

3. Discovery previously provided to the defendant contains the basis for Kayla being charged with Receiving Stolen Property. One individual, Kevin Labelle, told police that he believed Kayla definitely knew the defendant had the stolen firearms. Labelle said that Kayla

was walking in and out of living room while he and the defendant were talking about the firearms. He said that Kayla clearly saw the firearms, and the defendant was openly talking about the firearms being “hot” (which can be a slang term for stolen).

4. Another individual, Michael Sullivan, told police that Kayla was present in the room at 77 Gilford Street with Sullivan and the defendant when the defendant had a rifle and a shotgun. Sullivan said the defendant was openly talking about firearms.

5. A third individual, Tarah Hilbert, told police that the defendant had spoken to her about selling firearms, including a rifle, out of his house, which she believed was 77 Gilford Street. Hilbert said that Kayla was present for one of these conversations.

6. Finally, a fourth individual, who was incarcerated with Kayla at the Hillsborough County House of Corrections earlier in 2022, told police about statements Kayla herself made regarding the firearms. Specifically, this individual reported that Kayla talked about “them” stealing firearms and selling them for drug money. Kayla said they needed money for drugs and taking care of the kids. Kayla said she wasn’t there when the firearms were taken but it was Adam and a buddy who took them and brought them back to the house when she was home with the kids.

7. Kayla made initial statements regarding her purported knowledge of the defendant and firearms in March and May 2022. In contrast to the information from multiple individuals described above, Kayla initially disclaimed any knowledge of the defendant having firearms.

8. On June 3, 2022, Kayla was arrested for two charges of Perjury based on statements she had made in prior testimony before the Grand Jury for Hillsborough County Northern District. That same day she agreed to be interviewed by law enforcement. During this

interview, Kayla provided new information about the defendant and firearms which was contrary to her initial statements and which inculpated the defendant with respect to the instant case.

9. Also on June 3, 2022, the Manchester Police Department was engaged in an ongoing investigation into the whereabouts of the defendant's daughter, Harmony Montgomery, who had last been seen in late-2019. During her June 3 interview, Kayla reported to police that Harmony had been murdered in December 2019 by the defendant. Kayla also said that the defendant had encouraged her on multiple occasions to lie to police about Harmony's whereabouts, basically giving Kayla a "cover story" and telling her that as long as she stuck to the cover story everything would be OK.

10. While interviewing Kayla on June 3, investigators attempted to keep separate the portion of the interview that focused on the defendant and firearms from the portion that focused on Harmony's murder. However, despite investigators' efforts, there was significant bleed-over between the topics.

11. Per Rule 12(b)(4)(A) of the New Hampshire Rules of Criminal Procedure, the State's witness list for trial was due on October 7, 2022. Rule 12(b)(4)(A) states as follows:

Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. **Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing.**

(emphasis added). In accordance with the rule, on October 7, 2022, the State filed its witness list for trial and provided the defendant with that portion of Kayla's June 3 interview that focused on the defendant and firearms.

ARGUMENT

12. Rule 12 makes two references to the State’s ongoing obligation to disclose discovery to the defendant. Section (b)(7) provides for a continuing obligation to supplement discovery response on a “timely” basis, while section (b)(4)(A) recognizes what could be characterized as the ultimate deadline to provide witness statements, specifically not less than twenty calendar days prior to the final pretrial conference. Section (b)(7) does not give a definition of the word “timely.”

13. “Timely” is generally defined as “within a specified deadline; in good time; seasonable.” *Black’s Law Dictionary* (11th ed. 2019).

14. To the extent Rule 12 sets an ultimate deadline for the State to provide witness statements to the defendant, the State notes that the relevant portion of Kayla Montgomery’s June 3 interview was provided to the defendant within that deadline. Therefore, the State argues that its provision was timely, and consequently there is no basis to preclude Kayla’s testimony at trial.¹

15. In the alternative, assuming without conceding that providing Kayla’s June 3 interview on October 7, 2022, was a discovery violation, Rule 12 includes a section on remedies:

If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not

¹ The defendant apparently faults the State for providing Kayla’s June 3 statement “on the eve of the parties’ deadline for Motions in Limine.” (Def.’s Mot. ¶ 15.) However, the State notes that this timing was in large part due to the interplay of Rule 12, the calendar, and the Court’s Dispositional Conference Order. The State filed its witness list and provided the defendant with Kayla’s June 3 statement on the day they were due per Rule 12(b)(4)(A), which was October 7, 2022. Typically, per Rule 15, motions *in limine* would be due no less than five calendar days prior to the final pretrial conference, which would put fifteen days between the deadline for the State’s witness list and the deadline for motions *in limine*. However, in the instant case the Court set the deadline for motions *in limine* at fifteen days prior to the final pretrial conference, giving just five days between the deadline for the State’s witness list and the deadline for motions *in limine*. Further complicating the timeline is that October 7, 2022, was the Friday of a three-day holiday weekend.

disclosed; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.

Rule 12(b)(9). Of these remedies, the State suggests that the appropriate remedy would be to grant a continuance.

16. The State asserts that the October 7 disclosure of Kayla's June 3 interview was not some sort of scheme to gain an unfair advantage over the defendant. Instead, the October 7 disclosure was intended to balance the State's desire to protect the Harmony Montgomery investigation with the ultimate deadline for witness statements in the instant case set by Rule 12(b)(4)(A).

17. As noted above, Kayla's June 3 interview comingled information relevant to the instant case with information relevant to the ongoing investigation of the whereabouts of Harmony Montgomery. This put the State in the position of either disclosing to the defendant that Kayla had agreed to be interviewed and had told police that he murdered Harmony, or keeping this information confidential. An important factor in this balance is that Kayla had also told police about the defendant engaging in witness tampering towards her regarding her knowledge of Harmony's murder.

18. The State notes that the only prejudice the defendant identifies in his motion is that he already had a set trial strategy on October 7, which he claims Kayla's June 3 interview changed dramatically. (*See* Def.'s Mot. ¶¶ 15–16.) This prejudice can be cured by giving the defendant time to adapt his trial strategy to the information in Kayla's June 3 interview. *See State v. Stickney*, 148 N.H. 232, 236 (2002) (noting that a discovery violation by the State can be cured by giving the defendant more time to prepare to confront evidence against him). Where additional time will cure the prejudice claimed by the defendant, it is not necessary to extend to

the more extreme remedies of Rule 12(b)(9), including the defendant's request to preclude Kayla's testimony at trial.

19. Rule 12(b)(9) calls upon the Court to take a "just" action in the event of a discovery violation. Again assuming without conceding that providing Kayla's June 3 interview on October 7, 2022, was a discovery violation, the State argues that where the October 7 disclosure was done with the intent to protect the Harmony Montgomery investigation (and not with the intent to gain an unfair advantage over the defendant), where the October 7 disclosure was made within the ultimate deadline set by Rule 12(b)(4)(A), and where the only prejudice claimed by the defendant is that his trial strategy was already crystallized, the just result would be to give the defendant more time to prepare to confront the new evidence. This is especially appropriate where the defendant has known for several months now from the State's discovery that Kayla was an eyewitness to the defendant's possession of the stolen firearms.

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

(A) Grant the defendant additional time to prepare to confront the evidence in Kayla Montgomery's June 3 statement; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Date: October 24, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to counsel for the defendant via the electronic case filing system.

/s/ Jesse O'Neill

Jesse O'Neill