

NEW HAMPSHIRE  
SUPREME COURT  
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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2002-0287

State of New Hampshire

v.

Chad Evans

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**DEFENDANT'S PRO SE SUPPLEMENTAL BRIEF**

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Chad Evans  
Defendant  
PO Box 14  
Concord, NH 03302

TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| Table of Authorities .....  | ii          |
| Questions presented .....   | 1           |
| Statement of the Case .....   | 2           |
| Statement of Facts .....  | 3           |
| Summary of Argument .....   | 4-5         |
| <br>Argument  |             |
| I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO<br>INTRODUCE HEARSAY EVIDENCE UNDER NEW HAMPSHIRE RULE<br>OF EVIDENCE 803(2) WHEN THE NECESSARY PREDICATES FOR<br>ADMISSION WERE NOT PRESENT.....   |             |
| II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO<br>INTRODUCE PRIOR BAD ACT EVIDENCE UNDER NEW<br>HAMPSHIRE RULE OF EVIDENCE 404(B) WHEN AMANDA<br>BORTNER'S "STATE OF MIND" WAS IRRELEVANT AND WHEN<br>THE PREJUDICE OUTWEIGHED ITS PROBITY..... |             |
| Conclusion.....   | 6           |

TABLE OF AUTHORITIES

| <u>CASES:</u>  | <u>Page</u> |
|--|-------------|
| <u>State v. Bassett</u> , 139 N.H. 493, 659 A.2d 891 .....             | 5           |
| <u>State v. Richardson</u> , 138 N.H. 162 (1994), 653 A.2d 1361 .....  | 5           |
| <u>Simpkins v. Snow</u> , 139 N.H. 735 (1995), 661 A.2d 772 .....      | 4           |
| <u>State v. Woods</u> , 130 N.H. 721 (1988), 546 A.2d 1073 .....       | 4           |
| <u>Ohio v. Roberts</u> , 448 U.S. 56 (1980) .....                      | 4           |
| <u>United States v. Frankhauser</u> , 80 F.3d 641 (1st Cir. 1996) .... | 5           |
| <u>United States v. Gilbert</u> , 229 F.3d 15 (1st Cir. 2000) .....    | 5           |

QUESTIONS PRESENTED

1. Whether the trial court erred when it permitted the State to introduce hearsay evidence under New Hampshire Rule of Evidence 803(2) when the necessary predicates for admission were not present?

Issue preserved by objection. November 26, 2001 pretrial hearing.  
and T-V 7-36.

2. Whether the trial court erred when it allowed the State to introduce prior bad act evidence pursuant to New Hampshire Rule of Evidence 404(b) when Amanda Bortner's "state of mind" was irrelevant and when the prejudice outweighed its probity?

Issue preserved by objection. November 26, 2001 pretrial hearing.  
and T-XI 23-25.

STATEMENT OF THE CASE

A Strafford County Grand Jury brought a total of nine indictments against Chad Evans: one for second degree murder on 8-9, 2000, six for second degree assault. NOA 7-18, 23. The victim, Cassidy Bortner, who was 21 months old when she died. Additionally, the State brought one information charging Evans with endangering the welfare of a child, Cassidy, and another unrelated charged alleging simple assault against his girlfriend, Amanda Bortner. NOA 19-22.

All of the charges were consolidated for trial. At trial, Evans contended that Cassidy's babysitter, Jefferey Marshall, was responsible for her death. The trial court dismissed on of the first degree assault charges at the close of the State's case. T IX 17. After deliberations, the jury convicted Evans of all other charges except the remaining first degree . NOA 2. The trial Court (Nadeau, T., J.) sentenced Evans to serve 28 years to life in prison. NOA 1.

STATEMENT OF FACTS

Kassidy Bortner died on November 9, 2000. T-II 27, 63. In the hours immediately before her death, Kassidy was in the custody and care of Jefferey Marshall, the live in boyfriend of her mother's sister, Jennifer Conely, at Conely and Marshalls's home in Kittery Maine. T-II 138; T-III 141-145, 168-177, 228-259; T-IV 109-113. Both Forensic Pathologists who testified at trial confirmed that Kassidy suffered injuries while she was in Marshall's care the morning of her death. T-VII 178-179, 227-229, 242-243; T-IX 36, 58-60. Notwithstanding the extensive abuse alleged, a substantial search of Evans home yielded absolutely no forensic evidence to support the State's theory that he had severely abused Kassidy in his home. However, the police merely performed a superficial examination of the actual crime scene, Jefferey Marshall's home.

The State, over defense objection, moved in limine to admit statements made by Amanda Bortner to Tracey Foley seven days subsequent to amanda's first of four coercive interviews with the police hours after Kassidy's death. See Pages 7 through 36 of the November 26, 2001 pretrial hearing. The trial court (Nadeau, J.) permitted the State to introduce the statements under the "excited utterance" exception through the testimony of tracey foley. T-V 78-94. Amanda Bortner testified that her statements to foley were as result of the police convincing her that Evans had killed Kassidy. T-II 77, 87, 147; T-III 25-26.

Notwithstanding the fact that Amanda Bortner testified that she had initiated the simple assault by throwing a "mug" at Evans, Evans was convicted of the charge and was irrelevant to Evans "state of mind" and the circumstances surrounding Kassidy Bortner's death. See November 26, 2001 pretrial hearing and T-II 129, 131, 132, and 135.

SUMMARY OF THE ARGUMENT

The trial court erred when it permitted the State to introduce highly prejudicial hearsay statements through the testimony of Tracey Foley when the necessary predicates for the admission of the statements were not present.

Rule 803(2) provides a hearsay exception for excited utterances. The perceived "guarantees of trustworthiness" underlying this exception is the declarant's lack of capacity for fabrication or deliberate or conscious misrepresentation as a result of a startling event. In order to be admissible under Rule 803(2), there must have been a startling event, in response to which the declarant made a statement relating to the event at a time while the declarant was under the stress of the excitement resulting from the event.

The leading, coercive and suggestive interviews performed by the police are what led Amanda Bortner to believe that Chad Evans had killed her daughter and are what caused Amanda's state of excitement prior to her disclosure to Tracey Foley seven days later. Even if the statement was admissible it should have been excluded because the circumstances surrounding the making of the statement did not bear the "indicia of reliability" necessary for admission and there was an insufficient basis to conclude that the declarant manifested an adoption or belief that the statement was true to qualify as an adoptive admission. Ohio v. Roberts, 448 U.S. 56 (1980).

In Simpkins v. Snow, 139 N.H. 735 (1995), the New Hampshire Supreme Court required "some level of excitement or nervousness [as a] prerequisite to admission under the excited utterance exception to the hearsay rule." As such, where a witness later recounted an event for a few minutes and then "it was kind of brushed off," there was not adequate excitement to fall under the hearsay exception. Id. Cf. State v. Woods, 130 N.H. 721 (1988).

The trial court erred when it allowed the State to introduce the simple assault charge to prove Chad Evan's "state of mind" when his state of mind was irrelevant, the prejudicial effect outweighed its probative value, and where Amanda Bortner testified that she initiated the event which which Evan's was charged. This evidence allowed the jury to make impermissible inferential leaps that because Evan's abused amanda it was more likely that he had abused Kassidy, thereby causing her death. Evidence that Evan's and Bortner engaged in mutual combat, initiated by Bortner, was extremely irrelevant to the instant case. Allowing this type of inference served only to inflame the jury and prejudice Evan's by painting a bad character picture which is forbidden by New Hampshire Rule of Evidence 403 and 404(b).

On appeal in State v. Richardson, 138 N.H. 162 (1994), the defendant argued the trial court erred in admitting evidence of prior and subsequent bad acts under N.H. R. EV. 404(b). The Supreme Court reversed and remanded, finding that the subsequent bad act evidence was inadmissible. The prosecutor argued that the evidence was relevant to the defendant's state of mind. The Supreme Court held that the evidence was inadmissible because it was not connected to material events constituting the charged crime against the defendant. See also State v. Bassett, 139 N.H. 493 (1995).

It is precisely because evidence of past or subsequent misconduct is so repugnant that its unbridled admission into evidence would in most cases render impartial jury deliberations all but impossible, as the evidence diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character.

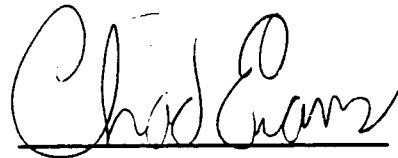
United States v. Frankhauser, 80 F.3d 641, 648 (1st Cir. 1996); United States v. Gilbert, 229 F.3d 15, 24 (1st Cir. 2000).



CONCLUSION

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court vacate his convictions and remand for a new trial.

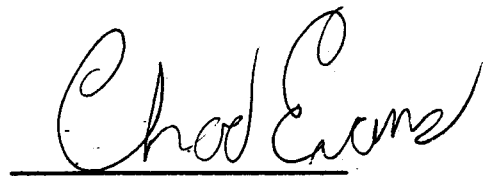
Respectfully Submitted,

A handwritten signature in cursive script, reading "Chad Evans", written over a horizontal line.

Chad Evans, pro se

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief has been mailed, postage paid, to the Office of the Attorney General, 33 Capitol Street, Concord, N.H. 03301, this 19 day of July, 2003.

A handwritten signature in cursive script, reading "Chad Evans", written over a horizontal line.

Dated July 18, 2003