

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

NOVEMBER TERM, 2001

SUPERIOR COURT

Nos. 00-S-888 – 00-S-896

Nos. 00-S-934 – 00-S-935

The State of New Hampshire

v.

Chad Evans

**STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATING TO THE
POSSIBLE INGESTION OF WINDEX BY THE VICTIM**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby submits the State's Motion In Limine to Exclude Evidence Relating to the Possible Ingestion of Windex by the Victim. In support of its motion, the State says as follows:

1. On November 16, 2001, the defendant was arrested on a manslaughter charge for causing the death of 21-month old Cassidy Bortner. 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 causing unprivileged physical contact to Amanda Bortner, Cassidy's mother.

2. Dr. Margaret Greenwald, the Maine Chief Medical Examiner, conducted an autopsy on November 10, 2000. Dr. Greenwald concluded that Cassidy died from multiple blunt force injuries to the head and abdomen. The head trauma (as evidenced by the bruising described below) was consistent with blunt force injury to the head. Dr. Greenwald also observed other "markers," such as retinal hemorrhage, that suggest either a shaking incident or a sudden impact with a hard surface. Dr. Greenwald observed extensive bruising throughout Cassidy's head. Numerous contusions were found beneath Cassidy's scalp. Cassidy also had a large contusion on the inside of her lower lip, consistent with having been struck in that location. Cassidy also had severe bruising in her abdomen, consistent with having been punched or kicked. In addition to bruising, Dr. Greenwald identified subdural bleeding, consistent with axonal injury to Cassidy's brain. Dr. Greenwald identified various older bruises on Cassidy's body, including on her buttocks and on the back of her head. These bruises appeared to be at least one week old. Finally, Dr. Greenwald identified fractures to Cassidy's left and right ulna, right hand, and left tibia. Testing indicated that the fractures occurred within one to three weeks of Cassidy's death.

3. Jeff Marshall will be a witness at trial. Marshall is the boyfriend of Amanda Bortner's sister, Jennifer Conley. Marshall and Conley often babysat Cassidy Bortner at their Kittery, ME apartment in the weeks prior to Cassidy's death.

4. Marshall babysat Cassidy for approximately one hour on the afternoon of November 8, 2000, before the defendant picked up Cassidy from Marshall's residence. On November 9, 2000, the day Cassidy died, Marshall babysat her at his residence from approximately 8:00 am to just after 12:00 noon, when he noticed that Cassidy was in distress and called 911.

5. In the wake of Cassidy's death, Jeff Marshall was interviewed several times by the police. Marshall provided detailed accounts of his care for Cassidy. During questioning, he informed the police that on one occasion at his residence a couple of weeks earlier, Cassidy "got into" the Windex. Marshall said that he assumed she had swallowed some of the Windex, and he tried to get her to spit it out. Discovery (D)-20, 1290. Marshall told police that Cassidy seemed fine after the Windex incident. D-1290.

6. Amanda Bortner told police that Jeff Marshall informed her of the above incident. D-1005. According to Bortner, when she was returned to her, Cassidy was sick and dehydrated. *Id.* Bortner did not seek medical attention for Cassidy.

7. The possible ingestion of substances has no bearing on the murder of Cassidy Bortner. The Maine Chief Medical Examiner Dr. Greenwald, as detailed above, determined that the cause of Cassidy's death was blunt impact injuries. Thus, evidence of the possible Windex ingestion by Cassidy while in Jeff Marshall's care and evidence that she allegedly was dehydrated or otherwise ill afterward should be excluded at trial. This evidence has no bearing on how Cassidy died or on who caused her death. As such, this evidence is irrelevant. N.H. R. Ev. 401. Because the evidence is irrelevant, it is also inadmissible. N.H. R. Ev. 402; see *State v. Guyette*, 139 N.H. 526, 529 (1995) (conviction reversed as evidence of prior uncharged and unattributed injuries to victim were not relevant on issue of whether defendant caused the *charged* injuries).

8. The State moves in limine to preclude the defendant from eliciting testimony from witnesses during direct or cross-examination or from introducing other evidence related to the above-described incident. This evidence is not relevant to any issue as it does not "make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence.” State v. Pelkey, 145 N.H. 133, 135 (2000) (quoting N.H.R. Ev. 401). Thus, the defendant should be precluded from eliciting testimony or otherwise introducing other evidence related to this incident.

9. Even if the above evidence had some relevance, it nonetheless is inadmissible. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.H. R. Ev. 403.

10. Here, any probative value would be miniscule. Rather than being remotely probative, introduction of this evidence would only create an unfair danger that the jury will dislike and discredit Jeff Marshall based on an irrelevant, collateral incident. See Pelkey, 145 N.H. at 136-137 (defendant’s DWI conviction reversed due to admission of his statement that his vehicle contained proceeds from drug sales; the danger of unfair prejudice created by admission of the statement substantially outweighed its limited probative value).

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

- (A) Order that evidence of the above-described incident, including witnesses’ observations of Kassidy Bortner’s condition thereafter, be excluded at trial;
- (B) Schedule a hearing on this issue if necessary; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Philip T. McLaughlin
Attorney General



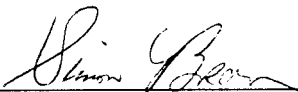
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November 15, 2001

I hereby certify that a copy of the foregoing was hand delivered this day to Mark Sisti, Esquire and Alan Cronheim, Esquire, counsel of record.



Simon R. Brown