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CLERK OF DISTRICT COURT
FRANKLIN COUNTY, KANSAS

**IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT**

**STATE OF KANSAS,
Plaintiff,**

vs.

**KYLE TREVOR FLACK,
Defendant.**

Case No. 2013 CR 104

MOTION TO ADMIT STATEMENTS MADE BY KAYLIE BAILEY

At jury trial, Plaintiff intends to introduce statements made by Kaylie Bailey on the morning of May 1st, 2013, to her mother, Lisa Smith, as to her plans for that day. This evidence is offered not to prove the truth of the statements but to explain the reason for Kaylie's actions between 11 a.m. and 1 p.m. on May 1st, 2013.

FACTS

Shortly after 11 a.m. on May 1st, 2013, Kaylie Bailey and her daughter, Lana Bailey, left their residence in Olathe, Kansas. Kaylie stopped at the Olathe Enterprise Bank and obtained \$30 from an ATM, stopped at the Gardier Shell Service Station and

purchased a fruit drink and a cold tea drink, and then headed to Ottawa. Once in Ottawa, Kaylie went to the Burger King restaurant around 12:20 p.m. and bought four double cheeseburgers, tater tots, and a kid's meal. She then proceeded to Andrew Stout's residence.

Lisa Smith, Kaylie Bailey's mother, stated during inquisition testimony that the reason Kaylie left the Olathe residence that day was to take food to Stout. (Inquisition testimony of Lisa Smith, BATES #2388, lines 7 to 9.) Kaylie told Lisa that Stout requested that she do this for him because he did not have a car to go to the bank for cash. (BATES #2388, lines 9 to 12.) This information was communicated to Kaylie through text messages from Stout's phone. (BATES #2387, line 23, to #2388, line 4.)

ISSUE – ADMISSIBILITY OF THE STATEMENTS

STATUTORY AND CASE LAW

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court. *State v. Martis*, 277 Kan. 267, Syl. ¶ 3, 83 P.3d 1216 (2004). Judicial discretion is abused if judicial action is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of fact. *State v. Rodriguez*, 295 Kan. 1146, Syl. ¶ 8, 289 P.3d 85 (2012).

Non-Hearsay

Statutory law

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence. K.S.A. 60-460, and amendments thereto.

Case law

Kansas case law clarifies what is and is not hearsay. The Kansas Supreme Court has stated that evidence of an out-of-court statement that is not offered to prove the truth of the matter stated is not hearsay. *State v. Becker*, 290 Kan. 842, Syl. ¶ 1, 235 P.3d 424 (2010). An example of non-hearsay is a statement offered into evidence not to prove the truth of the matter asserted but to show its effect on the listener. *Becker*, 290 Kan. at 847. This type of evidence can include directives that cause a listener to engage in certain actions. *Becker*, 290 Kan. at 848.

ARGUMENT

Plaintiff's theory is that the defendant killed Andrew Stout in the early morning hours of April 29th, 2013, and concealed his body in the southwest bedroom of the residence. The defendant then disguised himself as Stout and lured Kaylie Bailey to the residence through text messages on Stout's phone. (Plaintiff has scientific evidence that approximately 100 text messages were exchanged between Stout's phone and Bailey's phone starting the evening of April 29th, 2013, and ending the morning of May 1st, 2013. Because the defendant disposed of these cell phones before arriving in Emporia on May 3rd, 2013, the content of the messages is unknown.) Based on Kaylie's comments to her

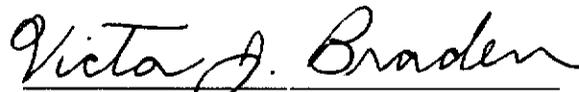
mother on the morning of May 1st, 2013, the text messages from Stout's phone directed her to bring food to Stout at his residence that afternoon.

Kaylie's comment to Lisa Smith that Stout had texted her to bring food to the residence is not hearsay. Kaylie had received a text message that was directive in nature – bring food. It explains why Kaylie behaved the way that she did that day – left her residence, obtained \$30 from an ATM, stopped off at a convenience store to get two drinks (a fruit drink and a cold tea drink), went to a fast food restaurant and purchase enough food for two adults and a child, and then proceeded to Stout's residence.

CONCLUSION OF THE MOTION

The statement made by Kaylie Bailey to her mother, Lisa Smith, is evidence offered not to prove the truth of the matter asserted, but to explain the reason for Kaylie's actions between 11 a.m. and 1 p.m. on May 1st, 2013. Therefore, it is admissible at jury trial.

Respectfully submitted,



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Attorney for the plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the original State's Motion to Admit Statements by Kaylie Bailey (Filing #26) was mailed on the 7th day of November, 2014, to:

The Clerk of the Franklin County District Court
Court Building
301 South Main Street
PO Box 637
Ottawa, KS 66067-0637

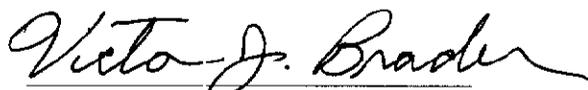
and, I hereby certify that a true and accurate copy of the State's Motion to Admit Statements by Kaylie Bailey (Filing #26) was mailed on the 7th day of November, 2014, to:

Ronald F. Evans
Attorney for the defendant
State of Kansas
Death Penalty Defense Unit
700 SW Jackson, Suite 500
Topeka, KS 66603

Timothy Frieden
Attorney for the defendant
State of Kansas
Death Penalty Defense Unit
266 North Main, Suite 210
Wichita, KS 67202

and, I hereby certify that a chamber copy of the State's Motion to Admit Statements by Kaylie Bailey (Filing #26) was sent via email on the 7th day of November, 2014, to:

The Honorable Eric W. Godderz
District Court Judge
Anderson County Courthouse
100 East 4th
P.O. Box 305
Garnett, KS 66032


Victor J. Braden, #18524
Deputy Attorney General