

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 STATEMENTS OF AMANDA
BORTNER AS A CO-CONSPIRATOR UNDER N.H. R. Ev. 801(d)(2)(E)**

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 Statements of Amanda Bortner As a Co-Conspirator Under N.H. R. Ev. 801(d)(2)(E). 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 Kassidy 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, Kassidy's mother.

2. The endangering the welfare of a child charge against the defendant, in pertinent part, alleges that between August 1, 2000 and November 8, 2000:

Evans knowingly endangered the welfare of Kassidy Bortner, age 20 months, the daughter of Amanda Bortner, by purposely violating a duty of care which he owed to Kassidy. While Evans lived with Kassidy and Amanda and provided care and supervision for Kassidy, Evans inflicted bodily injury to Kassidy. Evans bruised Kassidy's body and fractured her bones by repeatedly grabbing Kassidy by the face, throat, arms, and legs and by propelling Kassidy into the walls of the home, causing Kassidy to strike the walls. Evans also withheld Kassidy from proper medical treatment for those injuries.

3. On November 6, 2001, Amanda 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 Kassidy Bortner. One of the endangerment charges alleges the following conduct between August 1, 2000 and November 8, 2000:

While Bortner and Kassidy lived with Chad Evans, Evans inflicted bodily injury to Kassidy. Evans bruised Kassidy's body and/or fractured her bones by repeatedly grabbing Kassidy by the face, throat, arms, and legs and by propelling Kassidy into the walls of the home, causing Kassidy to strike the walls. Knowing of Evans' abuse, Bortner violated her duty of care or protection to Kassidy by failing to seek proper medical treatment for Kassidy's injuries and by failing to take steps to protect Kassidy from Evans' abuse.

4. During the time period of the above-detailed charges, both Amanda Bortner and the defendant told various lies to other people regarding Kassidy's injuries in an attempt to hide the abuse. To numerous people and at different times, Bortner explained the bruising injuries to Kassidy's face as having been caused by the defendant grabbing her face to prevent a fall off a trampoline. Other witnesses who saw the bruising were told Kassidy had fallen or that she was injured as the defendant carried her down the stairs. Bortner told her friend Emily Conley she and the defendant agreed to lie about the cause of Kassidy's injuries to cover for his abuse of Kassidy. Bortner told Conley that the defendant had caused the bruises and that he told Bortner

to use the trampoline story as an excuse. Bortner also told Conley that she and the defendant got a babysitter when his parents visited so that they would not see the bruises on Cassidy. Bortner told Jeff Marshall that she and the defendant were keeping Cassidy away from daycare until her bruises healed. The defendant told Jeff Marshall that once Cassidy's bruises healed, Cassidy would be taken to the doctor.

DISCUSSION

5. Amanda Bortner and the defendant conspired to hide Evans' on-going physical abuse of Cassidy. The existence of this conspiracy is supported by compelling independent evidence. Thus, under N.H. R. Ev. 801(d)(2)(E), all of Bortner's statements made in furtherance of the conspiracy are admissible at trial.

6. "[O]ut-of-court statements by co-conspirators are admissible as exceptions to the hearsay rule when made during the pendency of the criminal enterprise and in furtherance of the criminal object, as long as existence of the conspiracy is sufficiently proved by independent evidence." State v. Gonzalez, 136 N.H. 354, 356 (1992). The State must present a *prima facie* conspiracy case in order for the co-conspirator's hearsay statements to be admitted. Id. The applicability of the co-conspirator rule is not conditioned upon the presence of a conspiracy count in the indictment. State v. Favreau, 134 N.H. 336, 341 (1991).

7. A conspiracy may be proven by circumstantial evidence. See State v. Gilbert, 115 N.H. 665, 667 (1975) (affirming conviction for conspiracy based on circumstantial evidence). The very essence of a conspiracy is "secrecy and concealment," and the State is entitled to rely upon "inferences drawn from the course of conduct of the conspirators." Id. It is not necessary to establish an express agreement between the parties to prove the

existence of a conspiracy. Id. A tacit understanding between the parties to cooperate in an illegal course of conduct will support the existence of a conspiracy. Id.

8. The evidence in this case clearly establishes the existence of a conspiracy between the defendant and Bortner. The goal of the conspiracy was to conceal the defendant's on-going physical abuse of Kassidy. The conspiracy was furthered through Bortner and the defendant's lies and excuses made to others regarding how Kassidy had received her repeated and obvious injuries. The conspiracy was also furthered by their keeping Kassidy away from the defendant's parents, daycare providers, doctors, and others likely to intervene.

9. Sufficient independent circumstantial evidence implicates Bortner as a coconspirator, permitting use of her statements as non-hearsay. See State v. Batchelder, 144 N.H. 249, 252 (1999). "Independent evidence' is any evidence that is otherwise admissible." Id.

10. Independent evidence will show that Kassidy was in the defendant and Bortner's care continuously in the time frame of the endangering charges. Numerous witnesses will testify that bruising to Kassidy's face first began when Bortner and Kassidy moved in with the defendant. Witnesses will testify that Kassidy's demeanor changed drastically during this same time period. According to Jennifer Conley and Marshall, Kassidy became fearful and subdued and appeared frightened to move about their apartment when she visited. Dr. Margaret Greenwald, the Maine Medical Examiner, will testify that Kassidy suffered multiple injuries of varying ages in this time frame, including fractures. Yet, at no time did the defendant or Bortner seek medical attention for Kassidy. Instead, when the bruises became more frequent, Kassidy was stashed at the babysitter and kept away from parents, daycare, and doctors. Additionally, in

his statement to police, the defendant admitted to and demonstrated various methods of discipline he inflicted upon Cassidy, including face grabbing and smacks to the mouth. These actions, with sufficient force, are wholly consistent with many of the injuries observed on Cassidy by both lay witnesses and the forensic pathologist, Dr. Greenwald.

CONCLUSION

11. In this case, a conspiracy between the defendant and Bortner to endanger Cassidy's welfare is sufficiently proven by independent evidence. As such, all of Amanda Bortner's statements made in furtherance of the conspiracy, including the lies and excuses she made to others about Cassidy's injuries and admissions she made to others about concealing the abuse, are admissible as substantive evidence at trial.

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

- (A) Admit as substantive evidence all of Amanda Bortner's statements made in furtherance of the conspiracy to conceal the abuse of Cassidy Bortner;
- (B) Schedule a hearing on this issue if necessary; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

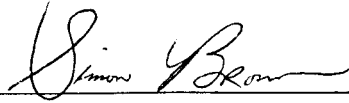
THE STATE OF NEW HAMPSHIRE

By its attorneys,

Philip T. McLaughlin
Attorney General



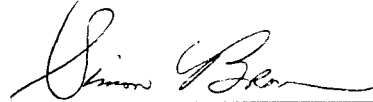
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November 15, 2001

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