

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STRAFFORD, SS

NOVEMBER TERM, 2001

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 PRECLUDE EVIDENCE OF JEFF
MARSHALL'S PRIOR ACTS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, with a motion in limine to preclude evidence of Jeff Marshall's prior bad acts. In support of this motion, the State submits the following:

1. On November 16, 2000, the defendant was arrested on a manslaughter charge for causing the death of 21-month old Cassidy Bortner. On December 14, 2000, 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. 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.

3. 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.

4. At trial the defendant may try to introduce evidence of prior disputes Jeff Marshall had with ex-girlfriends which are reflected in the discovery.

5. This Court should prohibit the defendant from introducing evidence of Jeff Marshall's prior conduct, reflected in discovery, which is not probative of his character for truthfulness.

6. Under N.H. Rule of Evidence 404(a)(3), evidence of the character of a witness is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except as provided in Rules 607, 608, and 609.

7. N.H. Rule of Evidence 608 provides as follows:

specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Many of the events referred to in discovery relate only to prior instances of disagreement involving Jeff Marshall and past girlfriends and, accordingly, are not probative of the character of Marshall for truthfulness or untruthfulness. See 2 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 9:21 (15th ed. 1998) ("The credibility of a witness may be impeached by evidence impugning the witness's character, but the evidence may refer only to the witness's character for truth and veracity."); CHARLES G. DOUGLAS, III, NEW HAMPSHIRE EVIDENCE MANUAL art. VI, at 201 (4th ed. 2000) ("if the court permits, specific instances may be inquired into on cross-examination, the inquiry is limited to *veracity* only.") (emphasis in original).

8. Any minimal probative value from evidence of prior alleged discourse involving Jeff Marshall "is substantially outweighed by the danger of unfair prejudice" to the State from admission of this evidence. See N.H. R. Ev. 403. Plainly, the defendant's purpose in seeking to introduce this evidence would be to suggest that because of prior discourse involving Jeff Marshall, it is more likely that he and not the defendant was the person who caused the death of Kassidy Bortner. That is an impermissible basis to seek introduction of such evidence. Hitchcock v. State, 413 So. 2d 741 (Fla 1982) (questions about witness's violent propensities not probative of credibility).

9. Of the above-listed prior acts, only one incident led to Jeff Marshall being convicted of a crime. In 1998, Marshall pled guilty to a misdemeanor offense not involving dishonesty or false statement.

10. Under N.H. Rule of Evidence 609:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he or she was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The defendant may not utilize Jeff Marshall's misdemeanor conviction to impeach him.

N.H. Rule of Evidence 609 prohibits use of this conviction as the offense was not punishable by death or imprisonment in excess of one year and the crime did not involve dishonesty or false statement.

11. Just as the State cannot cross-examine the defendant regarding his prior criminal record (short of the defendant opening the door to such evidence), nor can the defendant use the above-listed misdemeanor to impeach Jeff Marshall. See State v. Newell, 141 N.H. 199, 204 (1996) (where victim was convicted of simple assault and reckless conduct, which were not punishable by death or imprisonment in excess of one year and did not involve dishonesty or false statement, under Rule 609(a) evidence of these crimes was not admissible); State v. Norgren, 136 N.H. 399, 401 (1992) (while defendant opened door to introduction of prior misdemeanor convictions, Court notes that misdemeanor criminal threatening does not satisfy the threshold requirements for admissibility under Rule 609(a)).

12. If the defendant is permitted to introduce any of the above evidence involving Jeff Marshall, fairness dictates that the State be allowed to respond to this evidence through introduction of prior acts and statements of the defendant which show his violent propensities. Indeed, the rules of evidence must be construed to "secure fairness" and to

ensure that "the truth may be ascertained and proceedings justly determined." N.H. R. Ev.

102.


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

- A. Preclude the defendant from introducing evidence of Jeff Marshall's prior acts;
- B. Order a hearing if necessary; and
- C. Grant such other and further relief as this Court deems just and proper.

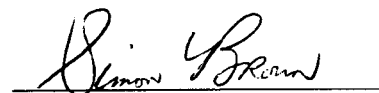
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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November 15, 2001

CERTIFICATION

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



Simon R. Brown