

THE STATE OF NEW HAMPSHIRE

Coös, SS.

MARCH 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-00078

**STATE'S OBJECTION TO DEFENDANT'S RULE 609 MOTION – NICHOLAS  
BELANGER**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Coös County Attorney and the Office of the Attorney General, and respectfully objects to the defendant's motion to impeach Nicholas Belanger using a 2009 criminal conviction for False Report of an Accident and Conduct After Accident. In support thereof, the State submits the following:

1. On June 21, 2019, the defendant caused a motor vehicle crash that resulted in the deaths of seven people, serious bodily injury to another person, and placed numerous additional motorists in danger of serious bodily injury and death. The defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He currently stands charged with seven counts of manslaughter, seven counts of impaired negligent homicide, seven counts of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. A jury trial is scheduled to begin on July 18, 2022.

2. At trial, the State anticipates calling Nicholas Belanger as witness. Mr. Belanger will testify, in substance, that he was working as a salesman at the Berlin City Auto Group car

dealership in Gorham, NH on June 21, 2019. That evening, Mr. Belanger observed a truck dropping off a white Rav-4, and later observed the operator of the truck come into the showroom. Mr. Belanger observed that as the truck left the dealership, it drove in a reckless and erratic fashion through the parking lot. After seeing the press release for the crash, Mr. Belanger reported his observations to law enforcement, and stated that the truck he observed in the lot was the same one he saw in the news coverage of the crash.

3. The defendant has filed a motion pursuant to New Hampshire Rule of Evidence 609, seeking permission to impeach Mr. Belanger by reference to his convictions for False Report of an Accident, RSA 264:28, and Conduct After Accident, RSA 264:25. According to Mr. Belanger's criminal history, he pled nolo contendere to each charge. Both convictions are dated July 15, 2009, and both convictions are listed as Class A misdemeanors.

4. N.H. Rule of Evid. 609 states that for any crime, regardless of the punishment, evidence of a criminal conviction "must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." Rule 609(a)(2). Rule 609 also states, however, that evidence of a conviction older than 10 years is admissible only if "(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it..." Rule 609(b).

5. The State objects, because the probative value of both the proffered convictions is substantially outweighed by its prejudicial effect. In addition, the conviction for Conduct After Accident should not be admitted for impeachment purposes since it does not involve a dishonest act or false statement.

6. RSA 264:28, False Reporting of Accidents, provides that a person is guilty of a misdemeanor if he “knowingly gives or causes to be given false information to any law enforcement officer or to the department or its agents concerning an accident or alleged accident.” RSA 264:25, Conduct After Accident, requires that any driver who knows or should have known that he or she was involved in an accident must immediately stop at the scene of the accident and exchange information with the driver of any other vehicle involved in the accident.

### **ARGUMENT**

7. The court should deny the defendant’s motion, since he has failed to meet his burden to show that the probative value of the convictions outweighs their prejudicial effect. The defendant has not put forth specific facts and circumstances to support his argument that the probative value of Mr. Belanger’s convictions substantially outweighs their prejudicial effect, as required by Rule 609(b).

8. The probative value of the both convictions is minimal. Rule 609(b) contains an inherent acknowledgment that convictions over 10 years old are likely so remote as to have no probative value. The rule only allows for such convictions to be used for impeachment if the party seeking to admit them can show that their probative value *substantially* outweighs their prejudicial effect. “The determination of remoteness is within the sound discretion of the trial court.” *State v. Staples*, 120 N.H. 278, 283 (1980).

9. Here, the False Report conviction carries minimal probative value. The scant evidence provided by the defendant is that Mr. Belanger falsely claimed that he was not involved in a motor vehicle accident. Rule 609(b) requires that the proffering party provide “specific facts and circumstances” in support of an argument that a conviction’s probative value substantially

outweighs its prejudicial effect. The defendant has failed to do so here. Merely citing the language of a complaint does not provide any aid to the court in determining whether or not the admission of a criminal conviction for impeachment purposes will be probative.

10. Further, the context of Mr. Belanger's expected testimony in this case is completely different from the circumstances of the False Report conviction. From the little information the defendant has provided, the False Report language indicates Mr. Belanger knowingly gave false information to a law enforcement officer after being involved in a motor vehicle crash. Here, Mr. Belanger reached out to law enforcement voluntarily, to provide information about his observations of erratic driving by another. Mr. Belanger had no personal involvement in the June 21, 2019 crash, and thus no reason to be dishonest. The prejudicial effect of admitting the False Report Conviction thus far outweighs whatever minimal probative value it carries.

11. The same is true of the Conduct After conviction. Unlike False Report, Conduct After Accident is not *per se* dishonest. *See State v. Holmes*, 159 N.H. 173, 176 (2009) (crimes that do not impute dishonesty or mendacity are not obviously dishonest for purposes of Rule 609). Its already minimal probative value is even further lessened by this fact. Allowing the defendant to confront Mr. Belanger with such minimal information regarding a Conduct After conviction from over 10 years ago would thus be highly prejudicial, and would do little to help the jury assess his credibility.

12. The defendant argues that the balancing test the court must conduct under Rule 609, weighing the probative value against the prejudicial effect of an impeachment used for purposes of impeachment, is limited to consideration of the prejudicial effect of such evidence *to the defendant*. This is an incorrect statement of law. The defendant cites *State v. McGill*, 153 N.H.

813, 816 (2006) for this proposition. That case interprets the statutory language of Rule 609(a)(1) that deals with prejudicial effect to *a defendant*.

13. Here, however, the court is not faced with applying Rule 609(a)(1); instead, the appropriate test is that laid out in Rule 609(b)(1). While Rule 609(a)(1)(B) states that a criminal conviction “must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to *that defendant*” (emphasis added), Rule 609(b)(1) states that evidence of a conviction older than 10 years is admissible only if “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” Rule 609(b) does not refer to prejudice to a defendant; it speaks only of prejudice generally.

14. When interpreting a statute, courts look first to the language of the statute itself, and “construe that language according to its plain and ordinary meaning.” *State v. Moran*, 158 N.H. 318, 321 (2009). “When the language of a statute is clear on its face, its meaning is not subject to modification.” *Correia v. Town of Alton*, 157 N.H. 716, 718 (2008). The courts interpret statutes “in the context of the overall statutory scheme and not in isolation.” *Id.* The courts “will not consider what the legislature might have said or add language that the legislature did not see fit to include.” *State v. Costella*, 166 N.H. 705, 709 (2014).

15. Here, the applicable statutory provision is Rule 609(b)(1), since the proffered convictions are more than 10 years old. The language of the rule speaks of prejudice, but specifically does not define that prejudice as prejudice *to a defendant*, as it does in other parts of Rule 609. The context of the statutory scheme makes clear that the legislature knew how to include such language, and chose not to do so. The court therefore is not limited in considering

whether the admission of a criminal conviction for impeachment purposes prejudices only a defendant; rather, the court should consider the conviction's prejudicial effect more broadly.

16. Here, the admission of the proffered convictions would prejudice the State and Mr. Belanger by confusing the jury, while providing no aid in assessing Mr. Belanger's credibility. The age of the convictions, combined with the defendant's failure to provide specific facts and circumstances in support of their admission, should lead the court to deny the defendant's motion.

17. If the court does allow the defendant to impeach Mr. Belanger with one or both of the convictions, the State respectfully states that it would be appropriate to limit the defendant's questioning of Mr. Belanger to whether or not he had been convicted of a misdemeanor(s) in 2009. Reference to the specific nature of the crimes is unnecessary and would not aid the jury in assessing Mr. Belanger's credibility.

18. The State also respectfully requests that, should the court allow the defendant to impeach Mr. Belanger with the convictions, it issue an appropriate limiting instruction to the jury.

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

- (A) Grant the relief requested; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

March 17, 2021

/s/ John G. McCormick  
John G. McCormick, Esq.  
Coos County Attorney  
NH Bar #16183  
Office of the Coos County Attorney  
55 School St. Suite 141  
Lancaster, NH 03584  
(603)788-5559

/s/ Scott D. Chase  
Scott D. Chase, Esq.  
Assistant Attorney General  
NH Bar #268772  
Office of the Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, NH 03301-6397

/s/ Joshua L. Speicher  
Joshua L. Speicher, Esq.  
Assistant Attorney General  
NH Bar #273020  
Office of the Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, NH 03301-6397

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  
Joshua L. Speicher