

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

**MOTION IN LIMINE: STATEMENTS MADE TO COOS COUNTY CORRECTIONAL  
OFFICER CPL. COVILL**

NOW COMES the accused, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves the Court for an Order *in Limine* precluding the State from introducing evidence of, or making reference to, the June 25, 2019 conversation between Cpl. Covill and Mr. Zhukovskyy.

In Support of this motion, Mr. Zhukovskyy States the following<sup>1</sup>:

1. The State provided as part of discovery a single page report from Cpl. Covill detailing purported conversations occurring on June 25, 2019 between Cpl. Covill and Volodymyr Zhukovskyy.<sup>2</sup>
2. Cpl. Covill alleges that during those conversations he asked Mr. Zhukovskyy about his drug and alcohol consumption and that Mr. Zhukovskyy replied that he consumed an entire bottle of Hennessey liquor every day.
3. According to Cpl. Covill, Mr. Zhukovskyy stated that he consumes ten bags of heroin every day. When asked to quantify how much was in a bag in ounces or grams, he was unable to do so. Cpl. Covill then made a circle with his fingers

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<sup>1</sup> All factual allegation are from discovery provided by the state unless otherwise noted.

<sup>2</sup> Attached as Exhibit A

roughly the size of a quarter and that Mr. Zhukovskyy confirmed that a bag was about that size.

4. As a preliminary matter, the State failed to provide notice of its intent to offer this 404(b) evidence in accordance with NH Rule of Criminal Procedure 12(b)(1)(F).
5. Substantively, the statements are inadmissible under the NH Rule of evidence.
6. Mr. Zhukovskyy's alleged statements regarding chronic alcohol use are irrelevant under Rule 401. No alcohol was found in Mr. Zhukovskyy's blood when tested at the NH State Forensic Lab, there were no observations consistent with alcohol use made by any witness before or after the accident, and no expert has opined that either consumption of alcohol or withdrawal from consumption of alcohol were a factor in this case. The evidence of Mr. Zhukovskyy's purported alcohol consumption would have no tendency to make the existence of any fact that is of consequence to the determination of this case more or less probable.
7. There is no admissible basis consistent with Rule 404(b) for which the evidence could be admitted.
8. Even assuming arguendo that there was some probative value associated with this evidence, it is significantly outweighed by the danger of unfair prejudice in that the jury would use the evidence for its tendency to indicate a propensity for alcohol use and impaired driving, or some other impermissible purpose.
9. Likewise, the statements allegedly made by Mr. Zhukovskyy regarding heroin use lack a permissible basis upon which to be admitted.
10. Although, unlike alcohol, there are allegations that Mr. Zhukovskyy was impaired by heroin and other drugs at the time of the accident, his alleged statement that he

consumed ten bags of heroin every day is nevertheless irrelevant under Rule 401 as to whether he was impaired at the time of accident.

11. The primary fact at issue in this matter is whether Mr. Zhukovsky was impaired at the time of the accident and whether his impairment caused the accident. His impairment at any other time of the day or on a different day is irrelevant to that determination.

12. Also irrelevant is the quantity of drugs consumed. The State's own experts concede that blood concentrations alone provide no helpful information regarding impairment beyond establishing that a person has consumed drugs. This is true because individual responses to opiates are so varied that that the amount consumed or concentration in the blood would have wildly different effects depending on the person and their tolerance.

13. Due to those variations, whether he consumed one bag of heroin or ten bags of heroin adds nothing to the analysis of whether he was impaired by whatever amount he may have consumed. Accordingly, the evidence is not relevant under Rule 401 because it would have no tendency to make the existence of any fact that is of consequence to the determination of this case more or less probable.

14. Additionally, because this evidence involves other crimes, wrongs, or acts it is properly analyzed under Rule 404(b). Under Rule 404(b), evidence of other bad acts is admissible when: (1) it is relevant for a purpose other than to prove the defendant's character or disposition; (2) there is clear proof that the defendant committed the acts; and (3) the prejudice to the defendant does not substantially

outweigh the probative value of the evidence. State v. Dukette, 145 N.H. 226, 229 (2000).

15. The evidence fails the first prong of the Rule 404(b) analysis. There is no allowable purpose for which this evidence is admissible under Rule 404(b). Any attempt to shoehorn this evidence into an exception to rule 404(b) is merely a ruse to put inadmissible character evidence before the jury for its patently unfair prejudicial impact.
16. Likewise, the evidence fails the second prong of the 404(b) analysis. There is no clear proof what Mr. Zhukovskyy allegedly said to Cpl Covill regarding his use of heroin was indeed true. The state has a significant burden to establish clear proof that what Mr. Zhukovskyy is saying is true. See State v. Michaud, 135 N.H. 723, 728 (1992)(holding that proof that it was more probable than not that the defendant committed the prior bad act was insufficient to meet the clear proof burden).
17. Here, there are two primary flaws with the State's proof. First, the circumstances of the supposed disclosure; an attempt to get special medical accommodation in an incarceration setting, created an incentive to exaggerate the scale of his problem to induce the jail to provide better or more substantial medical care. Given that dynamic, his supposed representations alone cannot be the sole basis of clear proof.
18. Second, other evidence contradicts the supposed claims of drug use made to Cpl. Covill. Mr. Zhukovskyy makes the following statements in his police interrogation regarding drug use:
  - "I'm not really like, like a big drug addict I wouldn't say"

- he consumed heroin "once in a while"
- he started when he was 18 but "it's like on and off"
- "I've been getting myself clean"
- "I'm going on the road and I'm just staying clean for months, you know"
- "I did about three or four bags a day"
- regarding the day of the accident "I had two in the morning and then I had some cocaine and that's it"

19. The State cannot simply choose from several differing representations the assertion that is most beneficial to their case, and correspondingly the most prejudicial to Mr. Zhukovskyy.

20. The evidence fails the third prong of the 404(b) analysis as well because any claimed probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and needless presentation of cumulative evidence.

21. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, or provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision upon something other than the established propositions in the case." State v. Russell, 159 N.H. 475, 485 (2009). "Unfair prejudice is inherent in evidence of other similar crimes or wrongs because, notwithstanding the permissible reasons for which such evidence might be admitted, there is a risk that the jury will find the defendant had a propensity to commit the charged crime merely because the defendant committed a similar crime or wrong in the past." State v. Belonga, 163 N.H. 343, 360 (2012) See

also, State v. Bassett, 194 N.H. 493, 502 (1995); Michaud, 135 N.H. at 728; State v. Ellison, 135 N.H. 1, 4 (1991).

22. As discussed *supra*, the evidence has no relevance to any fact at issue in this matter and accordingly has no probative value. Even assuming arguendo that there was some probative value, it is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and needless presentation of cumulative evidence.
23. The generic representation of what he typically consumes in a day is cumulative because during his police interrogation Mr. Zhukovskyy provides a detailed account of his drug consumption that is specific to the day of the accident. There is no need to further present confusing or misleading evidence of what his typical consumption was alleged to be.
24. The generic statement of how much he typically consumes is also confusing and potentially misleading to the jury. Here, there is no real evidence about what a “bag” of heroin is, no quantity, no information about potency, and no expert opinion about how a bag corresponds to impairment. There is a risk that the Jury will attribute too much importance to the number of bags despite there being no evidence to support the conclusion that the number is significant in any way.
25. Additionally, the statements even if assumed to be accurate, appear to be at best a description of his habitual use and not specific to any particular day. Allowing generic evidence of what he supposedly claimed his typical use to be would confuse or mislead the jury regarding his actual use on the day of the accident.

26. The unfair prejudice occasioned by allowing this evidence is manifest. First, this evidence necessarily requires the jury to learn that Mr. Zhukovskyy was incarcerated during the pendency of this case. The Jury learning of Mr. Zhukovskyy's pretrial detention carries its own negative inference which can interfere with the presumption of innocence. Cf. State v. Gilbert, 121 N.H. 305, 310 (1981)(recognizing that the sight of the defendant in handcuffs alone may interfere with the presumption of the defendant's innocence.)

27. Additionally, the Jury is going to hear that Mr. Zhukovskyy is a commercial truck driver and that had been driving commercially for years. Hearing that he supposedly claimed to have been consuming ten bags of heroin every day gives rise to the incredibly prejudicial and unfair inference that he routinely drove a commercial vehicle while impaired, the very same conduct that is alleged in this case. The prejudice is amplified by the similarity of the evidence to the alleged conduct in this case.

28. No limiting instruction would suffice to prevent the jury from impermissibly considering the powerful propensity implications inherent in this evidence. Further, allowing this cumulative evidence risks confusing or misleading the jury about Mr. Zhukovskyy's drug use on the day of the accident.

29. The State objects to this motion.

**WHEREFORE**, the accused respectfully prays the Court to grant this Motion *in Limine*, and for such further relief as may be just.

Respectfully submitted,

\_\_\_/s/Jay Duguay\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been forwarded this 22<sup>th</sup> day of October, 2021, to John G. McCormick, Esq., Coös County Attorney, and Scott Chase, Esq., Assistant Attorney General.

/s/Jay Duguay \_\_\_\_\_  
Jay Duguay