

## QUESTIONS PRESENTED

1. Did the trial court err in barring Vassar from arguing a justification defense, and instructing the jury not to consider such a defense?

Issue preserved by notice of defense, App. A1,\* the State's motion to preclude a justification defense, App. A4, Vassar's objection thereto, App. A14, the court's pre-trial decision indicating the defense would be conditionally barred, MH 40, 48, renewed request during trial to present a justification defense, T3 138-44, and the trial court's decision barring a justification defense. T3 145.

2. Did the trial court err in excluding evidence of the victim's prior violent and tumultuous acts, which both established his right to and were relevant to Vassar's justification defense?

Issue preserved by motion in limine to admit the evidence, App. A20, the State's motion to preclude the evidence and Vassar's objection thereto, App. A26, A32, the court's decision to conditionally preclude the evidence, MH 39, renewed request

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\*References to the record are as follows:

"App." refers to the Appendix to this brief;

"NOA" refers to the Notice of Appeal;

"MH" refers to the transcript entitled "final pre-trial and hearing on motions in limine," dated April 15, 2005;

"T1," "T2," and etc. refer to the separately-bound trial transcripts. A single transcript, containing testimony of both the fourth and fifth days of trial, is referred to as "T4."

to admit the evidence at trial, T3 138-44, and the trial court's denial of that request. T3 145.

STATEMENT OF THE CASE

The State charged Ethan Vassar with first degree murder, alleging that on June 20, 2004, he purposely caused the death of his brother Nicholas Vassar by shooting him multiple times with a handgun. T1 8. A second charge of criminal threatening alleged that he purposely placed or attempted to place Frank Magistro in fear of imminent bodily injury by pointing the handgun at Magistro and telling him to beg for his life. T1 9. Magistro, Nicholas's friend, witnessed the shooting. T1 81-82, 88-89.

The trial court instructed the jury concerning two lesser included offenses, second degree murder by knowingly causing Nicholas's death, and provocation manslaughter. T4 186-88. After trial, the jury acquitted Vassar of criminal threatening and murder in the first or second degree, and found Vassar guilty of provocation manslaughter. T4 196. The court (Lynn, J.) sentenced Vassar to twelve and one-half to twenty-five years, stand committed. NOA.

## STATEMENT OF THE FACTS

On June 20, 2004, Ethan's brother Nicholas embarked on a violent rampage through the Vassar family home, smashing things, assaulting their mother Donna, and threatening to kill Ethan, Donna, and any police that showed up. Subsequently, Ethan shot and killed Nicholas.

### The State's Case

On June 20, 2004, a number of police officers went to the Vassar residence in Springfield upon receiving a report that Ethan had shot his brother. T1 50-52, 60. When New London police officer Marshall Osgood arrived, Ethan walked out into the driveway, accompanied by Donna. T1 53, 60-61. Ethan submitted to handcuffing, while the police searched and processed the scene. T1 53, 61.

The police found Nicholas's body lying in a pool of blood on the floor of a room above the detached garage, next to a coffee table. T1 57-58. He had been shot five times in the neck, shoulder and back. T1 58, T2 140, 146. In Ethan's bedroom on the second floor of the main residence, the police found a .357 magnum handgun. T2 38. Inside the loaded gun, were five spent rounds and three live rounds of hollow point

ammunition. T2 42-44.

Frank Magistro, a friend of Nicholas's who was present at the shooting, testified that on June 20, 2004, he drank about five beers and then went over to hang out with Nicholas in his room above the garage. T1 81-82, 121. It was apparent to Magistro that Nicholas had been drinking before he arrived. T1. 114. Nicholas and Magistro listened to music and had a couple of beers. T1 82. At some point, Nicholas told Magistro he was going to the house, and left the garage. T1 84. After that, Magistro heard yelling coming from inside the house, and recognized Nicholas's voice, but could not hear what was being said. T1 84.

After about twenty minutes, Nicholas returned. T1 86. Magistro asked Nicholas what was going on, to which Nicholas replied, "nothing, never mind." T1 86. Magistro agreed he probably also asked Nicholas if he had been fighting with his mother. T1 128. Magistro claimed, however, that Nicholas exhibited his normal demeanor, and that he would not have guessed that anything had happened inside. T1 86-87. He further testified Nicholas changed the music in the CD player after coming in the room. T1 86.

Magistro testified that approximately ninety seconds after

Nicholas came in, the door swung open, and before Magistro could look towards the door, gunshots started firing. T1 88.

Magistro testified that Ethan shot Nicholas about three times. T1 88. Magistro claimed that Nicholas fell to the floor and then pleaded with Ethan to stop, but Ethan walked closer, and fired the last several shots at close range, standing over Nicholas. T1 88-89.

Magistro testified that after the shooting, he asked Ethan if Nicholas was dead, and tried to go over to help Nicholas. T1 92. Magistro claimed that Ethan then pointed the gun at Magistro's head and made him beg for his life, T1 93-94, but the jury acquitted Ethan of criminal threatening. T4 197.

Subsequently, Magistro testified, they walked down the stairs side by side and went out to Magistro's car. T1 95. Magistro testified that Ethan told him: "You never did anything to me, so I'll let you go and leave, you know, you didn't see anything." T1 95. Magistro then went home, called his parents, and told them what happened. T1 64-69, 96. Subsequently, his parents called the police. T1 73.

Marc Dupre, a firearms expert, testified that Ethan's .357 magnum revolver fired the shots that killed Nicholas. T3 26, 30, 32-33. Kimberly Rumrill, an expert in blood stain pattern

analysis, testified that the impact angle of certain stains of Nicholas's blood indicated that their source was about eighteen inches from the floor. T2 92, 103, 119-123. Deputy Chief Medical Examiner Jennie Duval conducted the autopsy, and found five separate gunshot wound paths. T2 135, 140, 146. She opined that the bullet paths were consistent with a standing shooter, and a victim who was first sitting, and then falling forward. T3 12. She also testified that Nicholas's blood alcohol content was .189 percent, which she characterized as "considerably higher" than the .08 legal limit for driving while intoxicated. T2 141.

A videotape of the main residence showed a broken chair in the fireplace area of the first floor. T2 70-71. On the second floor, the door to Donna's bedroom was broken off its hinges. T2 59-60. In Nicholas's bedroom above the garage, in a small closet about six to eight feet from Nicholas's body that had a hanging sheet for a door, police found a twelve-gauge shotgun leaning against a wall, and empty shell casings from rounds for that type of gun. T1 58-59, T2 81-82.

#### The defense case

As further discussed in the argument section of this brief,

the trial court generally precluded the defense from introducing evidence concerning Nicholas's drunken, threatening, and violent conduct directed towards Ethan and his mother in the twenty or so months prior to the shooting. In accordance with this ruling, Ethan and his mother generally confined their testimony to the day in question. Ethan testified that he spent the day mulching blueberry plants and getting gardening tips on the Internet. T3 77, 84. At some point during the day, Ethan testified, Donna told him to stay away from Nicholas, as he was in a bad mood. T3 81-83. Donna appeared scared, and asked Ethan several times if he knew what Nicholas was doing, where he was going, and where Nicholas's guns were. T3 82-83.

While working on the computer upstairs in Donna's bedroom, Ethan heard the door slam downstairs, and heard shouting, which he tried to ignore. T3 87. Eventually, however, Nicholas stormed upstairs, broke the door to Donna's bedroom off its hinges, and started "shoving things around," terrifying Ethan. T3 88. Nicholas, who according to Ethan appeared "scary, worse than [Ethan] had ever seen him," growled at Ethan, and then went back down the stairs, screaming at the top of his lungs to Donna that he had "fixed her room or something to that effect." T3 89-90. Ethan testified that he then went to his own bedroom,



near the stairs, where he felt more safe and could listen to what was happening downstairs. T3 90.

Ethan testified that subsequently, he heard Nicholas screaming at his mother numerous times, "give me my fucking money or I'm going to kill you." T3 91. He could hear his mother crying and "begging for her life," pleading several times, "I'm your mother, please don't hurt me...." T3 92. Ethan further testified that at one point, he heard Nicholas scream, "I don't care what happens to me, I'll fucking kill you, I'll fucking kill Ethan and I'll kill the fucking cops when they show up, so give me my money." T3 91. Ethan testified that he believed his mother's life was in danger, because of the things Nicholas said, the way he looked, and what Donna had told him earlier. T3 92. Asked why he did not simply go downstairs and give Nicholas money, Ethan testified: "[T]he sight of me always enrages Nick, even more so than he already is. I didn't want to go downstairs and make things even worse and get my mother killed." T3 93.

Ethan testified that, too scared to call the police, he crouched on his floor and took his handgun out, in case he needed it to protect his mother's life. T3 94-96. He heard the sounds of furniture being broken, and footsteps and other sounds

that indicated Nicholas was chasing and assaulting his mother. T3 97. He heard Nicholas punching the support beam near the chimney. T3 97. Finally, he heard Nicholas scream a final threat to kill Donna, as he left the house. T3 98. Ethan knew Nicholas had gone out to the garage because he could hear each of the three doors slam along the way. T3 99.

Ethan testified that he believed Nicholas was going to get his gun to kill Donna, "[b]ecause of the events of the previous two weeks," and believed he needed to get to Nicholas before Nicholas could return to the house to kill her. T3 99-100. The trial court precluded Ethan, however, from testifying about those events. T3 145. Asked why he did not then call the police, Ethan explained that he believed Nicholas would return before the police could arrive, and wanted to avoid a firefight in his mother's presence. T3 100. Instead, Ethan testified, he left his room to follow Nicholas "[a] couple of seconds" after he heard Nicholas leaving the house. T3 111. Ethan testified it took him about twenty or thirty seconds to walk up into the garage, at which point he walked into Nicholas's room. T3 112. Ethan testified that when he entered, he could see Nicholas, but there was a table in between them, so he could not see whether Nicholas held a gun or other weapon. T3 162, 165. It appeared

to Ethan at the time that Nicholas was crouching down. T3 103. Ethan testified: "I saw Nick and I was too scared to really think about anything at that point other than trying to protect my mother and I shot him." T3 101.

Ethan testified he began shooting from about eight to ten feet away, continued to step forward as he fired, and believed at the time he had fired about five shots. T3 101, 166. Ethan testified he did not realize Magistro was there until after firing the shots, at which point they both stood there "pretty much in shock." T3 104. Subsequently, Ethan testified, he did not threaten Magistro but instead walked him downstairs to his car. T3 104-106.

Magistro drove away, and Ethan and his mother drove to the residence of the Springfield police chief. T3 108. The police chief was out of town, so they returned home and called the police, and then waited for them to arrive. T3 69, 109-110.

On cross-examination, Ethan agreed that he had not seen Nicholas possess a weapon during the altercation with Donna, and that Nicholas had not struck Ethan during that altercation. T3 154, 157. The prosecutor cross-examined Ethan regarding inconsistent statements or omissions in his tape-recorded statement to the police. E.g., T3 154-57, 162-65, 170-71. The

prosecutor also questioned Ethan regarding numerous other firearms he owned and kept in his bedroom, and firearms which Donna owned. T3 152-53.

Donna testified that on the day in question, Nicholas "stormed in" to the house, "madder than hell" that Ethan had started a vehicle in the garage, which released exhaust fumes. T4 44. After a few minutes of Nicholas "yelling and hollering and raging," Donna left to put gas in Nicholas's car and buy groceries. T4 45. She testified that when she returned, Nicholas demanded money, and she gave him \$20. T4 45. She knew he would go out drinking with the money, which made her "really scared." T4 45.

According to Donna, later that evening, Nicholas charged into the house while she was watching TV and Ethan was upstairs in her bedroom working on the computer. T4 47. Donna testified that Nicholas yelled "give me some goddamned fucking money," and clenched her shoulders while yelling and raging. T4 48. As she went upstairs, Nicholas tore past her, saying "you think you're going to bed, well, let me get it ready for you." T4 49. Subsequently, she heard the sounds of things smashing and breaking, and Nicholas screaming. T4 49. Donna further testified that Nicholas then brought her upstairs to show her

what he had done. The door was "smashed from its casing," the bed was pulled away from the wall leaving scrape marks on the floor, and the headboard was bent over. T4 49, 65.

Donna testified that as she went downstairs, Nicholas followed, continuing to rage about getting his money, broke a chair, and pounded on a wooden beam. T4 51-52. Nicholas then grabbed her by the shoulders, forcing her backwards around the beam while demanding money and holding a fist in her face. T4 52. Donna testified that she begged Nicholas not to hurt her, and Nicholas yelled repeatedly that he was going to kill her, he was going to kill Ethan, and if any police showed up, he would kill them too. T4 52-53. After making these threats one last time, Nicholas left the house, T4 54, and after about thirty seconds to a minute, Donna went upstairs "thinking oh God, he'll be back. He always comes back." T4 54, 72, 77. Donna testified that when she went upstairs, Ethan passed her as he headed out of the house, and subsequently, she heard the gunshots. T4 55. At the time, she believed Nicholas was firing the shots. T4 55.

## SUMMARY OF THE ARGUMENT

The trial court erred in barring Ethan from arguing a justification defense, and instructing the jury not to consider such a defense. When the defense provides some evidence supporting a justification defense, the trial court must instruct the jury on the defense. Under the governing legal standards, even without consideration of Nicholas's past violent and tumultuous acts, Ethan's testimony described a situation of sufficient imminence to warrant a self-defense instruction.

When those prior violent acts are considered, Ethan's entitlement to a justification defense becomes more compelling. Treatises, and the majority of jurisdictions, hold that evidence of prior violent acts by the alleged victim, known to the accused, are relevant to establish both that the accused intended to act in self-defense, and that the manner in which the accused defended himself or another was reasonable. Based upon those principles, and based upon State v. Dukette, 145 N.H. 226 (2000), Ethan's knowledge of Nicholas's prior acts, involving violence, drunkenness, and reckless brandishing and firing of loaded guns, bolstered Ethan's argument that he reasonably believed Ethan was about to use unlawful, deadly force against himself or his mother. Accordingly, the court

erred in excluding the evidence.

I. THE JURY ERRED IN BARRING ETHAN FROM ARGUING A JUSTIFICATION DEFENSE AND INSTRUCTING THE JURY NOT TO CONSIDER THE DEFENSE.

Ethan persuaded the jury that Nicholas's behavior immediately prior to the shooting constituted sufficient provocation to reduce the charge to manslaughter. The trial court, however, barred Ethan from arguing that he acted in self-defense or defense of his mother, instructed the jury not to consider those defenses, and excluded evidence of Nicholas's prior violent and tumultuous acts. The trial court erred, because the defense elicited sufficient evidence to entitle it to self-defense and defense of another instructions as a matter of law, even absent consideration of Nicholas's prior acts. When the prior acts are considered, moreover, his case for self-defense is further strengthened.

A. Pretrial litigation

Prior to trial, Ethan filed a notice of intent to rely on self-defense and defense of another, App. A1, pursuant to RSA 627:4, II(a). (This brief will use the term "justification" to refer both to self-defense and defense of another.) The defense also moved in limine to admit specific instances of prior bad acts of Nicholas known to Ethan. App. A20.



The State, in turn, moved to bar any justification defense, App. A4, and also moved to preclude evidence of Nicholas's prior bad acts. App. A26. These motions, and Vassar's responses, App. A14, A32, reveal that the parties' respective positions involved significant factual disputes. In summary, the defense argued that Nicholas's violent conduct immediately preceding the shooting, along with his past violent and tumultuous conduct, led Ethan to reasonably believe that Nicholas went to his room above the garage to get a gun to kill Donna and Ethan. E.g., App. A1-A2, A15-17. The State argued, however, that the shooting had occurred after the victim had retreated from the encounter, and thus, there was no imminent threat justifying the use of deadly force. E.g., App. A11.

In a responsive pleading, App. A14, the defense detailed its offer of proof concerning Nicholas's past conduct that justified Ethan's reasonable belief that Nicholas was about to use deadly force against him or his mother. The pleading indicated Donna had told the police that "Nicholas had, within the preceding few weeks, taken to walking around the home with a loaded gun, screaming and yelling, and that she had decided that one of these days he was going to shoot her." App. 16. The pleading further indicated: "Based on what [Ethan] saw and

heard that night, combined with the escalating violence exhibited by Nicholas, including the drunken brandishing of loaded weapons, he felt both that his life and ... his mother's life was [sic] in imminent danger." App. A17.

At a hearing on these motions at which the parties made further offers of proof, the court indicated it was disinclined to allow the defense to rely on justification. MH 40, 48. The court acknowledged that if Ethan had a viable self-defense claim, than Nicholas's prior violent acts, to the extent known to Ethan, would likely be relevant to his state of mind. MH 39-40. The court expressed doubt, however, that the facts were sufficient to lead a reasonable person to fear the imminent use of deadly force by Nicholas. MH 40. The court noted that at any rate, such a defense could only be predicated on defense testimony that it had not yet heard. MH 43-44. Accordingly, the trial court conditionally precluded testimony regarding the prior bad acts, MH 39, ordered the defense not to refer to them or argue justification in opening statement, MH 46, and indicated that the issue could be reconsidered at the time of Ethan's testimony. MH 47-48.

B. Events during trial

After Ethan testified as to the circumstances occurring on

the day of the shooting that led him to believe that Nicholas had gone to the garage to get a gun, the defense requested permission to introduce three specific categories of Nicholas's prior bad acts. T3 138. First, the defense sought to admit evidence that there had been an "escalation in both the frequency and violence of his temper tantrums such that it appeared to be building to a crisis..." T3 138. Second, the defense proffered that Nicholas had "savagely beaten" Ethan four months prior to the shooting, in Donna's presence, after Ethan asked Nicholas not to overload the woodstove that night. T3 139. Third, the defense sought leave to introduce evidence that over the course of the two weeks immediately preceding the shooting, Nicholas had carried the shotgun around the house, "drunk and raging," had cranked shells into the shotgun in the living room while ordering Donna to get him beer, had emptied numerous shotgun shells onto the floor of the living room, and had repeatedly fired the shotgun and a .22 rifle out a window of the garage, littering the yard with shells. T3 139-140.

The defense argued that under Rule 404(b) all of these facts were relevant to a purpose other than propensity, that being Ethan's mental state, with respect to his claim of self-defense and defense of others. T3 142-43, 151. The defense

also asserted that the beating was relevant to explain why Ethan feared Nicholas and felt that going downstairs and confronting him in Donna's presence would only make things worse. T3 139. The defense further argued that the probative value of the evidence substantially outweighed any prejudice, as "it is difficult to think of any evidence more probative than the fear that can be occasioned by a drunken family member... wandering around the house... with a loaded shot gun...." T3 143. The defense concluded by arguing that where the evidence was highly relevant to Vassar's justification defense, to exclude the evidence would violate his right to present all proofs favorable, and his right to due process under the state and federal constitutions. T3. 143-44.

The trial court excluded all of the evidence. T3 145. The court ruled that, as a matter of law, Ethan could not claim or argue justification, and no justification instruction would be given. T3 145. The court ruled that because Ethan walked into Nicholas's room and shot first, and because Nicholas was unarmed, that "[n]o rational jury could find ... that he had a reasonable belief that he was in imminent danger at that point." T3 146.

Subsequently, in the court's instruction to the jury, it

categorically ruled out such a defense in language that suggested Ethan's testimony and theory of defense had been unreasonable:

During the trial the defendant claimed that he acted in self defense or in defense of his mother. In order to be justified in taking the life of Nicholas Vassar for the purpose of defending himself or his mother, there must have been evidence that the defendant reasonably believed he or his mother were in imminent danger that Nicholas Vassar was about to use deadly force against the defendant or his mother. You are instructed that as a matter of law the evidence was not sufficient to support the defense of self defense or defense of another, and therefore these are not issues that you will be addressing in your deliberations.

T4 188.

The issues presented in this appeal are, to some extent, mutually dependent. Vassar asserts that Nicholas's prior violent and tumultuous acts were relevant to support his justification defense. His explanation for why he reasonably believed the shooting was justified, in turn, was in part based on those prior bad acts. Even without the prior bad acts, however, the court should have given a justification instruction. This brief will, accordingly, first argue that the court erred in barring Ethan from presenting a justification defense, even absent consideration of the prior acts; and then argue that when those acts are considered, his case for self-

defense becomes more compelling. In section II, the brief will further explain why Nicholas's prior violent and tumultuous acts should have been admitted by the trial court.

C. The court erred in barring Ethan's justification defense, even absent consideration of Nicholas's prior violent and threatening acts.

Even without consideration of Nicholas's past violent and threatening acts, the trial court erred in barring Ethan from arguing a justification defense, and instructing the jury not to consider such a defense. Several points define the law regarding justification generally.

First, "[a] requested instruction on a party's theory of defense must be given if such theory is supported by some evidence, and refusal to charge on that defense is reversible error." State v. McMinn, 141 N.H. 636, 644-45 (1997) (quotations omitted) (reversing for failure to provide requested self-defense instruction in riot prosecution). In the context of entitlement to a self-defense instruction, this Court has defined "some evidence" as "more than a minutia or scintilla of evidence." State v. Haycock, 146 N.H. 5, 9 (2001) (quotations omitted). As a Florida court put it,

[W]here there is even the slightest evidence of an overt act by the victim which may be reasonably regarded as placing the accused

apparently in imminent danger of losing his life or sustaining great bodily harm all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused.

Hedges v. State, 667 So.2d 420 (Fla. App. 1<sup>st</sup> Dist 1996) (quotations and citations omitted). Once self-defense is raised, the State bears the burden of disproving the defense beyond a reasonable doubt. McMinn, 141 N.H. at 645.

Second, the trial court cannot bar a justification defense, based on its determination of the credibility of the testimony or evidence supporting the defense. Id.; Haycock, 146 N.H. at 11; State v. Hast, 133 N.H. 747, 749-50 (1990).

It is ... the province of the jury to reconcile the defendant's inconsistent trial testimony. Therefore, for our purposes, the sole question is whether the defendant introduced 'some evidence' to support a rational finding in favor of the defense, not whether the evidence in support of the defense is uncontradicted.

Haycock, 146 N.H. at 11.

Third, Ethan had no duty to retreat under the circumstances here. As Nicholas was a co-habitant rather than an intruder, Vassar relied solely on subsection (a) of the self-defense statute, which provides that "A person is justified in using deadly force upon another person when he reasonably believes that such other person: (a) Is about to use unlawful, deadly

force against the actor or a third person.” RSA 627:4 (a); see App. A17. Under that provision, an accused defending himself or another from a co-habitant has no duty to retreat where he acts upon his own property. State v. Warren, 147 N.H. 567, 571 (2002). Moreover, for the purpose of that provision, the accused’s property includes an outbuilding on the property such as the garage where the shooting occurred. State v. Pugliese, 120 N.H. 728, 731 (1980).

Fourth, while deadly force may only be utilized if the accused reasonably believed he faced an imminent danger, State v. Ke Tong Chen, 148 N.H. 565, 570 (2002), he may be entitled to a self-defense instruction even if, in fact, he was wrong in that belief. The “reasonable belief” required by RSA 627:4 is a two-pronged standard, requiring that Ethan subjectively believed Nicholas was about to use unlawful, deadly force against him or his mother, and that his belief was objectively reasonable under the circumstances. State v. Gorham, 120 N.H. 162, 163-64 (1980). Courts analyze both the subjective and the objective components of this test from the perspective of the accused, not from an omniscient or third-party viewpoint. Thus, a person who reasonably believed he faced imminent deadly peril has the defense even if mistaken. Id. at 163. On the other hand, a



person who unreasonably but honestly believed he faced imminent deadly peril does not have the defense. Id. at 163-64.

Applying these principles, Ethan's testimony, even without consideration of his knowledge of Nicholas's violent and tumultuous past, described a situation of sufficient imminence to warrant a self-defense instruction. Ethan's mother reported to him being very concerned regarding Nicholas's behavior earlier in the day. T3 81-83. Donna expressed particular concern about Nicholas's guns. T3 82-83. Subsequently, Ethan witnessed Nicholas's violent rampage in the home, including assaults on his mother, and destruction of property. Most importantly, Ethan described Nicholas's threats to kill Donna, Ethan, and any police summoned to the residence, T3 91, including the threat to kill Donna made immediately before he left for the garage. T3 98. Ethan testified that when he went into Nicholas's room above the garage, he believed Nicholas had gone there to get a gun to kill Donna and himself. T3 99-101. The garage is close enough to the house, that a person in Nicholas's room can look through a skylight and see people walking around the main residence. T1 85. The very nature of Ethan's threat - that he would kill not only civilians, but any police that arrived - coupled with the proximity of the garage,

allowing him to exit the garage armed and ready long before any emergency response could arrive - presented a threat of deadly force.

The trial court placed particular emphasis on the facts that Ethan shot first, and that Nicholas was unarmed. T3 146. More generally, the court appears to have accepted the State's theory that Nicholas had abandoned his attack or retreated from the conflict when he went to his room, and that accordingly, Ethan did not face an imminent threat and so could not claim justification. See, e.g., T3 48 (trial court states that "[p]re-emptive war may be great for foreign affairs, but you don't get to do it as part of self defense in the United States."). In the abstract, the court was correct, as self-defense cannot be asserted where the victim has withdrawn from the conflict. E.g., State v. Powers, 571 P.2d 1016, 1023 (Ariz. 1977). Thus, if the trial record supported only one view of events, that a reasonable person in Ethan's shoes would have believed Nicholas had not armed himself, but rather had withdrawn from the conflict by going to his room, then Ethan would have no right to mount a "preemptive strike" against a speculative future danger. State v. Buggs, 806 P.2d 1381, 1385

(Ariz. App. 1990) (“[A]fter a fight has broken off, one cannot pursue and kill merely because he once feared for his life.”).

The court erred, however, because conflicting testimony in this trial presented two very different perspectives. The State’s perspective, largely based on Magistro’s testimony, was that Nicholas had withdrawn from the conflict. Magistro’s credibility was vigorously attacked, T1 98-146, and his testimony was in fact rejected by the jury in substantial part when it acquitted Ethan of criminal threatening. Even crediting Magistro’s testimony, however, Ethan’s testimony presented a different perspective, specifically, his belief that Nicholas had not abandoned his attack by the act of leaving the residence, but rather, he had increased the danger by threatening deadly force and then heading for the place where he keeps his guns. Ethan further testified that when he entered Nicholas’s room, Nicholas appeared to be crouching down, he could not see whether Nicholas held a gun, and he commenced firing. T3 162, 165. Because of the hanging sheet, a person standing in that room could not see that the shotgun remained in the closet, T1 58, and Ethan testified that he did not learn Nicholas was unarmed until after the shooting. T3 121, 162-65. As discussed above, the fact that Ethan was apparently mistaken

regarding whether he faced an imminent deadly threat does not, standing alone, defeat a justification defense. Accordingly, a rational juror could reasonably find Ethan's conduct justified, based on his testimony and in the evidence of Nicholas's conduct immediately preceding the shooting, notwithstanding Magistro's testimony.

Finally, under the circumstances of this case, the right to present a justification defense cannot rise or fall on whether the accused waited until the danger reached its absolute apex, which in this case would require Ethan to wait until Nicholas actually returned to the main residence and aimed a loaded gun at his family members.

The proper requirement is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively.

2 Lafave, Substantive Criminal Law § 10.4(d) at 151 (2d Ed. 2003) (quoting 2 P. Robinson, Criminal Law Defenses § 131(c) (1) (1984)). A person in Ethan's shoes could reasonably believe that he had to go to the garage to protect himself and his mother, as the alternative, conducting a live firefight in the

main residence with his mother in the line of fire, would increase, not decrease, the danger.

- D. When Nicholas's prior violent and threatening acts are considered, Ethan's entitlement to a justification defense becomes more compelling.

It is a fundamental principle that the accused's knowledge of the victim's prior violent acts, directed at the accused or at third parties, can shed light both on the honesty of the belief that he needed to defend against an imminent attack, and the reasonableness of his belief.

If it can be established that the accused knew at the time of the alleged crime of prior violent acts by the victim, such evidence is relevant as tending to show a reasonable apprehension on the part of the accused. Since this is not the circumstantial use of character evidence to prove conduct, such use is not barred either by Rule 404 or Rule 405.

Louisell & Mueller, Federal Evidence § 139, at 108 (1978); accord 40A Am. Jur. 2d Homicide § 295 (2005); S. Saltzburg, M. Marin & D. Capra, Federal Rule of Evidence Manual § 404.02 (6), at 404-14 (8<sup>th</sup> Ed. 2002); II Wigmore on Evidence § 248, at 61 (3d Ed. 1940).

This Court recognized the rationale for this principle over a century ago:

A person attacked has no right to kill his assailant for the purpose of punishing a bad or desperate man, or of ridding the world of a ruffian; but the character of the assailant for ferocity, or peaceableness, known to the party attacked, is circumstantial evidence of apparent peril or apparent security, upon which he may be authorized to act. An attack upon a dangerous man may be unjustifiable: but the dangerous character of an assailant is a legitimate reason for apprehending danger, and employing speedy, energetic, and sure means of defence.

Aldrich v. Wright, 53 N.H. 398, 401 (1873) (citation omitted).

Nicholas's prior conduct over the course of twenty months involved the deadly intersection between violence, drunkenness, and reckless use of firearms. In particular, the latter had escalated, frightening Donna and Ethan, in the weeks preceding the shooting. Knowing of these prior acts, Ethan had reason to believe that Nicholas's threats to kill his mother, himself, and any police, made immediately before Nicholas headed towards the place where he keeps his guns, constituted a true expression of Nicholas's present and immediate intentions rather than a thoughtless expression of transitory anger. Thus, the prior acts strengthen Ethan's claims that he honestly believed he faced an imminent and deadly threat, and that his beliefs were objectively reasonable under all the circumstances.

The record suggests that a misconception regarding the nature of domestic violence caused the trial court to fail to perceive the nexus between Nicholas's past violence and the conduct exhibited by Ethan and his mother on the night of the shooting. Thus, in support of its decision to preclude self-defense, the court noted that all of the parties had lived together on the property during the twenty month period, yet "these other incidents ... were not sufficient to cause anyone in the household to take some action." T3 148. This seemed to imply that Nicholas could not have been as violent as his mother and brother claimed, or they would have done something about it. Defense counsel then pointed out that Donna and Ethan had gone to see the local police chief at his home several times, and Donna had told him that she believed if she told Nicholas to leave, he would kill her. T3 148. Defense counsel further pointed out that Donna had gone to a counselor, who told her to get a restraining order, but Donna had told the counselor that she believed Nicholas would kill her if she obtained such an order. T3 150. Nevertheless, the trial court maintained its order.

II. THE COURT ERRED IN EXCLUDING EVIDENCE RELEVANT TO  
SUPPORT VASSAR'S JUSTIFICATION DEFENSE.

The principle that an accused claiming justification is entitled to elicit evidence of prior violent and tumultuous conduct by the victim to the extent known to him, is followed by the majority of jurisdictions. See Commonwealth v. Fontes, 488 N.E.2d 760, 762 (Mass. 1986) ("We join the weight of authority in this country in concluding, as a matter of common law principle, that a defendant in a homicide case may introduce evidence of recent, specific instances of the victim's violent conduct, known to the defendant at the time of the homicide, to support his assertion that he acted justifiably in reasonable apprehension of bodily harm."); accord State v. Tribble, 428 A.2d 1079, 1084 n.6 and n.7 (R.I. 1981) (citing this as the majority rule and collecting cases); see also United States v. Saenz, 179 F.3d 686, 688-89 (9<sup>th</sup> Cir. 1999); State v. Day, 535 S.E.2d 431, 436 (S.C. 2000); State v. Waller, 816 S.W.2d 212, 215-16 (Mo. 1991); Burgeon v. State, 714 P.2d 576, 578 (Nev. 1986); Commonwealth v. Watson, 431 A.2d 949, 952-53 (Pa. 1981); Commonwealth v. Stewart, 394 A.2d 968, 971 (Pa. 1978); People v. Miller, 349 N.E.2d 841 (N.Y. 1976).

While this Court has never specifically addressed the admissibility of prior violent acts of the victim known to the



defendant in a self-defense case, the Court has ruled that where the defendant's state of mind is at issue, his own prior bad acts against the victim may become admissible under Rule 404(b). State v. Dukette, 145 N.H. 226, 230 (2000); State v. Lesnick, 141 N.H. 121, 125-26 (1996); State v. Richardson, 138 N.H. 162, 166-68 (1993). Thus, in Dukette, where the accused claimed self-defense, this Court held under Rule 404(b) that "evidence that the defendant previously committed unprovoked assaults upon the alleged victim to which the alleged victim did not respond violently undermines the defendant's argument that she reasonably believed the alleged victim was about to use unlawful, deadly force against her." Id. at 230-31. Because the evidence was offered for a purpose other than propensity, and its probative value was not substantially outweighed by prejudice to the defense, the Court held that the evidence should have been admitted. Id. at 231-32.

Neither logic nor any legitimate policy consideration would support the view that under Dukette, the State may admit evidence of the defendant's prior violent acts to defeat his justification claim, but the defendant may not admit evidence of the victim's prior violent acts, known to him, to support his justification claim. Thus, it is a fair inference from Dukette

that the majority rule discussed above is also the governing rule in this State. Of course, prior acts of violence not known to the accused cannot bear on his state of mind and may not be admissible. State v. Newell, 141 N.H. 199, 202-204 (1996) (in self-defense case, specific instances of violence not admissible under Rules 404(a)(2), 405 and 608(b); no claim made that violent instances were known to the accused and issue not analyzed under Rule 404(b) state of mind exception).

Applying Dukette, there was a sufficient logical nexus between Nicholas's prior acts, and the issues in dispute, Ethan's subjective state of mind, and the reasonableness of his belief that he faced an imminent threat requiring the use of deadly force. First, the prior acts involved the same parties. Second, the prior acts were in the recent past. Third, and most importantly, the prior acts, involving violence, drunkenness, and reckless brandishing and firing of loaded guns, bolstered Ethan's argument that he reasonably believed Nicholas was about to use unlawful, deadly force against himself or his mother. Accordingly, the court erred in excluding the evidence.

The trial court's orders not only prevented Ethan from presenting his defense, but also allowed the State to present a misleading picture of the situation to the jury. With self-

defense ruled out, and Nicholas's history of violence excluded, the State argued in closing that Ethan killed his brother because he was "upset, angry, and he made a decision that his brother had to die because of something that had happened downstairs." T4 148. The State further argued: "They want you to believe that a broken chair and a threat somehow resulted in a death sentence." T4 165. These arguments illustrate the manifest unfairness of Ethan's trial, as in reality the State had successfully prevented Ethan from telling the jury what he wanted them to believe -- that twenty months of escalating domestic violence, culminating in a terrifying, senseless and cruel attack on the day in question, motivated Ethan not to administer a "death sentence," but to protect himself and his mother from what reasonably appeared to be an imminent, deadly attack. Accordingly, this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Vassar respectfully requests that this Court reverse his conviction.

Oral argument is requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 9<sup>th</sup> day of January, 2006.

\_\_\_\_\_  
Theodore Lothstein

DATED: January 9, 2006