investigation through Texas law enforcement authorities revealed that the address Bortner provided did not exist.

On May 9, 2001, Amanda Bortner sent a letter to this Court requesting the Court to appoint counsel for her. Bortner indicated that her earlier statements to the police may not have been true. The letter expressed concern with the manner of the investigation into her daughter's death.

On June 11, 2001, Sgt. White received a second anonymous call through 911 dispatch. The caller reported that Chad Evans and Amanda Bortner spent the night together in Colebrook, New Hampshire at a cabin with their friends Bruce and Michelle Truell. Because this call was placed to 911, the caller's identification was recorded and the State Police learned that the call originated from the home of Alan Noyes. During the call, Noyes informed Sgt. White that he is quadriplegic. He explained that he received home care from Michelle Truell, one of Evans and Bortner's friends. During the call, Sgt. White learned that the initial anonymous call had been made by another one of Noyes' caretakers.

Sgt. White subsequently interviewed Noyes. Noyes stated that Michelle Truell told him that she was in Colebrook during the weekend of June 9, 2001, with her husband Bruce and Amanda Bortner. Noyes told Sgt. White that he went by the Truell residence on that weekend. Both of the Truell's vehicles were missing but the defendant's truck was parked in the Truell's driveway. When Noyes confronted Michelle Truell with this information, she became upset. She accused Noyes of spying on her, but told him that "the four of them" had been up until 5:30 a.m. one night. Sergeant White followed up on Noyes' report and learned that Bruce Truell had secured a fire permit in Colebrook for June 9, 2001. The permit was signed by Michelle Truell. Noyes also told the police that Michelle Truell had told him that Amanda Bortner and Chad Evans had devised a signal so that the defendant could contact Bortner. According to Truell, the defendant would let the telephone ring a predetermined number of times as a signal for Amanda Bortner to go to a pay phone. Shortly after the signal, Bortner would go to a payphone at Ames Department Store near the Truell residence in Newport and speak with the defendant.

Based on Noyes' call and Bortner's letter to the Court, the State subpoenaed additional telephone records. Those records provided support for Noyes' account. There is at least one telephone call from Bruce Aube's home (one of the defendant's closest friends) to a payphone at Ames Department Store in Newport, NH. The telephone records also prove that Bortner was not in Texas when she contacted Sgt. White and the victim/witness advocate. The phone records indicate that, following Sgt. White's attempts to contact Bortner in Texas, Nuernberg placed several phone calls to individuals in New Hampshire that were known to be friends both Evans and Bortner. These records further reveal that Bortner's phone calls to Sgt. White and the Attorney General's victim/witness advocate originated from Vanessa Mansson's residence in Keene, New Hampshire. Thus, Bortner was not in Texas as she claimed. These records also evidence an enormous number of phone calls between the homes of several of Evans and Bortner's friends and family, including Vanessa Mansson, Bruce Aube, Jeremy Hinton, Bruce and Michelle Truell, Eric Lepisto, Cathy Nuernberg, and Chester Evans (Chad Evans' father).

Based on the information in the State's possession that Evans had contact with Bortner over the phone and in person in violation of the no-contact bail condition, coupled with Bortner's stated desire to change the statements that she made to police, the Strafford County Grand Jury was convened to investigate whether Chad Evans has committed witness tampering. A number of witnesses were subpoenaed to testify.

When the police approached Vanessa Mansson, one of the defendant's friends, she initially denied that there was any contact between the defendant and Amanda Bortner. During the interview, Mansson stated that the defendant had approached her about a place for

Amanda Bortner to live. Bortner began staying at Mansson's home shortly before Christmas last year. Mansson eventually conceded that the defendant and Bortner had stayed together at her apartment on several occasions. She also informed the police that the defendant had provided Bortner a car that was registered in the name of the defendant's friend, Jeremy Hinton.

Jeremy Hinton was also interviewed by the police when they served the subpoena. Initially he indicated that the defendant and Bortner had not been together. Hinton later called the police and asked for a further interview. In that interview he related that the defendant and Bortner had been at his apartment at least once in June 2001. He also conceded that he had registered a car for the defendant.

On Tuesday, August 14, 2001, when the police attempted to locate Amanda Bortner, they discovered that she had a Vermont driver's license. When the police tried to locate Bortner at the address listed on her license, they determined that the address did not exist. Based on information provided by Vanessa Mansson, the police went to Pizza Hut in Brattleboro, Vermont, where Bortner had been working. Bortner arrived at work around 6:00 p.m. She appeared unkempt and was shocked when Sgt. White approached her. She adamantly denied that she and the defendant had been in contact. She also told Sgt. White that the police had twisted what she had told them. She repeated stated that Jeff Marshall had killed Cassidy. As Sgt. White left the restaurant he observed a gray Chevy Celebrity, packed with what appeared to be all of Bortner's possession in it.

On August 17, 2001, the grand jury began an investigation to determine whether Chad Evans committed the crime of witness tampering in violation of RSA 641:5.

C. Grand Jury Testimony

On August 17, 2001, Vanessa Mansson testified before the grand jury that Chad Evans was her life-long best friend. She testified that the defendant approached her in early December 2000 to live with her. Shortly thereafter, just before Christmas, the defendant asked her if Amanda Bortner could also live with Vanessa Mansson. The defendant told Mansson that Bortner had called him and he wanted to help Bortner out. Mansson lived in a one-bedroom apartment in Keene at the time. While the defendant and Bortner lived with Mansson, Bortner and the defendant slept in the same bedroom together. Initially the defendant and Bortner did not stay every day at Mansson's home. However, gradually over time, they stayed more frequently and eventually were living at her home every day. The defendant would buy groceries and provide for other household expenses while he and Amanda Bortner lived with Mansson. Mansson also testified that the defendant and Bortner lived with Mansson's ex-boyfriend for a period of time. Mansson's boyfriend Eric Lepisto confirmed this information. In addition to arranging for a place for Bortner to live, Mansson testified that the defendant had given Amanda Bortner a car registered in the name of the defendant's friend Jeremy Hinton.

Mansson told the grand jury that at some time in the Spring 2001, after the defendant and Bortner had been living together several months, Bortner approached Mansson and asked her how she could change her statements that she had made to the police. Mansson suggested that Bortner contact the victim/witness advocate. After this conversation, Mansson and the defendant had a conversation about Bortner's concern about her previous statements to the police. Mansson suggested to the defendant that Bortner could ask the court to appoint a

lawyer for her. Several days after this conversation, the defendant asked Mansson whether Bortner had spoken to Mansson about getting a lawyer. Mansson told the defendant that she had not spoken with Bortner about a lawyer. After this second conversation between the defendant and Mansson, Bortner approached Mansson and asked her how she could get a lawyer. Mansson then arranged for Bortner to get paperwork to petition for court-appointed counsel. Mansson knew that Bortner wrote to the Strafford County Superior Court after that because Mansson received Bortner's mail from the court at her home.

Mansson testified that the defendant had contacted her after Mansson was served with her subpoena. The defendant expressed concern about the grand jury investigation because he knew he was not supposed to have contact with Bortner. Mansson also testified that the defendant told her that he was concerned about getting caught with Bortner. But he told Mansson: "I don't think she will make it through this by herself." Mansson testified that he and Bortner did not go out in public because he felt he was being watched.

The defendant's other close friend Jeremy Hinton testified before the grand jury on Friday, August 17, 2001. Jeremy Hinton told the grand jury how the defendant and Amanda used his apartment on a number of occasions. He related one occasion on which he drove down to New York City with the defendant's brother, the defendant, and Amanda Bortner. They spent the weekend together visiting the sites in New York City, going out to clubs, and watching Red Sox/Yankees baseball game. Hinton testified that the last time he saw the defendant and Amanda Bortner together was in late June of this year at his apartment. He testified that both Amanda Bortner and the defendant had keys to his apartment and could use his home freely. He was aware that they had done so on several occasions.

Hinton testified that sometime around March of this year, the defendant brought him a 1987 Chevrolet Celebrity station wagon and asked Hinton to register the vehicle in Hinton's name. The defendant told Hinton that he felt he was being harassed by the police and wanted a car that they could not look up and know it was his own. The defendant told Hinton that it would be harder for the police to find out whose car it was if the car was registered in Hinton's name. Hinton testified that in late May or early June, Amanda Bortner came to his house and was driving the Chevy Celebrity. Hinton testified that Bortner was still driving the vehicle because she had driven it to court on Friday, August 17, 2001. Hinton testified that the defendant is no longer staying at home but is camping. Mansson had also testified that the defendant and Amanda Bortner were living together camping in some unknown location based on communication she had had with Bortner a few days before Mansson testified before the grand jury. Mansson also observed that Bortner had all of her belongings in the car.

When Bortner met with undersigned counsel on November 5, 2001, Bortner denied living with the defendant at Mansson's home in Keene. Bortner did acknowledge living with the defendant in a tent in the woods for about one month during the summer before the defendant's bail was revoked. She informed undersigned counsel that this arrangement ended when witnesses were subpoenaed to the grand jury. During that meeting with Bortner, she also minimized a number of events regarding the defendant's abuse of both her and Cassidy.

III. CONTACT BETWEEN THE DEFENDANT AND BORTNER IS ADMISSIBLE TO ESTABLISH BIAS AND CONSCIOUSNESS OF GUILT

The State should be permitted to introduce evidence of the defendant's continuous contact with Bortner in violation of the no-contact bail order for two reasons: (1) to establish Bortner's bias; and (2) to establish the defendant's consciousness of guilt.

The State intends to call Bortner as a witness at trial. The State anticipates that Bortner's testimony will differ in some material respects from her earlier statements to the police in the days after her daughter's death. The defendant's continuous contact with Bortner and his financial and emotional influence over her are relevant to demonstrate her bias in favor of the defendant. The rules of evidence clearly allow either party to impeach their own witness. N.H. R. Evid. 607; State v. Soldi, 145 N.H. 571, 573 (2000). Moreover, the New Hampshire Supreme Court has recognized that motive or bias evidence is central to a witness' credibility. See State v. Etienne, No. 99-007, slip op. (N.H. Mar. 7, 2001) (reversing defendant's conviction where defendant was not permitted to explore witness' bias or motive to lie). "Bias is never classified as a collateral matter and may always be proved by extrinsic testimony and exhibits, as well as cross-examination of the impeached witness." 2 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 9:11, at 612 (15th ed. 1998); see United States v. Abel, 469 U.S. 45, 52 (1984). "Bias can result from any relationship between a witness and a party that might cause a witness to slant his or her testimony. The cross-examiner is permitted great latitude to establish a witness' relationship to a party in an effort to show a witness's bias. The nature of the relationship may be business, social, sexual, or otherwise." Wharton's Criminal Evidence, supra § 9:12, at 613-14; Abel, 469 U.S. at 52 ("Bias is a term used in the 'common law of evidence' to describe

the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.”).

The State’s investigation has revealed that the defendant has exercised significant financial and emotional control over Bortner while he was out on bail. This influence includes arranging for a home for Bortner, buying her a vehicle, and paying for groceries and other living expenses while he was living with her. They also slept together in the same room almost continuously since the defendant was released on bail. This type of influence is highly probative of Bortner’s bias toward the defendant and motive to testify favorably to the defendant. See Watkins v. State, 426 S.E.2d 238, 243 (Ga. Ct. App. 1992) (“It is competent to impeach [a witness] by evidence tending to show that she was the paramour of the defendant, -- not to impeach her by reason of the immorality, but to show her intimate relations with the accused and her probable bias as a witness.”) (quotation omitted); see also Wharton’s Criminal Evidence, supra § 9:12, at 615-16 n. 97 (citing numerous cases recognizing that a witness’s intimate or sexual relationship with the defendant is probative of the witness’s bias). For this reason it is appropriate to introduce evidence of the defendant’s contact with Bortner to impeach her in the event that she testifies inconsistently with her earlier statements to the police.

Even if Bortner does not testify inconsistently with her earlier statements to the police, evidence of the defendant’s post-arrest contact with Bortner is still admissible in order to establish the defendant’s consciousness of guilt. It is well-settled that a no-contact bail provision like the one that was imposed by this Court is designed to prevent exactly the type of influence over important witnesses that the defendant exercised over Bortner in this case.

See United States v. Morris, 259 F.3d 894, 901 (7th Cir. 2001); State v. Boho, 568 N.W.2d 322, 1997 WL 208424, , *2 (Wis. Ct. App. 1997). Courts have noted that the purpose of a no-contact order is to prevent a defendant from “potentially interfering with the amount of cooperation the [prosecutor’s] office will receive from the victim and jeopardizing the prosecution’s ability to advance the case against him.” Boho, 1997 WL 208424, at *2. In other words, the goal of a no-contact order is to “reduce the possibility of creating a reluctant witness,” by preventing the defendant from “perpetuat[ing] his harmful influence in the [witness’s] life.” Morris, 259 F.3d at 901.

Evidence that the defendant has violated the no-contact provision in an effort to influence the witness is admissible to establish the defendant’s consciousness of guilt. Professor McCormick has observed that “wrongdoing by the party in connection with its case, amounting to obstruction of justice is also commonly regarded as an admission by conduct. By resorting to wrongful devices he is said to provide a basis for believing that he or she thinks his case is weak and not to be won by fair means, or in criminal cases that the accused is conscious of guilt.” John W. Strong, McCormick on Evidence § 265, at 465 (4th ed. 1992); see also United States v. Shorter, 54 F.3d 1248, 1260 (7th Cir. 1995) (recognizing “long tradition of admitting attempts to influence a prosecution witness as indicating defendant’s consciousness of the weakness of his case”) (citation omitted); United States v. Henderson, 58 F.3d 1145, 1150 (7th Cir. 1995) (same); Nguyen v. State, 543 S.E.2d 5, 12 (Ga. 2001) (attempt to influence witness by offering to buy a boat for witness is admissible to demonstrate consciousness of guilt); State v. Peck, 93 Wash. App. 1024, 1998 WL 847109, *4 (Wash. Ct. App. 1998) (recognizing that defendant’s violation of no-contact order through

repeated contact with victim through love letters, poetry, and promises of their future together supported an inference that he was attempting to persuade her not to cooperate with the prosecution); State v. Bravo, 639 P.2d 358, 359 (Ariz. Ct. App. 1981) (“Evidence that a defendant attempted to influence the testimony of a witness against him tends to show a consciousness of guilt.”);

The New Hampshire Supreme Court has recently addressed a similar issue in State v. Fisher, 143 N.H. 311 (1999). In that case, the defendant attempted to influence the victim’s testimony by providing her a “script.” Id. at 318. The trial court admitted the evidence and provided the jury with the following instruction:

attempts by a defendant to make up evidence or to influence a witness in connection with a crime charged may be considered by you in light of all of the other evidence in the case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

Id. The Supreme Court upheld this instruction. Id. at 318-20.

This Court should admit evidence that the defendant and Bortner co-habitated in violation of the bail order and that the defendant engaged in elaborate steps to avoid getting caught with Bortner. Evans arranged for a place for Bortner to live in Keene, they slept together in the same bed for an extended period of time, and he bought groceries and other household amenities while they lived together. The defendant purchased a vehicle for Bortner and even arranged to have it registered in his friend’s name so that the police would not know that the defendant and Bortner were in contact if she was stopped for a motor vehicle violation. Eventually the defendant and Bortner moved into the woods in Vermont

until the defendant's violation of his no-contact order was discovered and his bail was revoked.

There is also a strong inference that the defendant caused Bortner to write to the court and request a lawyer so that she could recant her statement. Mansson testified that the defendant first talked with her about how Bortner could get a lawyer. Then sometime later, the defendant again asked Mansson whether Bortner had spoken to her about securing a lawyer. Sometime after this conversation, Bortner spoke with Mansson about securing a lawyer through the court. Bortner then wrote to the court indicating that she wished to recant some of her prior statements. This evidence provides compelling circumstantial evidence that the defendant sought to influence Bortner by "perpetuat[ing] his harmful influence in the [witness's] life." Morris, 259 F.3d at 901; cf. United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) (upholding defendant's witness tampering conviction based on circumstantial evidence that the defendant influenced the witness to testify falsely before the grand jury). Thus, the jury should be able to consider this evidence as an indication of the defendant's consciousness of guilt.

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

(A) Permit the State to introduce evidence of the defendant's contact with Bortner in violation of the no-contact provision in the bail order; and

(B) Grant such further relief as may be just and proper.

Respectfully submitted,

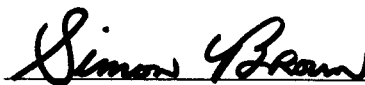
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November 13, 2001

I certify that a copy of the foregoing was mailed this day, postage prepaid, to Mark Sisti, Esq., and Alan Cronheim, Esq., counsel for the defendant.



N. William Delker