

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 ADMIT AMANDA BORTNER'S EXCITED
UTTERANCES**

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 Admit Amanda Bortner's Excited Utterances. In support of its motion, the State says as follows:

FACTS

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. At trial the State intends to call as a witness Tracey Foley of Springvale, ME. Foley has known Amanda Bortner since Bortner was 16 years of age. Bortner regularly babysat Foley's stepson and daughter. Foley got along well with Bortner and describes her as a quiet, easy-going person.

3. After Bortner gave birth to Cassidy, she babysat less frequently for Foley, and eventually they lost touch with each other. However, on a Friday in October 2000, Foley and Bortner had a chance meeting at the Springvale YMCA. Bortner had Cassidy with her at the time. Foley, Bortner, and Cassidy spent time together at the YMCA and then went back to Foley's residence. The following day, Bortner returned to Foley's house with Cassidy where they spent the night. On Saturday, Bortner had with her various gifts she had bought for the defendant's birthday, which fell on October 15.

4. During those two days, Foley observed "awful" bruises across the bridge of Cassidy's nose and in her cheek area. Foley asked Bortner about the bruises on Cassidy's face. Bortner told her that Cassidy sustained the bruises when Chad Evans caught her by the face with his hand as she fell off a trampoline. On Saturday, Foley also observed a bruise on Bortner's jaw. When she asked Bortner how she sustained the bruise, Bortner said that she had fallen into a door. Foley doubted her story. Bortner said she could not believe Foley thought that somebody would hit her. Foley told Bortner that she could stay with her if she needed to get away from any abuse.

5. Bortner was supposed to visit Foley the following Friday, but she never showed up and never called. Foley reached Bortner by telephone on Sunday and reminded her of their plans. Foley told Bortner that her not calling had worried her. Bortner replied sarcastically, "Well, what did you think, I was getting beat?"

6. Foley did not hear from Bortner after their Sunday conversation. Foley learned of Cassidy's November 9 death through the newspaper. On Monday, November 13, 2001, Foley went to the Kittery Police Department where she provided a statement.

7. On November 16, 2000, at 9:00 p.m., the defendant was arrested at his Rochester home and charged with manslaughter in connection with Cassidy's death. Later that evening, Bortner appeared unannounced at Foley's Springvale residence. Springvale is less than 19 miles from Rochester. Foley described Bortner as a "wreck." According to Foley, "Bortner "was a mess...her hair was a mess...she was distraught...(and) definitely not typical Amanda." Bortner was crying and very emotional. In Foley's estimation, Bortner was in no condition to have driven due to her emotional state.

8. Bortner talked to Foley for approximately two hours at Foley's kitchen table. Both Bortner and Foley were upset and crying during their conversation. Bortner walked in, hugged Foley, and said words to the effect of, "You knew, and I didn't listen." Bortner said that she was present when the defendant was arrested that evening. Bortner said that after the arrest she drove from the defendant's home to Springvale. Bortner began to talk about the defendant's treatment of Cassidy. She said that the defendant was jealous of Cassidy and that anytime Cassidy would try to get Bortner's attention, the defendant became angry. Bortner said that if Cassidy would not be quiet, the defendant would lose control. To quiet Cassidy, the defendant would grab her and push her up against the wall. Additionally, Bortner described an incident when the defendant threw Cassidy onto the bed in their bedroom.

9. By the end of their conversation, both Bortner and Foley were exhausted. Foley told Bortner that she needed to sleep, and Bortner slept at Foley's house that night. Cassidy's funeral was held two days later, November 18, in Springvale.

10. On November 6, 2001, Bortner was charged by information with two counts of endangering the welfare of a child in connection with the on-going abuse and eventual death of Cassidy Bortner.

DISCUSSION

11. Amanda Bortner's emotional statements to Tracey Foley on November 16 were excited utterances under N.H. R. Ev. 803(2). Thus, they are admissible at trial as exceptions to the hearsay rule.

12. An excited utterance is:

(a) statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

N.H.R.Ev. 803(2); State v. Coppola, 130 N.H. 148, 153 (1987). Statements are admissible as excited utterances when it appears "to the satisfaction of the presiding justice that the utterance was a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by that event, and before he had time to contrive or misrepresent." Semprini v. Railroad, 87 N.H. 279, 280 (1935); Coppola, 130 N.H. at 153-54; State v. Kenna, 117 N.H. 305, 307 (1977).

13. "The declarant's spontaneity, then, is the requisite condition that removes a statement admissible under Rule 803(2) from the sort of 'mere narrative' that the hearsay rule would bar from evidence." Coppola, 130 N.H. at 154 (citing State v. Martineau, 114 N.H. 552, 558 (1974)). "Whether or not this test of spontaneity is met is for the trial court to determine in the exercise of its sound discretion." State v. Bonalumi, 127 N.H. 485, 487-88 (1985) (citing Bullard v. McCarthy, 89 N.H. 158 (1937)). In addition to the declarant's demeanor, the nature of the exciting event, the declarant's state of mind, and all other

circumstances surrounding the statements are relevant. Id. at 489 (citing MCCORMICK, EVIDENCE sec. 297, at 856 (3d ed. 1984)).

14. Amanda Bortner's statements to Tracey Foley on November 16 are excited utterances as they were a spontaneous verbal reaction made in response to a most startling event, the arrest of Bortner's live-in boyfriend Chad Evans for the homicide of her only daughter, 21-month old Kassidy. That the defendant's arrest was a sufficiently startling event under the rule is supported by the Supreme Court's holding in State v. Bonalumi.

15. In Bonalumi, the Supreme Court upheld admission of statements made at the police station by the defendant's wife approximately 50 minutes after his arrest for driving while intoxicated, second offense. Earlier in the evening the defendant's wife had tried to prevent the defendant from driving because she believed he was too drunk to drive. Bonalumi, 127 N.H. at 488. At trial, the court allowed the police officer to whom the wife relayed her earlier conversation with the defendant, to testify as to what she told him. In addressing the husband's arrest, the Supreme Court noted, "[W]hile this may not be a widely recognized startling event, the courts look to the effect upon the declarant and, if satisfied that the event was such as to cause adequate excitement, the inquiry is ended." Id. (citing C.MCCORMICK, EVIDENCE sec. 297, at 855). In concluding that the husband's DWI arrest was a sufficiently startling event, the Bunalumi trial court stated that the wife would have been excited and possibly angry due to the arrest, noting that the defendant faced a jail sentence and heavy fine. Id.

16. In comparison, the defendant Chad Evans had been arrested for manslaughter, a homicide level offense carrying an exponentially higher penalty than that in Bunalumi. Evans had been charged in the death of Bortner's baby daughter, and the homicide had

occurred just one week earlier. Undoubtedly, the arrest intensified the emotional stress Bortner already was experiencing after Cassidy's death. Thus, under the totality of the circumstances, the defendant's manslaughter arrest easily qualifies as a "startling event" under the excited utterance hearsay exception.

17. Tracey Foley's testimony will clearly establish that when Bortner showed up at her house, Bortner was still in a state of nervous excitement produced by the startling event. Normally an easy-going, quiet person according to Foley, that night Bortner was an emotional, tearful "wreck." Moreover, Bortner's emotional upset did not subside. She remained tearful and emotional throughout her contact with Foley that night, to the point that she was exhausted by the end of their conversation. Additionally, the circumstances surrounding Bortner's statements could not be more tumultuous. Not only were the statements made in the immediate wake of her boyfriend's arrest but they were uttered only seven days after the sudden murder of her daughter and two days before Cassidy's funeral.

18. Bortner made her statements to Foley after having driven from Rochester to Springvale, ME, a distance of less than 19 miles. Such a brief trip and time interval between the event and the utterances does not rebuff a finding that Bortner was still under the stress of excitement produced by the startling event when she spoke to Tracey Foley. "The precise amount of time that may elapse before a statement loses its spontaneity as an excited utterance evoked by a startling event and becomes mere narrative cannot be established by any absolute rule of law and accordingly, (m)uch must be left to the discretion of the (trial) court in admitting or rejecting such testimony." Martineau, 114 N.H. at 557 (citations omitted). Here, the arrest and conversation occurred in the same evening and were sufficiently contemporaneous. Such a conclusion would be consistent with prior Supreme

Court holdings addressing similar time intervals between the startling event and the utterances in question. See State v. LaClair, 121 N.H. 743,747 (1981) (one hour sufficiently contemporaneous); State v. Plummer, 117 N.H. 320, 325 (1977) (“more than three hours” sufficiently contemporaneous); Martineau, 114 N.H. at 557 (“two or three hours” sufficiently contemporaneous); cf State v. Woods, 130 N.H. 721, 726 (1988) (statements made by victim later in the day and next day not sufficiently proximate to startling event).

19. Finally, the fact that some of Bortner’s statements may have been made in response to questioning by Foley does not defeat a finding of spontaneity. State v. Lesnick, 141 N.H. 121, 128 (1996) (fact declarant was responding to police officer’s questioning did not compromise trial court’s ruling that statements were spontaneous and, thus, admissible); Coppola, 130 N.H. at 154 (“the fact that the victim gave her statements in answer to questions is in no way inconsistent with the probable spontaneity of her responses”); LaClair, 121 N.H. at 747 (the mere fact that the statement is made in response to a question asked some time after the incident does not make the statement inadmissible as a matter of law); Hudson, 121 N.H. at 11; State v. Kenna, 117 N.H. at 308; cf State v. Cole, 139 N.H. 246, 248 (1994) (statement erroneously admitted as excited utterance because “clearly deliberate” and made in response to a “direct charge of fault”).

CONCLUSION

20. Given the gravity of the startling event, the close proximity of the arrest to the utterances, and the surrounding circumstances, Amanda Bortner’s statements to Tracey Foley describing the defendant’s abuse of Cassidy constitute excited utterances under N.H.R.Ev. 803(2) and should be admitted as substantive evidence at trial.

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

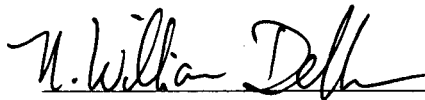
- (A) Admit as substantive evidence Amanda Bortner's statements to Tracey Foley on November 16, 2000;
- (B) Schedule a hearing on this issue if necessary; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

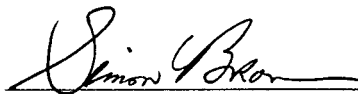
THE STATE OF NEW HAMPSHIRE

By its attorneys,

Philip T. McLaughlin
Attorney General



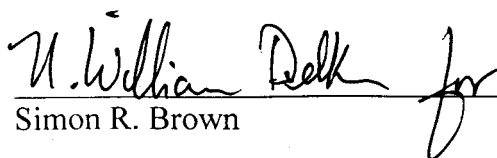
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November 15, 2001

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