

REDACTED

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0464

State of New Hampshire

v.

Justin M. Lamontagne

Appeal Pursuant to Rule 7 from Judgment
of the Sullivan County Superior Court

BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

Whether the court erred by barring the defense from introducing testimony referring to a bondage image that Lamontagne thought depicted A.C.

Issue preserved by defense motion, the State's objection, the defense's response, the hearing on the matter, and the trial court's order. Supp. 31-33; A8-A33; H 2-24.*

* Citations to the record are as follows:

"Supp." refers to the supplement filed with this brief containing the order from which Lamontagne appeals;

"A" refers to the appendix to this brief, containing other relevant documents;

"H" refers to the pre-trial hearing held on June 17, 2021;

"T1" through "T3" refer to the consecutively-paginated transcripts of the three-day trial held in August 2021.

STATEMENT OF THE CASE

A Sullivan County grand jury indicted Justin Lamontagne with four counts of non-consensual dissemination of private sexual images, and one count of attempted aggravated felonious sexual assault (AFSA). A3-A7. All five charges alleged offenses against A.C., a woman with whom Lamontagne had been in an intimate relationship. The four dissemination charges all involved the same video file, sent at essentially the same time on August 4, 2019, to four different people. T1 5-8. The attempted AFSA charge alleged that Lamontagne performed a substantial step toward the commission of AFSA by retaining a copy of a private sexual video¹ and threatening to release it unless A.C. engaged in sexual activity with him. T1 8.

Lamontagne stood trial over three days in August 2021. A jury convicted him on the four dissemination counts and acquitted him on the attempted AFSA count. T3 330-31. The court (Tucker, J.) sentenced Lamontagne to three concurrent stand-committed terms of one year and three months to three years. A34-A42. On the fourth conviction, the court pronounced a consecutive suspended term of three and a half to seven years. A43-A45.

¹ The video file involved in the four dissemination charges constituted a short excerpt of the longer video referred to in the attempted AFSA charge.

STATEMENT OF THE FACTS

In 2019, Justin Lamontagne worked as a shift manager for a plastic molding company. T2 220. Previously, he had worked for Fujifilm Dimatix (hereinafter, "Fujifilm"). T1 165. Since about 2016, he had been in an intimate relationship with A.C. T1 65-66, 148; T2 220. She worked for Fujifilm as a production technician. T1 65, 109. During a part of their relationship, they lived together. T1 66-67, 140, 148.

In February 2019, they separated but remained in touch, and to some extent later resumed their intimate relationship. T1 68-70; T2 221-24, 241, 284. In June or July 2019, they broke up again. T1 69-70; T2 239, 241. Meanwhile, before the final break with Lamontagne, A.C. began a new intimate relationship with another man, Kyle Roberts. T1 65, 70, 139. Lamontagne learned of that relationship in the middle of June. T2 223-24.

In the weeks before July 21, A.C. and Lamontagne discussed sexual matters, among other subjects. T1 147. A.C. spent July 6, Lamontagne's birthday, with him. T2 226, 247. With the goal of trying to rebuild their relationship, they discussed trust, honesty, and ways of improving their sex life. T2 226-27, 249. Among other ideas, they spoke of making a video together. T1 147-48; T2 226-27, 241. During their relationship, they also talked about A.C.'s mental health

issues, and Lamontagne had encouraged her to seek help. T1 148-49.

On July 21, 2019, A.C. came to Lamontagne's apartment. She testified that she went to the apartment to collect some mail and other possessions. T1 71, 81.

Lamontagne testified similarly that she came to the house that day to get a package, and that their relationship at that point was "done." T2 233-34, 239, 241.

After she finished gathering her property and as she prepared to leave, she and Lamontagne shared "either a hug or a kiss good-bye, and [she] was held." T1 71. Lamontagne asked if they could have sex one more time, and A.C. agreed. T1 71. They decided to make a video recording of their sexual encounter. T1 71, 153-54.

A.C. testified that they agreed that the tape would remain private and not be shared with anyone. T1 71, 139, 154-55. She denied agreeing that Lamontagne could later send the video to any other person, for any reason. T1 71-72, 137-38. In particular, she denied that they agreed that release of the tape to others depended on her getting therapy or breaking up with Roberts. T1 84, 154-55. However, A.C. acknowledged that she consented to the making of the tape. T1 143, 153-54.

Lamontagne testified that A.C. still wanted to try to salvage their relationship, despite her infidelity with Roberts.

T2 225, 237. When she visited him on July 21, the prior conversation about making a video together resumed and culminated in an agreement to record the sex tape. T2 227, 233-34, 248.

Lamontagne testified that A.C. “said she was going to get therapy for her mental state, her mental health. And that if she didn’t hold up some of these things, then [he] could send out the video.” T2 227, 233. They also agreed that she would break up with Roberts. T2 242-43, 257. If she didn’t take those steps, Lamontagne could release the video and their relationship would be over. T2 265, 270.

In the days following July 21, A.C. and Lamontagne communicated by Facebook Messenger, and the State introduced evidence detailing the messages they exchanged. T1 79-136. The Facebook messages introduced in evidence by the State covered the period from July 21 to August 5.

A.C. testified that, after July 21, Lamontagne used the tape as leverage to pressure her to spend time with him and have sex with him. T1 72, 138. At trial, initially, she testified that they had sex again after July 21. T1 72, 115, 144-45. However, when speaking to the police and the prosecutor before trial, A.C. had denied that she and Lamontagne had sex after July 21. T1 73-74, 143-44, 146.² Later, at trial, she

² Lamontagne testified consistently with A.C.’s initial statement to the police, in that he also denied that they ever again had sex after July 21. T2 228.

testified that she could not remember whether they had sex again after July 21. T1 145-46. Ultimately, she agreed that her memory of the matter would have been better when speaking to the police in 2019 than when testifying at trial two years later. T1 146, 153.

In an effort to corroborate A.C.'s version of events, the State emphasized messages sent by Lamontagne that implied or stated an interest in an ongoing sexual relationship, T1 82-84, 95-96, 99-100, 118-19, or more generally expressed his hope and expectation that they would continue to see each other. T1 101-02, 106-13, 118. The State also called attention to messages in which Lamontagne referred to the possibility of sending the tape to others. T1 109-10, 120, 130-33.

Lamontagne denied demanding sex from A.C. or linking the release of the tape to her willingness to have sex with him. T2 228, 253-54. He testified that, following July 21, he asked A.C. about her progress on getting therapy and leaving Roberts. T2 228, 255. The defense accordingly emphasized messages linking the tape's release to A.C.'s progress in arranging for mental health therapy, T1 84, 90, 148-51; T2 296-97, and messages calling for the end of her relationship with Roberts or commenting on the fact that she was involved with Lamontagne and Roberts at the same time. T1 121, 127, 132-33.

Lamontagne testified that, in the period following July 21, A.C. did not appear to make progress in either area. T2 228. Consistent with his understanding of their agreement, he believed that he had her consent to release the tape. T2 230-32, 260. When subsequently he sent out an excerpt, he did so pursuant to their agreement, and not with the purpose of harassing her. T2 230.

During the period immediately before he released the tape, Lamontagne prepared different versions of excerpts of the video. T2 229, 263-64, 270-72. He also recorded himself articulating various explanations for sending to others an excerpt of the July 21 video. T2 271-76. In the end, he did not send out any version of his recorded explanations.

On August 4, Lamontagne sent an excerpt of the July 21 video to four people: Trevor Pregent, Anthony Kendall, Tyler Lahaye, and Tommy “Treez” LaFountain. T1 151-52, 157-61, 172-73; T2 281. All four recipients worked, or had worked, at Fujifilm. T1 157-58, 162, 169, 173; T2 281. The excerpt consisted of a few seconds of the tape and showed A.C. naked but did not show any sexual act. T1 152, 162-63; T2 229-30, 232, 285. The messages accompanying the excerpt asked the recipient to forward the video to Roberts, adding that Roberts “should have thought twice before he touched” A.C. T1 161, 167, 172; T2 197, 199, 204-06. After

learning that the excerpt was sent, A.C. contacted the police. T1 138, 140; T2 183-84.

At trial, the State argued that Lamontagne used the video as leverage to try to extort A.C.'s compliance with his demands. With respect to the agreement at the time Lamontagne and A.C. made the tape, the State asserted A.C.'s version of events – the tape was to remain private. The State contended that only after the tape's creation did Lamontagne unilaterally announce a link between the tape's release and A.C.'s ending her relationship with Roberts and seeking therapy. T1 90-91, 138.

Lamontagne testified, and the defense argued, that he did not release the excerpt without her consent, nor did he have a purpose to harass. Rather, he released it with the prior consent she granted when they created the tape.

The defense challenged A.C.'s credibility, noting that she initially lied to the police about when the tape was made, to make it seem that the sexual acts preceded the beginning of her relationship with Roberts. T1 73, 141; T2 185. A.C. explained that she was embarrassed about having sex with Lamontagne after they had broken up and did not want her new boyfriend to find out. T1 73. The defense also elicited the fact that Lamontagne voluntarily met with the police and answered their questions in an interview lasting more than two hours. T2 211-12.

SUMMARY OF THE ARGUMENT

The trial court erred in excluding the proffered testimony about a bondage image that Lamontagne saw on social media before July 21 and mistakenly thought depicted A.C. To convict Lamontagne, the State had to prove, among other elements, that he did not believe A.C. consented to the dissemination of the sex tape excerpt. The defense did not seek to introduce the image itself. Rather, the defense sought to introduce testimony about it, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The proffered testimony thus met Rule 401’s definition of “relevance.” The exclusion of the evidence prejudiced the defense, by removing one substantial supporting pillar of Lamontagne’s claim to believe that A.C. consented to the charged acts of dissemination.

I. THE COURT ERRED IN EXCLUDING TESTIMONY ABOUT AN IMAGE LAMONTAGNE SAW ON SOCIAL MEDIA AND THOUGHT DEPICTED A.C.

In April 2021, before trial, the defense filed a motion *in limine* to introduce certain evidence relating to A.C. A8-A12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The State objected. A13-A18. [REDACTED]

[REDACTED]

Soon after the State filed its objection, the prosecution obtained new indictments against Lamontagne. For the first time, the State charged Lamontagne with attempted AFSA, alleging that he threatened to release the tape if A.C. did not

have sex with him. T1 8. After receiving the new indictments, the defense filed a response to the State's objection. A21-A33.

[REDACTED]

The written pleadings thus defined a dispute about three items of evidence: 1) testimony about the bondage image; 2) the Facebook message conversation between

Lamontagne and A.C., beginning with Lamontagne's confronting A.C. about the bondage image, and leading up to their July 21 agreement to record their sexual activity⁵; and 3) testimony⁶ about A.C.'s new sexual relationship with Roberts. The defense argued that the image, and to some extent also the Facebook conversation, were relevant as bearing on Lamontagne's state of mind when in August he disseminated the excerpt of the July 21 sex tape. In addition, once the State indicted Lamontagne for attempted AFSA, the defense argued that the Facebook conversation was also relevant to A.C.'s state of mind – in particular, whether she consented to the making of the video.

On June 17, 2021, the court convened a hearing on the motion. H 2-24. With respect to the bondage image, counsel confirmed that the defense at trial would not assert that the image actually depicted A.C. The defense would assert, though, that at the relevant times Lamontagne believed it depicted A.C. H 5. The fact that the image did not, in fact, depict A.C. rendered inapplicable the rape shield doctrine. H

⁵ Ultimately, other than messages about the bondage image, the State conceded that the defense could ask questions about the pre-July 21 messages. H 20. At trial, the defense did introduce evidence about the pre-July 21 Facebook messages exchanged between A.C. and Lamontagne. T1 140, 147-48. Accordingly, this appeal focuses on the court's ruling excluding testimony about the bondage image and about the messages in which Lamontagne and A.C. discussed it.

⁶ As noted already, Lamontagne does not pursue any claim on appeal relating to this third item. See H 2-4 (parties largely agreed on boundaries of admissible evidence as to that item).

10-11. Lamontagne's contrary belief, though, made the evidence relevant because of the bearing of that belief on his mental state at the time he disseminated the excerpt of the sex tape. Counsel repeated that the defense did not seek permission to introduce the image itself. H 23.

The State cited State v. Mazzaglia, 169 N.H. 489 (2016), and proposed that the rape shield doctrine barred admission of the evidence. H 5-8. The State also denied that the image had any tendency to prove any relevant point about Lamontagne's mental state. H 5-10, 18.

With respect to the Facebook conversation beginning with the bondage image and leading up to the making of the sex tape, the State disclaimed any plan to elicit testimony that A.C. did not consent on July 21, either to sex or to the making of the video. H 9, 18. Concerned that A.C. might nevertheless deny that she consented on July 21 either to sex or to the recording, the defense re-asserted that basis of admissibility, focused on the AFSA charge and on A.C.'s mental state. H 11-12, 16-17. In addition, counsel also argued for the admissibility of the Facebook conversation, as bearing on the dissemination charges and on Lamontagne's mental state. H 12-16, 22-23.

At the close of the hearing, the court took the matter under advisement. H 24. By a written order signed July 31, 2019, the court denied the defense motion *in limine*. Supp.

31-33. In its order, the court characterized the defense claim as seeking permission for “Lamontagne to testify about seeing a woman in bondage, but without suggesting he thought the image was of A.C. and without introducing the image itself as evidence.” Supp. 32. Insofar as the defense sought to introduce the evidence as bearing on A.C.’s consent to the activities of July 21, the court denied the defense request, citing the State’s agreement that the July 21 “sexual encounter with Lamontagne and its filming were consensual....” Id. Thus, the court ruled that “whether the bondage video [sic]⁷ prompted them to make their own video is not relevant.” Id.

The court later acknowledged, though, that the defense also sought to introduce the evidence as bearing on Lamontagne’s mental state. Thus, the court recognized that a defense theory of admissibility rested on the contention that “Lamontagne at one point believed the bondage video was evidence that A.C. had previously exposed her body on the internet....” Supp. 32. As noted already, the defense contended that that belief supported the reasonableness of Lamontagne’s subsequent belief that A.C. would agree to authorize him to share an image of her naked body, under the circumstances here. Id.

⁷ As described above, and as counsel pointed out at the pre-trial hearing, H 17-18, the proffered image was a photograph, not a video. [REDACTED]

On that question of the admissibility of testimony about the image and Lamontagne's belief that it depicted A.C., the court excluded the evidence, reasoning that "the issue at trial will not be over the terms of the agreement and whether it included A.C.'s authorization to release the video if she did not meet certain conditions, but rather whether there was an agreement at all." Id. The order continued by observing that the "State represents A.C. will testify the defendant used the video of them to blackmail her by threatening to publish it if she did not continue to see him, and doing so when she refused." Supp. 32-33. In denying the defense request to elicit the proffered testimony about the bondage image, the court erred.

If the trial court correctly interprets the rules of evidence, its application of those rules is reviewed for an unsustainable exercise of discretion. State v. Munroe, 173 N.H. 469, 472 (2020). Under that standard, this Court assesses whether the ruling is clearly untenable or unreasonable to the prejudice of the appellant's case. Id. This Court does not, though, defer to the trial court's interpretation of the rules of evidence. Id. ("we review the trial court's interpretation of court rules *de novo*").

Here, undoubtedly because nobody asserted that the bondage image depicted A.C., the trial court did not rely on

Rule 412's rape shield doctrine.⁸ Rather, the court treated the question of admissibility as raising a question of relevance. Relying exclusively on a finding that the proffered evidence was irrelevant, the court did not cite Rule 403 nor weigh any probative value of the evidence against any concern about its risk of unfair prejudice.

Evidence Rule 401 defines as relevant evidence that has "any tendency to make a fact [of consequence] more or less probable than it would be without the evidence." N.H. R. Ev. 401. Rule 402 generally provides for the admissibility of relevant evidence, and for the inadmissibility of irrelevant evidence.

To gauge the relevance of the proffered testimony about the bondage image, one must bear in mind the elements the State had to prove to convict Lamontagne of the charged crimes of non-consensual dissemination of private sexual images. RSA 644:9-a, II defines the crime. To prove that crime, the State had to prove that Lamontagne: (1) purposely; (2) with the intent to harass A.C.; (3) disseminated an image identifiably of her; (4) that depicted her intimate parts; (5) having obtained that image under circumstances in which a

⁸ Reliance on Rule 412 would have been error. The rape shield doctrine governs the admissibility of "evidence of prior consensual sexual activity between the victim and any person other than the defendant..." N.H. R. Ev. 412(a). The agreement by the parties that the bondage image depicts an unknown woman takes the image out of the reach of the rule, because it does not show sexual activity of A.C.

reasonable person would know or understand that the image was to remain private; when (6) he knew or should have known that she did not consent to the dissemination of the image. RSA 644:9-a; see also A3-A6 (indictment). The jury instructions reflected that description of the crime's elements. T2 313-17.

As described above, the dispute at trial centered on Lamontagne's mental state. The defense contended that, given their prior agreement, he thought A.C. consented to the release of the tape. As relevant to the element of non-consent, the court instructed the jury that, to convict, "the State must prove beyond a reasonable doubt that [Lamontagne] was aware that it was practically certain [A.C.] had not consented to the dissemination." T2 316. Accordingly, if Lamontagne believed, even wrongly, that A.C. consented to the dissemination, he did not commit the charged crimes. In a related vein, the defense also disputed the element alleging that Lamontagne had a purpose to harass A.C.

Through the pre-trial litigation, the defense proffered that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In that way,

Lamontagne's belief about the bondage image was relevant for

its bearing on the mental state elements in dispute in this case – whether Lamontagne had a purpose to annoy A.C. and whether he believed that A.C. consented to the dissemination of the sex tape excerpt.

The point becomes clear upon consideration of two hypothetical people, each depicted in an otherwise identical bondage image. One person is willing to have her bondage image made public. The other is not. Of the two, the willing person manifests a different and markedly less private sensibility toward the public release of a revealing, sexualized image. Accordingly, one can infer she would be more likely than the other person subsequently to consent to the release of the sex tape excerpt.

That explanation posits that Lamontagne engaged in a kind of propensity reasoning. He inferred from what he thought was A.C.’s attitude toward the public release of her bondage image a conclusion about her attitude toward the public release of the charged sex-tape excerpt. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This Court’s propensity caselaw aims to prevent the parties from arguing, and the jury from relying on, a propensity inference that because a person did some specified action at one time, that person is more likely to have done a

similar action at another time. “In other words, no link in the chain of inferences justifying relevance can be derived from the prior conduct’s tendency to show character or disposition.” State v. Melcher, 140 N.H. 823, 828 (1996).

Here, though, in seeking the admission of the bondage image, the defense did not propose to introduce prior or other conduct by any person who mattered in this case. Neither would testimony about the proffered image have proved anything about A.C.’s character or disposition. Indeed, the only “other conduct” revealed in the bondage image was that of the unknown woman depicted in it, and her character or disposition had no importance in Lamontagne’s case.

The court could properly have excluded the bondage image had the defense offered it to prove the following inference: because A.C. consented to the public release of the bondage image, it is more likely that she consented also to the release of the sex tape excerpt. But that is not the inference the defense advanced. Because it did not depict her, A.C. never made any decision about releasing it and the bondage image otherwise proved nothing about A.C.’s mental operations.

The defense offered it, rather, as relevant to Lamontagne’s mental operations. The propensity-evidence doctrine does not require parties or juries to be blind to the fact that people in society often draw propensity inferences

about each other. While the law disallows the jury from relying on propensity reasoning, it does not require the jury to disregard the role propensity reasoning may have played in a criminal defendant's mental state.

One of the reasons Lamontagne thought A.C. consented to the dissemination of the charged image was that he believed that she had previously consented to the dissemination of the bondage image. [REDACTED]

[REDACTED] But the law defining the mental state element doesn't require Lamontagne to have been right that A.C. consented. To convict him, the State had to prove that he "was aware that it was practically certain that A.C. had not consented to the dissemination." T2 316. Though wrong to have formed the beliefs he formed about A.C., Lamontagne was nevertheless entitled to an acquittal if he did form those beliefs and thus was not aware that A.C. did not consent. The court therefore erred in failing to recognize the relevance of the proffered evidence.

None of the considerations advanced by the court justify its ruling to the contrary. In addition to its misunderstanding of the bondage image as a video, see supra n.7, the court may have misunderstood the purpose for which the evidence was offered. Initially, the order asserted that, at the hearing, "the issue boiled down to whether Lamontagne should be allowed

to testify about seeing a woman in bondage, but without suggesting that he thought the image was of A.C....” Supp. 32. On the contrary, as described above, it was essential to the defense argument that Lamontagne believed that the image depicted A.C. Later in the order, the court recognized as much, acknowledging that “Lamontagne at one point believed the bondage video was evidence that A.C. had previously exposed her body on the internet...” Supp. 32.

In response to the defense argument, the court wrote:

It appears, however, that the issue at trial will not be over the terms of the agreement and whether it included A.C.’s authorization to release the video if she did not meet certain conditions, but rather whether there was an agreement at all. The State represents A.C. will testify the defendant used the video to blackmail her by threatening to publish it if she did not continue to see him, and doing so when she refused.

Supp. 32-33. That reasoning cannot justify the ruling.

As described more fully above, the dispute at trial pitted two competing narratives against each other. According to Lamontagne, he and A.C. agreed, at the time of the making of the sex tape, that he could later release it under the specified circumstances. According to A.C., they reached a different agreement when they made the sex tape, under which it could not be released to others under any circumstances. It does

not much matter whether one characterizes that dispute as a conflict between two versions of an agreement, or as a conflict over whether there was an agreement at all. Under either characterization, the proffered evidence would have supported Lamontagne's version, by making more plausible his claim to believe that A.C. would agree to the release to others of a naked image of herself.

That error prejudiced the defense. Applying a conventional understanding of contemporary social norms, the jury was likely to begin deliberations with a general sense that most people, and perhaps especially most women, would regard with dread the prospect of the publication of objectifying, sexually-suggestive images of their naked bodies. Therefore, the defense would expect to face some skepticism when it asked the jury to find that A.C. consented to have her ex-boyfriend publish such an image. In closing argument, the prosecutor encouraged that skepticism. See, e.g., T2 301 ("Who in their right mind, who in their right mind would negotiate what this man has crafted....?" ... You know intuitively, your life's experience tells you, she told you this did not happen that way"); T2 302 ("she never wanted anybody to see that. She never wanted you to see that"). That same skepticism would tend to weigh against Lamontagne's claim that he believed A.C. to have consented to the charged dissemination.

The exclusion of the proffered evidence prejudiced the defense because it would have countered that conventional expectation. Had Lamontagne not seen on social media the bondage image that he thought depicted A.C., his claim to believe that she would later consent to the public release of the sex tape excerpt would be significantly less credible. But having seen the image, and believing that it depicted A.C., he could more reasonably think that she consented to the sex-tape excerpt's release, she not being a person as strongly inclined to the preservation of her privacy as others.

This Court must accordingly reverse Lamontagne's convictions.

CONCLUSION

WHEREFORE, Mr. Lamontagne respectfully requests that this Court reverse his convictions.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 5369 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: June 22, 2022

SUPPLEMENT

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The State of New Hampshire
JUDICIAL BRANCH

SULLIVAN COUNTY

SUPERIOR COURT

No. 220-2020-CR-13

STATE OF NEW HAMPSHIRE

v.

JUSTIN M. LAMONTAGNE

ORDER

Justin Lamontagne is charged with the nonconsensual dissemination of private sexual images in violation of RSA 644:9-a, and attempted sexual assault based on his alleged threat to release the images. He moves in limine to introduce evidence of an image of an unidentified woman in bondage, explaining its admissibility as follows.

Lamontagne and the alleged victim, "A.C.", were in a three-year romantic relationship. The relationship ended, but Lamontagne and A.C. stayed in contact. While in the non-romantic stage of their connection, Lamontagne saw images on the internet of a woman in bondage. He thought the woman was A.C., but according to the State the woman's face is blurred and there is no information in the video that identifies the woman.

Lamontagne sent the image to A.C., who told Lamontagne she wasn't the person depicted. This led, however, to a discussion of possible sexual activity in which Lamontagne and she could engage. According to Lamontagne, A.C. suggested making a

video of them having sex, with the understanding that if A.C. did not break up with her new boyfriend or if she didn't get help for her depression as Lamontagne suggested, then Lamontagne could send the video to whomever he wished. Lamontagne will say he viewed this arrangement as A.C.'s way of being kept accountable. He told police he did not understand A.C. rescinded permission to disseminate the video, and he published it.

At a hearing on the motion, the issued boiled down to whether Lamontagne should be allowed to testify about seeing an image of a woman in bondage, but without suggesting he thought the image was of A.C. and without introducing the image itself as evidence. The motion identifies two grounds for admissibility. The first is that Lamontagne's discovery of the image "prompted the discussion of making a video." Motion, ¶ 20. According to the State, however, A.C. agrees the sexual encounter with Lamontagne and its filming were consensual, (State's Objection, ¶ 2), so whether the bondage video prompted them to make their own video is not relevant.

The second reason advanced is that since Lamontagne at one point believed the bondage video was evidence that A.C. "had previously exposed her body on the internet, it would impact the reasonableness of his belief that [A.C.] would enter into an agreement whereby he could share images upon a breach of [their] 'agreement.'" Motion, ¶ 21. It appears, however, that the issue at trial will not be over the terms of the agreement and whether it included A.C.'s authorization to release the video if she did not meet certain conditions, but rather whether there was an agreement at all. The State represents A.C. will


testify the defendant used the video of them to blackmail her by threatening to publish it if she did not continue to see him, and doing so when she refused.

Evidence of the bondage video is not relevant under the circumstances as the parties describe them. References to it, therefore, are excluded. The defendant argues also that he ought to be allowed to enter evidence that A.C. and her new boyfriend had a sexual relationship, because it "goes directly to Mr. Lamontagne's mental state." Motion, ¶ 27. According to the motion, the agreement was conditioned, in part, on A.C. breaking up with her boyfriend. *Id.* ¶ 14. The relevance of whether A.C.'s relationship with her new boyfriend was sexual is not explained, so it too is excluded.

The motion in limine to introduce evidence concerning the bondage tape (doc. no. 12) is DENIED. The ruling is preliminary, with leave to a party to request reconsideration if circumstances at trial warrant.

SO ORDERED.

JULY 31, 2021



JUDGE BRIAN T. TUCKER