



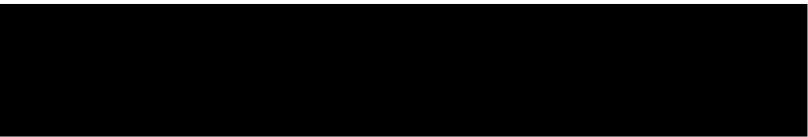
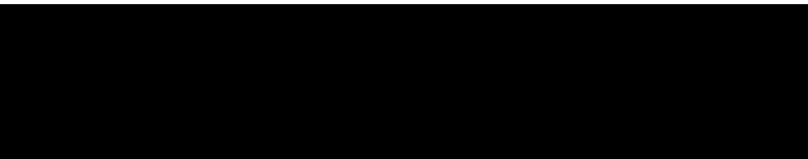
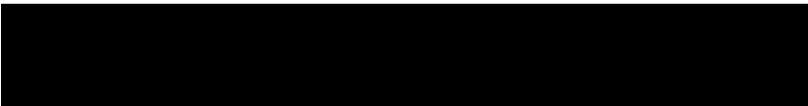
Merrimack
No. 85-155

THE STATE OF NEW HAMPSHIRE

v.

NANCY MCPHERSON

April 11, 1986



Stephen E. Merrill, attorney general (*Robert B. Muh*, assistant attorney general, on the brief and orally), for the State.

James E. Duggan, appellate defender, of Concord, by brief and orally, for the defendant.

BROCK, J. After a jury trial, the defendant was convicted of welfare fraud, RSA 167:17-b, I(d) (Supp. 1985), and in this appeal claims that the Trial Court (*Cann, J.*) erroneously excluded, as hearsay, statements that she had made to a neighbor. For the reasons that follow, we reverse and remand for a new trial.

The defendant was convicted for purposefully failing to disclose to the State Division of Welfare the fact that she was simultaneously receiving unemployment compensation and AFDC benefits, a disclosure which would have substantially reduced her benefits.

At trial, Ms. McPherson mounted a two-pronged defense against the charge. First, she claimed that she thought the State Division of Welfare had been properly informed through the City of Concord welfare office of her receipt of unemployment compensation. Second, she claimed that she thought the money she was receiving through the State Division of Welfare constituted child support from her ex-husband, since she had assigned over \$3,000 in support arrearages to the division of welfare and had been informed by a case technician that any further child support would be funneled to her through that office. Given the structure of her defense, Ms. McPherson's criminal intent or lack thereof was crucial, since RSA 167:17-b, I(d) (Supp. 1985) states:

"[No person shall] [i]ntentionally fail to disclose the receipt of property, wages, income or resources or any change in circumstances which would affect his eligibility for assistance or his initial or continued right to any benefit or payment for the purpose of receiving any assistance, benefit or payment under RSA 167 or RSA 161 to which he is not entitled."

Thus, any evidence tending to show that the defendant did not intend to defraud the State welfare office would be important to her defense.

Defendant's counsel attempted to introduce, through a neighbor, evidence of Ms. McPherson's statements to the neighbor to the effect that she was receiving child support checks from the division of welfare. In reality, those checks constituted State welfare assistance. The trial court excluded this evidence on the ground that the statements were hearsay and not encompassed by the state of mind exception to the hearsay rule. The defendant contends on appeal that the statements were not hearsay. Alternatively, she asserts that if the statements were hearsay, they fell within the state of mind exception to the hearsay rule.

At the outset, we note that defendant's appellate counsel maintained that it was impossible to tell from the trial record exactly what the testimony of the neighbor, Jacqueline Abodaca, would have been, since the only evidence of those statements was an offer of proof made by defense counsel at the time of Ms. Abodaca's testimony. We disagree. During a colloquy with the court at the time of the State's objection, defendant's counsel asserted that Ms. Abodaca

it was not overwhelming. In addition, we do not agree that the proffered testimony was merely cumulative. Moreover, we cannot say that, had the evidence been admitted, it would have had no effect on the jury's verdict. *Cf. State v. Ruelke*, 116 N.H. 692, 694, 366 A.2d 497, 498 (1976).

Thus, we hold that the exclusion of these statements was clearly erroneous and that the exclusion was not harmless error. We therefore reverse and remand for a new trial.

Reversed and remanded.

All concurred.

Hillsborough
No. 85-181

THE STATE OF NEW HAMPSHIRE

v.

DAVID F. ALLISON

April 11, 1986

Stephen E. Merrill, attorney general (*Andrew L. Isaac*, assistant attorney general, on the brief and orally), for the State.

Marsh & Segal, of Concord (*Harris Krinsky* on the brief, and *Ronald Ian Segal* orally), for the defendant.

PER CURIAM. In this second appeal arising out of the defendant's conviction for second degree murder, he claims that the Trial Court (*Contas, J.*) erroneously denied his motion for a new trial. He argues that (1) the court's jury instructions were facially contradictory, ambiguous, unintelligible, and erroneous, and thereby deprived him of his due process right to a fair trial, and (2) counsel's failure to preserve this issue denied him effective assistance of counsel. For the reasons that follow, we affirm.