

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

NO. 216-2022-CR-00020 & -02372

**ORDER ON THE DEFENDANT'S MOTION TO SEVER**

The defendant, Adam Montgomery, is charged with second degree assault based on the defendant's alleged July 2019 assault of his then 5-year-old child, Harmony Montgomery ("Harmony").<sup>1</sup> See Docket No. 216-2022-CR-00020. In another docket, the defendant is charged with second degree murder, tampering with witnesses and informants, falsifying physical evidence, and abuse of corpse based on his alleged murder of Harmony on December 7, 2019, and the resultant actions the State alleges were taken to conceal the murder and dispose of her body. See Docket No. 216-2022-CR-02372. The defendant previously filed an assented-to motion to join both cases, which the Court granted. Mot. to Join (Doc. 14.)<sup>2</sup>

The defendant now seeks to revisit the joining of the two dockets and moves to sever the charges before trial. Mot. to Sever (Doc. 92.) The State and the defendant subsequently exchanged responsive pleadings regarding the defendant's motion to

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<sup>1</sup> Originally, docket number 216-2022-CR-00020 included one count of interference with custody, and two counts of endangering the welfare of a child. On June 28, 2022, the Court granted the defendant's motion without objection to sever the felony charge of second degree assault from the misdemeanor charges. (See Doc. 19 in No. 00020.)

<sup>2</sup> Unless otherwise provided, the Court references documents in docket number 216-2022-CR-02372.

sever. See State's Resp. to Def.'s Mot. to Sever (Doc. 95); Def.'s Resp. to State's Resp. (Doc. 99.) For the reasons that follow, the defendant's motion to sever is DENIED.

### **Factual Background**

The following facts are derived from the parties' proffers in their pleadings, as well as the probable cause affidavits filed in support of both cases. (See Doc. 9 in No. 00020; Doc. 6 in No. 02372). On November 18, 2021, Crystal Sorey called the Manchester Police Department ("MPD") to report her biological daughter missing. (Doc. 9 in No. 00020.) Sorey told the MPD that she had not seen her daughter, Harmony, since approximately April 21, 2019. (Id.) At the time, the child was in the physical and legal custody of the defendant, her biological father, pursuant to a decision from the Lawrence Juvenile Court in Massachusetts on February 21, 2019. (Id.) Subsequently, an employee of the MPD contacted the Division for Children, Youth and Families ("DCYF") of the New Hampshire Department of Health and Human Services. (Id.) MPD's Initial attempts to check the previous addresses provided by DCYF proved unsuccessful. (Id.)

On December 27, 2021, DCYF notified the MPD that they were unable to locate Harmony. (Id.) As a result, the MPD initiated an investigation into Harmony's whereabouts and actively attempted to track down the defendant. (Id.) During their investigation, MPD officers and investigators made contact with members of the defendant's family. (Id.) After speaking with the defendant's uncle, Kevin Montgomery, the MPD learned that the defendant had reportedly given Harmony a black eye in July 2019 and admitted the conduct to Kevin Montgomery when Kevin was at the Montgomery house. (Id.)

On December 28, 2021, a detective with the MPD spoke with Kayla Montgomery, the defendant's wife, and inquired about the last time she had seen Harmony. (Id.) Kayla

indicated she had last seen Harmony in November or December of 2019. (Id.) She said she believed the defendant brought Harmony to Sorey around that time. (Id.) Kayla told police that she had not physically seen the defendant since late October 2021, and had not spoken with him since mid-November 2021. (Id.) On December 31, 2021, Kayla participated in a voluntary interview with MPD detectives and discussed in further detail the last day she had seen Harmony. (Id.)

Also on December 31, 2021, MPD patrol officers were on the lookout for the defendant and his then girlfriend, Kelsey Small, in Manchester. (Id.) Upon discovery of the defendant's whereabouts, detectives responded to the location to speak with the couple. (Id.) At that time, the MPD determined that Harmony was not with the defendant and her whereabouts continued to be unknown to the police.

Because DCYF was granted protective supervision of Harmony, the defendant was given an order that day instructing him to cooperate with the MPD and assist with locating Harmony. (Id.) However, the Defendant did not cooperate with police. (Id.) Upon issuance of a warrant, the defendant was arrested and charged with second degree assault for causing bodily injury to Harmony in July of 2019, as well as one count of interference with custody, and two counts of endangering the welfare of a child. See generally Docket No. 216-2022-CR-00020.

Subsequently, the MPD continued their investigation and search for Harmony. On May 20, 2022, Kayla Montgomery testified under oath before the Grand Jury in Hillsborough County Northern District as part of the Grand Jury's investigation into Harmony's disappearance. (Doc. 06 in No. 02372.) After investigating Kayla's testimony to the Grand Jury, investigators discovered she made several untruthful statements while

under oath. (Id.) As a result, an arrest warrant was obtained and Kayla was arrested on two charges of perjury on June 03, 2022. (Id.) On that same day, Kayla participated in a proffer interview at the Manchester Police Department. (Id.) During the interview, Kayla revealed that Harmony had died on December 7, 2019. (Id.)

Kayla shared that they had become homeless in November of 2019 and that she lived with the defendant and their children in their vehicle. (Id.) Kayla explained that the defendant would become upset that five-year-old Harmony was not communicating when she needed to go to the bathroom and was having accidents in the car. (Id.) Kayla indicated that after each accident, the defendant would strike Harmony in the face/head with a closed fist. (Id.) She stated that the defendant struck Harmony multiple times after one of her accidents which caused her death. (Id.)

Over the succeeding months, law enforcement personnel continued their investigation to gather evidence and corroborate Kayla's account of Harmony's death. In October of 2022, the defendant was charged with second degree murder, tampering with witnesses and informants, falsifying physical evidence, and abuse of corpse. See generally Docket No. 216-2022-CR-02372. On November 23, 2022, the defendant filed an assented-to motion to join the second degree assault charge with the charges in the second case. (See Doc. 14.) The motion was subsequently granted, and the cases were joined. (Id.)

On January 11, 2024, members of the State met with Kayla in anticipation of trial. (Doc. 95 ¶ 4.) After that meeting, the State supplemented their previously provided discovery materials and sent the defense notice of three purported changes or additions to Kayla's account of the circumstances leading to Harmony's death in the form of a

“Zwicker letter.” See State v. Zwicker, 151 N.H. 179, 192 (2004). The instant motion followed.

### **Analysis**

In support of his motion, the defendant points to the Zwicker letter he received on January 11, 2024, and argues that there has been a substantial change in evidence in the weeks before trial. The defendant argues that the State “now portrays the second degree assault and second degree murder charges as mere parts of a larger, pervasive, and sustained pattern of abuse.” (See Doc. 92 ¶ 3.) The defendant contends that such a strategy will interfere with the jury’s ability to “impartially consider the charges separately on the own individual merits.” (Id. ¶ 9.) The extent to which, if at all, these new pieces of information, along with the other evidence in the case, would result in unfair prejudice to the defendant if the previously joined dockets remain together, “is a factor for the trial court to consider under the ‘best interests of justice’ prong” of the joinder analysis. State v. Brown, 159 N.H. 544, 554 (2009); see N.H. R. Crim. P. 20(b). Accordingly, the Court analyzes whether joinder is appropriate under the present circumstances of the cases.

Pursuant to Rule 20 of the New Hampshire Rules of Criminal Procedure, “[i]f a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.” N.H. R. Crim. P. 20. (emphasis added). In doing so, joinder seeks to “achieve efficiency and economy for both the government and the defendant.” Brown, 159 N.H. at 555 (2009); see also State v. Girard, 173 N.H. 619, 624–25 (2020) (“Joint trials avoid the duplication of evidence and may reduce inconvenience to victims and witnesses,” and “[t]he potential benefits to the

defendant may include the faster disposition of pending charges, the possibility of concurrent sentence in the event of conviction, and protection against enhanced sentencing that might occur from separate trials.”).

I. Related Offenses

The Court must first determine whether offenses are related for purposes of Rule

20. Offenses are related if they:

- (A) are alleged to have occurred during a single criminal episode; or
- (B) constitute parts of a common scheme or plan; or
- (C) are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

N.H. R. Crim. P. 20(a)(1)(A)–(C). As the state recognizes, the absence of evidence indicating a single criminal episode or common scheme requires the Court’s analysis to focus on whether the offenses are “logically and factually connected.” (See Doc. 95 ¶ 17.)

This is “largely determined by the close relationship among the offenses with respect to both the underlying charged conduct and the evidence to be used to prove the charges[.]”

Id. In Brown, the New Hampshire Supreme Court set forth five factors that trial courts should consider when determining whether charges resulting from separate criminal episodes are related:

- (1) the temporal and spatial relationship among the underlying charged acts;
- (2) the commonality of the victim(s) and/or participant(s) for the charged offenses;
- (3) the similarity in the defendant's mode of operation;
- (4) the duplication of law regarding the crimes charged; and
- (5) the duplication of witnesses, testimony and other evidence related to the offenses.

159 N.H. at 551–52.<sup>3</sup> While no single factor is dispositive on the question of relatedness, these factors are “guidelines that must be sensibly applied in accord with the purposes of joinder.” Id. at 552.

Here, the parties agree that the underlying events from which the charges arise lack a clear temporal and spatial relationship, which weighs against joinder. (Compare Doc. 95 ¶ 19, with Doc. 92 ¶ 8.) However, the State argues that the remaining Brown factors support keeping the two cases joined. (See Doc. 95 ¶ 19) The Court addresses each in turn.

a) Commonality

The State argues, and the defendant does not appear to dispute, that there is commonality between the two charges because the two cases involve a common defendant and victim. (Id.) In State v. Bruno, No. 2017-0414, 2018 WL 7080488 at \*3 (N.H. Dec. 26, 2018) (nonprecedential), the supreme court found the charged offenses were logically and factually related, where they involved the same perpetrator and victim. Here, the defendant is the common perpetrator and Harmony is the common victim in the second degree assault charge in the first case and the second degree murder charge in the second case. Additionally, Kayla Montgomery is a central witness in both cases. This commonality between the two cases supports the relatedness of the charges.

b) Mode of Operation

The defendant argues that the mode of operation is dissimilar in each case, because “the alleged mode of operation – striking the victim with one’s fist – differs in

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<sup>3</sup> The Court notes that the “relevant language of the joinder rule in effect at the [time of the Brown Court’s ruling], Superior Court Rule 97-A, is identical to the corresponding provisions of the current rule, New Hampshire Rule of Criminal Procedure 20.” State v. Rivera, 175 N.H. 496, 498 (2022); compare Superior Court Rule 97-A(I)(A)–(B) with N.H. R. Crim. P. 20(a)(1)–(2).

the degree of force and number of blows.” (Doc. 92 ¶ 8.) In response, the State argues that the mode of operation in the two cases supports joinder, because in each case, the defendant physically assaulted Harmony with his hands when he was angry with her. (Doc. 95 ¶ 19.) The Court agrees with the State. The supreme court has found a consistent mode of operation supporting joinder when a defendant utilizes a similar means or method when committing the alleged offenses. In Girard, the supreme court determined that the defendant’s “proficiency with technology enabled the defendant to take actions that underlay each of the . . . charges.” 173 N.H. at 626. Likewise, in Brown, the supreme court found the defendant’s mode of operation was similar for all the charges because they all involved a “drug buy” in the defendant’s car. 159 N.H. at 547, 554. While the defendant’s alleged conduct may differ in the degree of force and number of blows, the supreme court has focused on the underlying method utilized when committing the alleged offenses, which is the same in both matters. See Girard, 173 N.H. at 626. Thus, the mode of operation is sufficiently similar to weigh strongly in favor of joinder.

c) Duplication of Law

The defendant argues that there is no duplication of law because the law the jury will be expected to apply differs in both *mens rea* and *actus reus*. (Doc. 92 ¶ 8.) In response, the State argues that the law of assault and murder have running through them the same core concepts. (Doc. 95 ¶ 19.) The Court agrees with the defendant that the *mens rea* and *actus reas* in the two matters differ. There is little overlap in the law to be applied in these cases to support joinder on the basis of this factor. However, while this factor weighs against joinder, the Court does not find this factor to be particularly



significant in the context of the pending charges here. The law to be applied on the charges is not particularly complex. The Court does not find that this will create confusion amongst the jury or challenge their ability to apply the law to the facts as they find them. Therefore, while the Court finds this factor weighs against joinder, it does not find the weight significant.

d) Duplication of Witnesses, Testimony, and Other Evidence

Lastly, the Court must consider the duplication of witnesses, testimony, and other evidence, which is routinely an important factor and policy goal of joinder that contributes to the relatedness of offenses. See Brown, 159 N.H. at 552. While the defendant recognizes there will be some duplication in witnesses, he argues the overlap is minimal when compared to the number of witnesses and evidence pertaining solely to the second degree murder charge. (Doc. 92 ¶ 8.) He also points to Kevin Montgomery, who he argues will have relevant information to impart solely with respect to the second degree assault, but not for the second degree murder charge. (Id.) In response, the State admits that the length and number of witnesses for each case would be different if severed. (Doc. 95 ¶ 19.) However, the State indicates it would rely on the same witnesses “to establish Harmony’s residence, the injuries seen, the after effects of the defendant’s criminal behavior, and the defendant’s intimidation of others in his circle to prevent them from reporting or testifying to what they had witnessed, or as retribution from having done so.” (Id.) Notably, underlying both cases is testimony from law enforcement who investigated Harmony’s disappearance, as well as the testimony of Kayla Montgomery who is alleged to have directly bore witness to much of the defendant’s alleged criminal acts. Similarly, both cases will inevitably involve lengthy and detailed cross examination and

impeachment evidence of Kayla Montgomery. Further, in light of second degree assault charges being brought in connection with the police investigation of disappearance of Harmony, there would be significant duplication of evidence regarding preliminary matters as well. While the two cases lack a complete duplication in witnesses and testimony, the Court finds significant duplication weighing strongly in favor of joinder. See Magoon, 2019 WL 2184829 at \*3 (affirming the trial court’s determination that significant overlap in witnesses, including “the witness testimony and evidence that explains the investigation and the events leading to the discovery of each alleged victim” supported joinder).

For the aforementioned reasons, the Court concludes that the underlying offenses are related and thus finds that the Brown factors weight in favor of joinder.

## II. Best Interests of Justice

After considering the Brown relatedness factors, the Court must evaluate whether joinder will offend the best interests of justice. See Brown, 159 N.H. at 554. The New Hampshire Supreme Court has articulated the “best interests of justice” standard as follows:

[C]harges should be tried separately whenever it is deemed appropriate to promote a fair determination of the defendant’s guilt or innocence, which includes evaluating whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense.

Joinder can give rise to other concerns of undue prejudice as well, which may cause the best interests of justice to override conducting a single trial . . . [such as when] charges may be likely to unusually inflame the jury against the defendant . . . [or when] a weak case is joined with a strong case . . . A defendant can also be disadvantaged if the available defenses are inconsistent or if the defendant wants to testify as to one offense but not as to others. Ultimately, in determining the best interest of justice, the purposes underlying joinder, i.e., efficiency and economy, must give way

when conducting a single trial would jeopardize a defendant's right to a fair trial.

Id. at 555–56.

Accordingly, the Court now considers the defendant's argument that the State "portrays the second degree assault and second degree murder charges as mere parts of a larger, pervasive, and sustained pattern of abuse." (Doc. 92 ¶ 3.) Specifically, the defendant argues that the State "intends to employ a trial strategy of bootstrapping the separate offenses and portray a long and unrelenting pattern of abuse and neglect that defies a jury's ability to impartially consider the charges separately on their own individual merits." (Id. ¶ 9.) In support thereof, the defendant points to the Zwicker letter which provided three asserted deviations from Kayla's originally anticipated testimony as discerned from Kayla's interview on January 11, 2024. Notably, the letter notifies the defendant of the following: (1) Kayla herself saw the defendant strike Harmony in the week prior to the family becoming homeless; (2) Kayla disclosed that she believes the defendant cut off contact with Crystal Sorey because he did not want her to discover he was bruising Harmony; and (3) Kayla now describes Harmony as skinny and looking exhausted at the time they were living homeless in their car. (Id. ¶¶ 3–7.)

The Court notes, however, that evidence of abuse is not necessarily inadmissible or unfairly prejudicial to the defendant. Rule 404(b)(1) of the New Hampshire Rules of Evidence provides in pertinent part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person . . . [i]t may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In State v. Thomas, 168 N.H. 589, 600 (2016), the supreme court affirmed the admission of evidence of physical abuse under

Rule 404(b) and highlighted that evidence of other forms of abuse the defendant perpetrated against the victim was relevant to show the conduct was committed knowingly and reflected that the defendant's actions were part of an obvious and deliberate pattern of abuse.

While the State has not noticed any intent to admit evidence under Rule 404(b), the supreme court has indicated “[o]ther act’ evidence is ‘intrinsic,’ and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.” State v. Wells, 166 N.H. 73, 77–78 (2014) (quotation and citation omitted); see United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000) (characterizing evidence of “other acts that are inextricably intertwined with the charged offense” as “background evidence”). “Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense.” Wells, 166 N.H. at 77–78. Against this backdrop, the first and third deviations in Kayla's anticipated testimony may be properly admissible as intrinsic evidence of other acts.<sup>4</sup> Otherwise, the State indicates that it has no intention of raising the second deviation regarding Kayla's opinions about why the defendant cut off contact with Sorey in its case-in-chief.

Given the state of the evidence at this time, including the information in the January 11, 2024 Zwicker letter, and taking into account the Court's ruling on the defendant's motion to exclude Rule 404(b) evidence, the Court is unpersuaded that the second

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<sup>4</sup> This evaluation and determination on the admissibility of potentially intrinsic evidence will be more thoroughly discussed in another order in response to the defendant's pending motions *in limine*.

degree assault and second degree murder charges, when tried in the same case, prevent a jury from impartially considering the charges. Notably, the lack of any Rule 404(b) evidence in the period between the alleged second degree assault in July of 2019 and directly preceding the alleged second degree murder in December of 2019, would allow a jury to discretely consider the two charges. See Bean v. Calderon, 163 F.3d 1073, 1085 (9th Cir. 1998) (“[P]rejudice generally does not arise from joinder when the evidence of each crime is simple and distinct[.]”). Further, the underlying charges and the evidence supporting them are not so complex as to raise concerns that a jury cannot intelligently apply the law and relevant facts to each charge. See Bruno, 2018 WL 7080488 at \*4 (noting the jury’s ability to distinguish the evidence and apply the law intelligently to each offense even when joinder resulted in the joining of thirty-five charges, some of which the defendant believed could risk “inflaming the emotions of the jury”). Any remaining concern that the jury will convict a defendant upon the accumulated effect of the evidence is appropriately quelled through carefully crafted jury instructions. See Magoon, 2019 WL 2184829 at \*4 (noting the danger of propensity was mitigated when the “trial court committed to taking measures, including craft[ing] instructions that will clearly and carefully convey to the jury what may be considered when evaluating [the defendant’s] guilt or innocence for each offense.”).

Ultimately, both the State and the defendant can benefit from joinder in this circumstance. Joinder “enables the state to avoid the duplication of evidence required by separate trials, to reduce the inconvenience to victims and witnesses, to minimize the time required to dispose of the offenses, and to achieve a variety of other economies in connection with prosecutorial and judicial resources.” Brown, 159 N.H. at 552. Likewise,

when “charges are joined into a single trial, the defendant may . . . raise reasonable doubt as to his responsibility for one of the charges, [and] that doubt might undermine the strength of the State's case as to all of the other charges.” Bruno, 2018 WL 7080488 at \*3. Additionally, “[i]f the defendant successfully impeaches the credibility of [a witness] in one instance, such impeachment will [a]ffect the credibility of the witnesses in regard to their testimony as to all offenses.” Brown, 159 N.H. at 556. Here, the recent deviations in Kayla Montgomery’s intended testimony, as indicated in the Zwicker letter, provide additional opportunity for the defendant to seek to impeach her credibility, but does not support severance.


Therefore, the Court finds that the jury will be able to distinguish the evidence and apply the law intelligently to each offense without jeopardizing the defendant’s right to a fair trial and the best interests of justice are served by consolidation. See Brown, 159 N.H. at 554.

### Conclusion

For the foregoing reasons, the Court determines that the charges in the two dockets are sufficiently related and comport with the best interests of justice. Accordingly, the State’s motion to sever the two dockets is DENIED.

**SO ORDERED.**

January 25, 2024  
Date

  
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Amy B. Messer  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 01/25/2024