

STATE OF NEW HAMPSHIRE

COÖS, SS.

MAY 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

STATE'S OBJECTION TO DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF INTERVIEW, PART ONE AND ADDENDUM

NOW COMES the State of New Hampshire, by and through the Offices of the Coös County Attorney and the Attorney General, and objects to the defendant's Motion *In Limine* To Exclude Portions Of Interview, Part One. In support of its objection, the State submits the following:

1. The defendant has filed a motion *in limine* seeking to exclude certain portions of the defendant's interview with investigators from the New Hampshire State Police on June 24, 2019.¹ The defendant has also filed an addendum to his motion, identifying two additional portions of the interview that he seeks to exclude, based on the same arguments put forward in his motion *in limine*.
2. The State agrees to redact certain portions of the interview, as described in more detail below. The State objects to the remainder of the defendant's motion and addendum, on the grounds that the portions of the interview identified by the defendant are relevant and admissible

¹ In this objection, the State only addresses the portion of the interview identified in the defendant's Motion *In Limine* To Exclude Portions of Interview, Part One. The State has already filed a separate pleading addressing the portions of the interview identified in the defendant's Motion *In Limine* To Exclude Portions Of Interview, Part Two, and thus makes no argument with regard to them here.

under Rules 401 and 403, and the defendant has failed to identify any valid grounds to exclude them.

Redactions The State Agrees To

3. The State agrees to redact the portions of the interview identified by the defendant in paragraphs 6 – 10 of his motion. The State reserves the right to present these portions of the interview for the purposes of impeachment and/or rebuttal.

Redactions the State Objects To

4. The State objects to the defendant's motion to the extent the defendant seeks to redact the portions of the interview identified in paragraphs 12 to 15 of his motion. The State also objects to the defendant's addendum, which identifies two further portions of the interview he seeks to exclude.

5. The portions of the interview the defendant seeks to exclude contain references to the defendant's admitted use of heroin on Saturday, June 22, 2019, the day after the crash. The defendant claims that this evidence is "not relevant to the issue that will be before the jury at trial, which is causation of the accident and resulting deaths and injury." Defendant's Motion *In Limine*, ¶ 17. To the contrary, this evidence is relevant for several reasons, and is important to help the jury understand crucial issues upon which they will be asked to render verdicts. The relevance of this evidence is high, and significantly outweighs any danger of unfair prejudice to the defendant.

6. Under Rule 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. *State v. Shaw*, 173 N.H. 700, 710 (2020); N.H. Rule of Evidence 401. The standard for

relevancy under Rule 401 is low. *State v. Jette*, No. 2020-0165, 2021 WL 5896407, at *4 (N.H. Dec. 14, 2021).

7. The defendant is charged not only with seven counts of manslaughter, but also seven counts of impaired negligent homicide, RSA 630:3, II. Impairment is an element of these crimes. At trial, therefore, the State will have the burden to prove beyond a reasonable doubt that the defendant was under the influence of drugs at the time of the crash.

8. The State does not expect the defendant to deny at trial that he consumed heroin and cocaine on the morning of the crash. The defendant admitted during his interview that he used heroin and cocaine on the morning of the crash before he began driving, and testing done on a blood sample taken from the defendant approximately two hours after the crash confirmed that the defendant had consumed heroin, cocaine and fentanyl at some point that day.

9. The issue of whether or not the defendant consumed drugs at some point prior to the crash is therefore unlikely to be the subject of dispute. Nor is the issue of whether or not the defendant was a drug user in general – the defendant has not objected to the portions of the interview in which the defendant admits that he is a habitual drug user.² The State expects, instead, that the evidence and argument at trial will focus on the effect that these drugs had on the defendant. The jury will know that the defendant was a habitual drug user, and that he consumed drugs the day of the crash. They will then have to decide whether or not the defendant was impaired by those drugs at the time of the crash. They will also have to evaluate the credibility of his statement that the last time he used drugs before the crash was in the morning.

10. In light of the above, evidence of the defendant's drug use on the day after crash is highly relevant to the issue of impairment because it provides the jury a first-hand opportunity to

² For example, on page 12, the defendant says "I do have a drug problem. I'm gonna admit it, you know." On p. 25, the defendant admits that he "used at least every day, every 10 hours or so."

observe the defendant as he undergoes symptoms of withdrawal. The State expects the jury to hear testimony from experts called by both the State and the defendant who will testify as to the physiological effects of drugs on the human body and on persons generally. These experts will also testify as to whether or not the concentration of drugs in the defendant's system at the time his blood was drawn, approximately two hours after the crash, is consistent with the use of drugs at the time the defendant admitted to using them earlier that day, or at another time.

11. The evidence offered by the experts will be relevant and helpful to the jury, but it will be generalized as to persons in general. The evidence of the defendant's drug use on Saturday, comprising not only his statements about his drug use that day but also his physical appearance and other statements throughout his interview, will provide the jury with evidence of the effect of drugs that is particular to the defendant. This is highly relevant, where the jury will ultimately be tasked with determining whether or not he was impaired at the time of the crash, and with evaluating the credibility of his statements that his last use of drugs prior to the crash was in the morning before he began driving.

12. Evidence of the defendant's drug use the day after the collision is highly relevant for other reasons. Most significantly, evidence that the defendant used drugs on Saturday, June 22, 2019, the day after the crash, is relevant in order to explain his physical condition during the June 24, 2019 interview two days later and prevent the jury from being confused or misled. The defendant makes numerous references during the interview to the fact that he feels cold and or tired, and attributes these symptoms to the fact that he is going through withdrawal after not consuming any drugs since Saturday morning.

13. On page 19 of the interview, the defendant has the following exchange with investigators:

DETECTIVE TORSEY: Superman. Okay. Um -- so is it fair to -- I mean, do you -- are you thinking that you maybe have a little bit of a drug problem at this point?

VOLODYMYR ZHUKOVSKYY: Yeah, I do, because, I mean, right now I'm kind of -- I don't feel good like. Like there was nothing yesterday, and I shouldn't go through it, and now I don't feel good.

14. This portion of the interview is followed immediately by a portion of the interview to which the defendant objects in paragraph 1 of his addendum, in which the defendant says that he did two bags of heroin on Saturday morning.

15. Almost immediately after this portion, on page 20, the defendant tells investigators that he has a drug problem and says that he did drugs the morning of the crash "just so I don't feel -- so I don't get sick, you know, during the day." On pages 20 to 21, he describes how often he has to do drugs, and has the following exchange with investigators:

DETECTIVE TORSEY: Yeah. So that tells me -- I mean, you're obviously -- you're hooked on it pretty good if you're getting -- you're getting sick from it.

VOLODYMYR ZHUKOVSKYY: Yeah, I --

DETECTIVE TORSEY: (Indiscernible) use another bag?

VOLODYMYR ZHUKOVSKYY: -- I have to do it like at least -- like in the morning I have to do it.

DETECTIVE TORSEY: Okay.

VOLODYMYR ZHUKOVSKYY: So once I do it like I have like a 10 -- 10 -- 10-hour window or like a 12-hour window --

DETECTIVE TORSEY: Yeah.

VOLODYMYR ZHUKOVSKYY: -- before I do the next one.

DETECTIVE TORSEY: Yeah. Okay. All right. At this point in time you've been well over that?

VOLODYMYR ZHUKOVSKYY: Yeah.

DETECTIVE TORSEY: And you're doing okay?

VOLODYMYR ZHUKOVSKYY: Well, I mean, I'm fine right now, but, I mean, it's like getting, you know -- it's like, you know, I'm cold right now.

DETECTIVE TORSEY: Yeah.

VOLODYMYR ZHUKOVSKYY: You know, I'm a little bit cold right now --

DETECTIVE TORSEY: Yeah.

VOLODYMYR ZHUKOVSKYY: -- but it's like I can go through it, you know.

DETECTIVE TORSEY: You can go through it?

VOLODYMYR ZHUKOVSKYY: Yeah.

16. Later in the interview, beginning on page 40, the defendant and investigators discuss the effect that drugs have on his body over time:

DETECTIVE TORSEY: So let me just -- while he's writing that down let me just ask this. How were you feeling just prior to the accident? Were you starting to feel the down? Getting down?

VOLODYMYR ZHUKOVSKYY: No, not really. I mean, I was -- I was fine. I mean, I was driving. I was fine.

DETECTIVE TORSEY: Right. Well -- and the reason why I ask that is obviously, you know, you have that time period, right, that you did at eight, and then your -- you got that 10-hour, eight to 10-hour time period where like you start to get the -- you know, the drop-off, if you will, right?

VOLODYMYR ZHUKOVSKYY: Yeah.

DETECTIVE TORSEY: Is that usually what happens? And then -- so I'm just wondering if that was -- if that's possible.

VOLODYMYR ZHUKOVSKYY: If I was having what?

DETECTIVE TORSEY: If you were getting that at that time period of, you know, eight to 10 hours after taking it at 8:00. Because normally you'll get that -- that drop-off

point where you're like going down.

VOLODYMYR ZHUKOVSKYY: Yeah.

DETECTIVE TORSEY: You know what I'm saying?

DETECTIVE SERGEANT MCLAUGHLIN: Yeah, kind of like you right now.

DETECTIVE TORSEY: Yeah.

DETECTIVE SERGEANT MCLAUGHLIN: All you're doing is yawning and tired, right?

VOLODYMYR ZHUKOVSKYY: Yeah, I'm tired right now.

17. This exchange is again followed immediately by a portion of the interview to which the defendant objects in paragraph 2 of his addendum, in which the defendant says that he hadn't done any drugs in approximately 40 hours.

18. On pages 47, 49, and 61, the defendant asks for a blanket because he is cold. In the context of the interview, and in consideration of the statements listed above, it is clear that the defendant is cold because he is undergoing withdrawal symptoms. On page 60, he states that "I mean, I'm cold" and "I don't feel good." On page 62, he states that he is "out of it" and that he "do[esn]'t feel ok." On page 65, he reiterates that he is "really cold." On pages 70 to 71, after receiving the blanket, the defendant wraps it around himself, and eventually lies down on the couch. On page 82, the defendant admits to the detectives that "right now I'm crashing" from not using drugs, and says that he just wants to fall asleep.

19. In light of the numerous instances noted above in which the defendant admits that he is undergoing withdrawal symptoms, evidence that indicates when he last used drugs is highly relevant to help explain those symptoms and provide context for the jury. Without the knowledge that the defendant used heroin on Saturday, there is a very high risk that the jury would be misled

as to the nature of source of the defendant's condition during the interview, which will be presented to the jury via video.

20. The portions of the interview referenced above in paragraphs 13 and 16 of this motion, to which the defendant has lodged no objection, will be confusing to the jury without the necessary context provided by the portions of the interview that follow them, to which the defendant does object in paragraphs 1 and 2 of his addendum, respectively.

21. Certain of the objected-to portions of the interview are specifically relevant for other reasons and should be admissible in order to provide necessary context to the remainder of the interview, and prevent the jury from being misled.

22. The statement referenced in paragraph 13 of the defendant's motion is specifically relevant and should be admissible because without it, the jury would be misled by the statement that immediately follows it, in which Detective Torsey asks the defendant, "So you only had it on Friday morning at 8:00?" The defendant responds "yeah." If the portion of the interview on page 18 in which the defendant states that he consumed heroin on Saturday is redacted, the jury will be left with Detective Torsey's question if the defendant **only** had [drugs] on Friday morning. This would lead the jury to believe that when the defendant responds in the affirmative, he is stating that the only time he **ever** did drugs was on Friday morning. The objected-to portion of the interview provides crucial context for the following statements, and should be allowed in order to prevent the jury from being misled on an important topic, and to prevent the defendant from obtaining a misleading advantage. *See State v. Wamala*, 158 N.H. 583, 589 (2009) (when one party has introduced admissible evidence that creates a misleading advantage, the opponent may then introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage).

23. The portion of the interview the defendant objects to in paragraph 14 of his motion should be admissible for similar reasons. The defendant states, on page 26 of the interview, that “after the morning I never used nothing.” The objected-to portion of the interview, in which the defendant states that he used on Saturday morning, immediately follows. With the context of the objected-to portion, it is clear that the defendant’s statement on page 26 that “after the morning I never used nothing” only references Friday. If that portion is redacted, however, the jury likely be led to believe that the defendant’s statement on page 26 indicates that he never used drugs again at any point after Friday morning. This portion is necessary in order to prevent the jury from being misled, provide necessary context for the statements that immediately precede it, and prevent the defendant from obtaining a misleading advantage.

24. The defendant argues that the objected-to evidence should be excluded because the State did not give notice of its intent to introduce such evidence pursuant to Rule 12(b)(1)(F) and Rule 404(b). This argument should not be considered. The defendant has been on notice of the State’s intent to introduce the defendant’s interview, including the objected-to statements, for months (if not years).³ As the defendant has noted in other motions, the State and the defendant have been in discussions regarding redactions to the defendant’s interview since early December, 2021. The defendant cannot claim that he has not been on notice of the State’s intent to introduce the objected-to portions of the interview, and he certainly cannot claim that he has been prejudiced. His argument with regard to Rule 12 should be rejected.

25. The defendant also argues that the objected-to evidence should be excluded since the State has not met the requirements for admission under Rule 404(b). This argument should also be rejected.

³ The transcript of the interview was provided to the defendant in discovery on July 28, 2020.

26. The State does not seek to introduce the defendant's statements about his drug use on Saturday to show that the defendant has a propensity to consume drugs. Instead, the State intends to offer them for the purpose of educating the jury on the particular nature in which the defendant's body processes heroin, aiding the jury in evaluating the credibility of his statements about the timing of his drug use, and providing context for his statements about his withdrawal symptoms and his physical appearance. For these reasons, the evidence is highly relevant and probative.

27. The objected-to evidence also clearly satisfies the clear proof prong of the Rule 404(b) test for admissibility. The statements at issue were made by the defendant himself – there is no reason to doubt the veracity of his statements, and thus no reason that the evidence does not satisfy the clear proof test.

28. Finally, the probative value of the objected-to evidence is not substantially outweighed by the danger of unfair prejudice. The probative value of this evidence is high, since the defendant's impairment will be an important issue at trial. The evidence will also be important to provide necessary context for the rest of the interview, and explain the defendant's statements and physical appearance.

29. As noted above, the jury will undoubtedly know that the defendant used drugs on at least one occasion on the day of the crash, because the defendant admitted to doing so. The defendant also admitted to being a habitual user of heroin and cocaine. The jury will know that the defendant previously overdosed on heroin and required emergency medical services to revive him. In light of this evidence, the danger of unfair prejudice from evidence showing that the defendant used drugs on one other occasion is exceedingly low. The evidence therefore is admissible pursuant to the Rule 404(b) test, and pursuant to Rule 403.

30. Since the contested portions of the interview are relevant and admissible for the reasons described above, the defendant's motion and addendum should be denied.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny the defendant's motion and addendum; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

May 5, 2022

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CERTIFICATE OF SERVICE

I certify that this pleading has been provided to counsel of record, through the Superior Court's electronic filing system.

/s/ Joshua L. Speicher
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