

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  
DEFENDANT'S GOOD CHARACTER AND/OR ALLEGEDLY GOOD  
TREATMENT OF CHILDREN OTHER THAN 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 Defendant's Good Character and/or Allegedly Good Treatment Of Children Other Than The Victim. In support of its motion, the State says as follows:

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 the time of her death on November 9, 2000, Cassidy Bortner lived with her mother Amanda Bortner and the defendant at the defendant's Rochester residence. In October 2000, the defendant's divorce from his wife Tristan Evans became final. With Tristan, the defendant had one son, Kyle, age 3. Tristan also had an older son Brent, age 7, through an earlier relationship. Under terms of the divorce, the defendant had custody of Kyle four days per week.

3. When interviewed by the police after Cassidy's death, both Tristan Evans and the defendant stated that he, the defendant, was a good father to Kyle and Brent and that neither of those children was physically abused by him.

4. The defendant's alleged good treatment of children other than Cassidy Bortner has no bearing on the pending charges. Thus, witnesses should be precluded from testifying about the defendant's alleged good treatment of other children or from providing an opinion as to whether the defendant is the type of person who would physically abuse children. Such evidence would constitute inadmissible character evidence.

New Hampshire Rule of Evidence 404(a) governs the admissibility of character evidence. The general rule is that evidence of a person's character or trait of character is inadmissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. N.H.R.Ev. 404(a). "The rationale behind this rule is the notion that this evidence has slight probative value but has a tendency to be highly prejudicial or to confuse the issues." Cohn v. Papke, 655 F.2d 191, 194 (9<sup>th</sup> Cir. 1981). An exception to the general rule allows the accused to present evidence of a pertinent trait of character to prove that he acted in conformity with that character trait at the time of the alleged crime. N.H. R. Ev. 404(a)(1). Thus, to be admissible under 404(a)(1), two requirements must be satisfied. (citation omitted). First, the proffered evidence must be "pertinent." N.H. R. Ev. 404(a)(1). Second, the evidence must constitute a "character trait." Id. (citation omitted).

State v. Graf, 143 N.H. 294, 297-98 (1999).

5. Evidence of how the defendant treated children other than the victim is not pertinent. “Evidence is ‘pertinent’ if it is relevant.” Id. at 298. Being the type of person to physically abuse children is not pertinent to the charged crimes as such conduct is “generally not the type of conduct which is done in public, but [in] an environment or location calculated to avoid detection.” Id. at 297-98 (where Supreme Court affirmed trial court’s exclusion of evidence that the defendant was not the type of person who would sexually assault minors).

6. One who abuses a child would not be expected to inflict the abuse in public nor to honestly and openly acknowledge the abuse to others. Thus, acquaintances and friends of the defendant would not have the requisite knowledge to form an opinion as to whether the defendant is the type of person to physically assault a child. “Accordingly, the proffered evidence, lacking any foundation, would be irrelevant because it does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Id. at 299 (citing N.H. R. Ev. 401).

7. Likewise, the defendant should be precluded from introducing specific instances of his good conduct towards children other than Kassidy Bortner to show that he is not the type of person to physically abuse children. N.H. R. Ev. 405(b) addresses evidence of the defendant’s character by means of specific instances of conduct. N.H. R. Ev. 405(b) states:

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

8. The defendant's alleged good conduct and/or non-abuse towards his own children is not an essential element of the pending charges. The defendant's character simply is not an element of second degree murder, first and second degree assault, or endangering the welfare of a child. See State v. Newell, 141 N.H. 199, 201-02 (1996) (victim's prior convictions for reckless conduct and simple assault inadmissible under Rule 405(b) as not an essential element of self-defense). Thus, testimony and evidence about specific instances of the defendant's conduct towards other children is inadmissible.<sup>1</sup>

9. Should the Court deny the State's motion or otherwise permit testimony relating to the defendant's treatment of other children, the State has a right to address that evidence. Recent discovery, bate stamped 3174-3177, reveals evidence the State intends to use to rebut or impeach any such evidence if introduced at trial

10. Rather than permitting the trial to become ensnared on a collateral, irrelevant issue, for the reasons discussed, no evidence should be permitted at trial relative to the defendant's alleged good treatment of children other than the victim.

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

- (A) Grant the State's motion to preclude witnesses from providing testimony regarding the defendant's good character or good treatment of children other than the victim;
- (B) Schedule a hearing on this issue if necessary; and

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<sup>1</sup> If the State introduces the defendant's videotaped statement at trial, the State intends to move to redact portions where the defendant discusses his treatment of Kyle and Brent Evans. See State v. Crosby, 142 N.H. 134, 138 (1997) ("The State may not employ a trial strategy of introducing evidence which itself creates the necessity for admitting prior bad acts evidence."). Without redaction, the State would be in a position of needing to address a misleading impression created by the defendant's statements.

(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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N. William Delker  
Bureau Chief

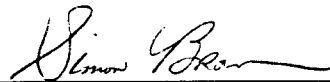


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November 15, 2001

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.



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Simon R. Brown