

STATE OF NEW HAMPSHIRE

COÖS, SS.

APRIL 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 TWO**

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 Two. 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 State agrees to redact the limited portion of the interview identified by the defendant that includes his statements about obtaining a lawyer and the potential penalty he faces for his role in the crash that is the subject of this case. The State objects to the remainder of the defendant's motion, on the grounds that the portions of the interview identified by the defendant are relevant and admissible under Rules 401 and 403, and the defendant has failed to identify any grounds to exclude them.

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 Two. The State will separately address the portions of the interview identified in the defendant's Motion *In Limine* To Exclude Portions Of Interview, Part One, in a separate pleading, and thus makes no argument with regard to them here.

Redactions The State Agrees To

2. The State agrees to redact the following portion of the interview, beginning on page 93 and ending on page 94:

VOLODYMYR ZHUKOVSKYY: I'm gonna obviously have to get a good lawyer to solve this case, you know what I mean, so like I don't get a lot of time in jail.

(begin p. 94)

DETECTIVE TORSEY: Um-hum.

VOLODYMYR ZHUKOVSKYY: You know what I mean? Just like I'm really looking, and my parents are looking. They've -- to find me a good lawyer.

DETECTIVE TORSEY: Okay.

VOLODYMYR ZHUKOVSKYY: You know what I mean? Which is gonna have to happen so I don't get life in prison.

DETECTIVE TORSEY: Um-hum.

VOLODYMYR ZHUKOVSKYY: Which is likely to happen, I'm gonna get life, right?

DETECTIVE TORSEY: That's -- that's way beyond, down the road at this point in time, okay?

DETECTIVE SERGEANT MCLAUGHLIN: That -- that's -- that's way down the road, so.

DETECTIVE TORSEY: Right.

VOLODYMYR ZHUKOVSKYY: I'm obviously -- I'm obviously gonna be charged with it.

DETECTIVE TORSEY: Well, yeah, you're -- you've been arrested for it at this point in time, okay? That's what we went over before. We talked about, okay?

Redactions the State Objects To

3. The State objects to the defendant's motion to the extent the defendant seeks to redact any other portion of the interview. The defendant seeks to exclude the portion of the interview beginning at page 93, where the defendant says "I'm gonna obviously have to get a good lawyer to solve this case, you know what I mean, so like I don't get a lot of time in jail," and extending to the end of the interview on page 104.

4. As an initial matter, the State objects to the defendant's motion to the extent it attempts to exclude any portion of the interview after the defendant says "I'm gonna be fine, you know" near the bottom of page 96, since that portion of the interview was not part of the parties' previous discussions. The defendant raised no objections to any portion of the interview prior to the previously scheduled final pre-trial date of November 9, 2021. As noted in the defendant's March 15th, 2022 Assented Motion To Extend Deadline, the parties were previously directed by the court to confer as to which portions of the June 24, 2019 interview needed to be redacted. On December 1, 2021, the defendant provided the State with an email designating ten specific sections of the interview it wished to have redacted. The last of these sections began on page 93, and ended on page 96 with the words "I'm gonna be fine, you know." Defense counsel's email did not include any reference to any portion of the interview after that.

5. On March 14, 2022, the State agreed to redact four of the ten sections, and indicated it would object in whole or in part to redacting the remaining six sections identified by the defendant in defense counsel's December 1, 2021 letter. On March 15, 2022, the deadline for filing all motions *in limine* in this case, the defendant sought to extend the March 15, 2022 deadline, for the purpose of filing a motion regarding the contested redactions to the interview. On this basis, the State assented.

6. The defendant now seeks to admit the entirety of the interview that occurs *after* the “I’m gonna be fine, you know” comment on p. 96. Since the portion of the interview beginning on p. 96 after the comment “I’m gonna be fine, you know” and continuing until the end was not part of the previous discussions between the parties, it also should not be subject to the assented-to extension of the March 15, 2022 deadline.² The State’s assent to the extension was based upon the belief that the extension applied only to the issue of redacting those portions of the interview the defendant had already identified. For the defendant to take advantage of the extended deadline, and now seek to redact portions of the interview that he failed to identify to the State or the court despite ample opportunity over the course of this case, would be improper and in violation of the court’s orders. For that reason, the defendant’s motion should be denied.

7. Notwithstanding the fact that the defendant should not be allowed to seek redaction of portions of the interview he has not previously identified, well after the applicable deadline, the State further objects to the proposed redactions on other grounds. The defendant has not specifically identified which portions of the interview it seeks to redact, as he did in his Motion *In Limine* To Exclude Portions Of Interview, Part One. Rather, he has included the text of the entire section, and then makes vague and non-specific references to portions of it. For this reason alone, the defendant’s motion should be denied.

8. On November 16, 2021, the court denied the defendant’s previous motion *in limine* to exclude evidence of the defendant’s drug use on days prior to or after June 21, 2019 without prejudice, since the defendant had not identified specific evidence he wished to exclude. The court (and the State) face the same issue now that arose then: the State cannot object to, nor can the court rule upon the admissibility of, evidence that has not been identified with specificity.

² Although the defendant’s motion was filed on April 18, 2022, after the agreed-upon April 15, 2022 deadline, the State does not object to the remainder of the motion on this basis.

9. Notwithstanding the above, to the extent that the State is able to address certain portions of the interview the defendant makes reference to, the State objects on the grounds that the contested portions of the interview are relevant and admissible for specific and articulable reasons, and the defendant has failed to provide any basis justifying their exclusion.

10. The defendant argues that the segment from pp. 94-96, which includes a discussion concerning the defendant's family and their reaction to the news of his involvement in the accident, should be excluded since it has no relevance under Rule 401. This is incorrect. The referenced section includes highly relevant statements from the defendant which the defendant fails to even mention in his motion, much less provide any grounds for exclusion.

11. 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).

12. The section in pp. 94-96 includes statements by the defendant that "I told [my father] – like I told him that I'm gonna go to jail, which is a hundred percent, you know. It's just a matter of time." This statement is relevant to show the defendant's consciousness of guilt. The defendant's statement that he would certainly be going to jail shows that he knew he had done something wrong. The defendant's conversation with his father came after the incident but before his arrest, and so his belief at that moment could only have been based on his actions, and not on the fact that he had been charged with a crime.

13. In the same section, the defendant also says that he is disappointed in himself, and that he let himself and his family down. These statements similarly go to show his consciousness of

guilt, which is highly relevant and properly admissible. Evidence of the defendant's opinion that he had acted wrongly or criminally is probative of his state of mind, and may properly be used by the State to meet its burden to show that the defendant acted with the requisite *mens rea*.

14. Next, the defendant refers to pp. 95-98, stating that these pages include a "pep talk" in which the investigators discuss how the defendant can "wipe the slate clean" and "be a new person right now." The defendant argues that this portion of the interview is not relevant, and that none of it is necessary to understand the context of the defendant's answers.

15. To the contrary, this portion of the interview is highly relevant and necessary to provide context for the defendant's answers. As the defendant admits, the New Hampshire Supreme Court has noted that "in some circumstances, the officer's statements [in a recorded interview with a suspect] provide necessary context without which the jury cannot appreciate the meaning of the suspect's answers." *State v. Willis*, 165 N.H. 206, 218 (2013).

16. Here, the discussion on pp. 95-98 about coming clean and starting over is relevant because it provides crucial context to understand the statements made by the defendant on p. 99 that "I just want to say sorry for the people that died, you know," and "...they shouldn't like have gone through it. **Like, I mean, like I should not be driving**....If you really like look, at the eyes of the truth, I want the truth" (emphasis added). Without an understanding of the conversation about honesty that comes before, the jury would be confused and lack the context necessary to understand the defendant's statements immediately afterwards, in which he admits that he should not have been driving at the time of the crash. The defendant's admission that he should not have been driving is crucial to the jury's understanding of the case, and the jury should be given the opportunity to analyze it with the benefit of the full context in which it was

made. Despite the obvious relevance of this statement, the defendant fails to mention it in his motion, and provides no argument for why it should be excluded.

17. The defendant states that from pp. 100-102, the detectives engage in a discussion of the defendant's honesty, and argues that to the extent the detectives' statements can be interpreted as suggesting their opinion of the defendant's credibility, or their opinion as to the defendant's guilt, they should be excluded. The detectives' statements in this section do not improperly comment on the defendant's credibility or his guilt.

18. To the contrary, on page 100, Detective McLaughlin tells the defendant that "[y]ou're obviously an honest guy," and "there's no reason for us to believe that you've been dishonest today." These statements do nothing to cast doubt on the defendant's credibility; to the contrary, they admit that the defendant has been truthful with them. Such statements cannot be prejudicial to the defendant, and are more akin to an interrogation strategy to urge the defendant to tell the truth. *See State v. Willis*, 165 N.H. at 218 (ruling that statements by an interrogating officer in a recorded interview did not implicate the same concerns underlying the prohibition against witness testimony as to credibility at trial). The detectives' statements cannot be understood by any reasonable person to express any opinion on the defendant's guilt or innocence, or his credibility, and should not be redacted on that basis.

19. The detectives' statements are also relevant for other reasons. The statements, in conjunction with the defendant's responses, provide context to explain further statements by the defendant. In the discussion about honesty, the defendant ultimately states on page 101 that "**I said I shouldn't be driving, is one of the major things**" (emphasis added). This statement is part of the discussion about honesty, in which the detectives discuss making sure that the defendant has told them everything. This statement is highly relevant, and requires the necessary

context for the jury to properly understand it. The defendant does not mention this statement in his motion, and fails to provide any basis for its exclusion.

20. The defendant also seeks to redact the section from p. 102 to the end of the recording, arguing that nothing in this section is relevant to the case under investigation. To the contrary, on page 103, the defendant states agrees with the detectives that they have treated him fairly and with respect, and states that they had covered everything with regard to the accident. These statements are important to show the context of the interview, specifically the tone of the interview and the defendant's perception of his treatment. The jury will be tasked with determining the credibility of the defendant's statements in the interview, and the defendant's stated opinion that he was treated well is relevant to show that he had no reason to lie or be dishonest, and counter any claims the defendant might make at trial that his statements were coerced or the result of deceptive interrogation tactics.

21. Finally, the defendant argues broadly that the material referenced in his motion is "clearly designed to have a great emotional impact on the jury and appeal to the juror's senses of resentment and outrage." This is incorrect. As noted above, the portions of the interview the defendant seeks to redact are necessary to provide context for the defendant's statements. The contested portions also contain highly relevant statements including multiple admissions by the defendant that he should not have been driving, that he had let himself and his family down, and that he was certainly going to jail. These statements are all relevant and probative for the reasons stated above. The defendant has provided no legal basis for their exclusion, beyond a conclusory allegation that they are intended to inflame the jury's emotions. The defendant's attempt to exclude the larger portions of the interview containing these statements, based on vague and non-specific arguments, should not be entertained.

22. Since the contested portions of the interview are relevant for specific and articulable reasons, the defendant's motion should be denied.

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

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

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

April 25, 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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