

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

19-CR-078

**OBJECTION TO STATE'S MOTION #3**

NOW COMES the accused, Volodymyr Zhukovskyy, by and through counsel, Jay Duguay, Esq., and Steve Mirkin, Esq., and respectfully OBJECTS to the State's "Motion #3" seeking to introduce an alleged prior instance of heroin use and overdose unrelated to the incident in question, and states as follows:

1. He is charged with seven alternative counts of Reckless Manslaughter, Impaired Negligent Homicide, and Negligent Homicide, as well as one count each of Reckless Conduct and Aggravated DUI, all stemming from a fatal vehicular collision on June 21, 2019.
2. The State by its "Motion #3" seeks to introduce evidence that, some seven weeks prior to the crash on May 5, 2019, he had consumed opioids and overdosed in Agawam, Mass., necessitating rescue by emergency medical services.
3. The State is alleging, in essence, that the accused caused the collision, and the resulting deaths of seven motorcyclists, by operating his employer's truck recklessly or negligently – in the Negligent Homicide/DUI indictments, due to his allegedly being impaired by virtue of having consumed illegal drugs – and crossing into the opposite lane of travel.

4. The accused asserts that the proffered evidence is being put forth by the State for no other purpose than to try to unfairly prejudice him to the jury, by seeking to establish that he has a propensity to use illegal substances, which of course is the precise purpose prohibited by Rule 404(b). “The purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs.’ State v. Bassett, 139 NH 493, 496 (1995). Evidence of other wrongs is inherently prejudicial, State v. Hickey, 129 NH 53, 62 (1986), and increases the likelihood that a jury will decide the case on an improper basis. The concern that a defendant might be convicted because of his character is the gravamen of Rule 404(b). See generally Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea*, 130 Mil.L.Rev. 41 (1990).” State v. McGlew, 139 NH 505, 509 (1995).
5. The State alleges, first, that such evidence is admissible under the NHRE 404(b) exceptions in order to prove his “intent.” Specifically, the State asserts that in order to prove he acted recklessly, it bears the burden of proving that he was aware of, and consciously disregarded, a substantial and unjustifiable risk, RSA 626:2, II(c). While this is true, and the accused most certainly does not concede to having acted recklessly or negligently, that by itself does not establish grounds to admit evidence of the May 5 incident.<sup>1</sup>

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<sup>1</sup> It is worth noting that the State’s commissioned expert report indicates that the accused actually did not cause the crash by “crossing into the opposite lane of travel”, but rather that his vehicle collided directly over the center line with the motorcycle driven by decedent Albert Mazza; toxicological evidence provided by the State establishes that Mr. Mazza was *per se* impaired by alcohol at the time.



6. The first flaw in the State's argument is the assertion that evidence of the accused having overdosed seven weeks before the crash "is highly probative of his awareness of the risk involved in illegal drug use." State's Motion at ¶ 8. In fact, it is difficult to imagine, in this day and age, that anyone is unaware of the risk involved in drug use<sup>2</sup>. Moreover, there is no specific apparent connection between an incidence of apparent overdose, and an allegation of impaired driving seven weeks later. Further, alleged awareness of the risk of overdose, as alleged by the State, has no real relevance to awareness of the risk of driving after using drugs (which is also so widely known to the general public as to be beyond the need for specific proof).
7. The cases referenced by the State on this point do not establish a basis for admission of this evidence. In State v. Dushame, 136 NH 309 (1992), a Reckless Manslaughter/DUI case, evidence was permitted of the defendant's four prior DUI convictions within less than eight years. In affirming the trial court's ruling on that issue<sup>3</sup> by a 3-2 vote, the Court emphasized the specific similarity of the charged and uncharged offenses: "We agree with the State that evidence of the defendant's driving record showing his past experience of *repeated arrests, convictions and punishment for DWI* may be deemed relevant to the question of whether the defendant acted recklessly when he subsequently drove his vehicle in an intoxicated condition." *Id.* at 316-17 (emphasis added); and further noted that the trial court had admitted "only the documentary evidence of the prior convictions for

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<sup>2</sup> According to the Centers for Disease Control, opioids were involved in more than 46,000 drug overdose deaths in the U.S. in 2018 alone. <https://www.cdc.gov/media/releases/2020/p0318-data-show-changes-overdose-deaths.html>

<sup>3</sup> The conviction was reversed on an unrelated ground.

DWI, [and thus] substantially eliminated the prejudicial effect that the underlying details of the earlier DWI's might have had upon the jury." *Id.* at 316. In the instant case, on the other hand, the direct connection between the prior action and the alleged offense, as well as the fact of prior "arrests, convictions and punishment", is not present.

8. The other cases cited by the State are similarly inapposite. In State v. Milton, 169 NH 431 (2106), the issue was expert testimony about the structure and practices of the prison gang to which the defendant admitted he belonged, to establish his alleged motive in assaulting the victim at the direction of a gang leader; the trial court specifically *precluded* the State from introducing evidence of the defendant's specific position within the gang, and there was no evidence of prior "bad acts" by the defendant. *Id.* at 433-34. In State v. Addison, 165 NH 381 (2013), evidence of the defendant's having committed other recent serious crimes, with the same weapon he was then carrying, combined with his knowledge that police were looking for him in connection with such prior crimes, was held admissible as tending to prove his *specific motive* for shooting a police officer. *Id.* at 464-65. Again, the connection between the other "bad acts" and the alleged mental state in the charged offense is immeasurably stronger than that asserted in the instant case. And in State v. McGlew, *supra*, the Court reversed the defendant's Sexual Assault conviction, concluding that evidence of a different sexual assault, several years earlier, involving different alleged acts with a victim of different sex, did not "meet the requirement that prior bad acts evidence be in some significant way connected to material events constituting the crime charged," *Id.* at 507.

9. The State asserts, in ¶ 2 of its Motion, that on the May 5 incident, the accused was found “lying on the ground, blue in the face, with a weak pulse and fixed pinpoint pupils.” No such observations were reported by any person who was in contact with the accused before or after the June 21 crash; to the contrary, numerous trained police officers interacted with him over the minutes and hours immediately following the crash and none noted any observations consistent with his being under the influence of drugs or alcohol.
10. The accused asserts, therefore, that such evidence is not proffered for a valid purpose under NHRE 404(b), but rather is precisely the sort of propensity evidence that such rule is designed to avoid.
11. Finally, the accused takes strong issue with the State’s contention that any probative value the uncharged bad act evidence has in this case is not substantially outweighed by the danger of unfair prejudice to the defendant. NHRE 404(b)(2)(C). “We have previously recognized that evidence of other crimes or prior convictions carries with it inherent prejudice. State v. Ellison, 135 N.H. 1, 4 (1991); State v. Hickey, 129 N.H. 53, 62 (1986); *see also* State v. Woodbury, 124 N.H. 218, 220 (1983). Unfair prejudice ‘is an undue tendency to induce a decision against the defendant on some improper basis ..., commonly *one that is emotionally charged.*’ State v. Cochran, 132 N.H. 670, 672 (1990). ‘Evidence that appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case.’ 1 J. Weinstein and M. Berger, *Weinstein’s Evidence*, ¶ 403[03], at 403–33 to –39 (1992).” *Dushame*,

*supra*, 136 NH at 318-19 (Brock, C.J., concurring in part and dissenting in part) (emphasis added).

12. It cannot be disputed that this is an “emotionally charged” case. One year later the roadside commemorations of the decedents remain prominently displayed at the scene, and virtually every filing in the case is promptly reported by major media throughout New Hampshire as well as in Boston. To permit the State to utilize an otherwise unrelated prior incident of drug use, to propose an extremely dubious theory of particularized “awareness of the risk involved in illegal drug use”, is at its very heart unfairly prejudicial to the accused herein, and inherently inconsistent with the purpose of Rule 404(b) “to prevent a conviction based on evidence of other crimes or wrongs.” *McGlew, supra*.

WHEREFORE, the accused respectfully prays the Court:

- A) To conduct a hearing herein;
- B) To DENY the State’s Motion #3; and
- C) For such further relief as may be just.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been forwarded this 15<sup>th</sup> day of, 2020, to John G. McCormack, Esq., Coos County Attorney; Shane Goudas, Esq., Assistant Attorney General; and Benjamin W. Maki, Esq., Traffic Safety Resource Prosecutor.



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Steve Mirkin, Esq.