STATE OF NEW HAMPSHIRE

COÖS, SS. OCTOBER 2021

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

STATE'S PARTIAL OBJECTION TO DEFENDANT'S MOTION FOR CLEAR PROOF HEARING, AND MOTION TO PROCEED WITH HEARSAY TESTIMONY, EXHIBITS, AND PROFFERED EVIDENCE

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 partially assented-to motion to conduct a "clear proof" hearing prior to trial, to the extent the defendant demands the State present certain witnesses, and respectfully requests this Court authorize the State to proceed via hearsay testimony, exhibits, and proffered evidence. In support thereof, the State submits the following:

I. BACKGROUND

1. On May 29, 2020, the State filed its motion *in limine* #2. In relevant part, the State requested that the Court admit evidence of specific instances of the defendant's hazardous driving observed by witnesses on June 21, 2019, leading up to the fatal crash. Specifically, the State requested the Court admit the testimony of: (1) Sally Hull; (2) three Littleton firefighters, Thomas Hartwell, Paul Ingersoll, and Quintin Ross; and (3) two Berlin City Auto Group employees, Anthony Plant and Nicholas Belanger. The State argued that the evidence was admissible both as intrinsic evidence and under 404(b).

2. The defendant objected, arguing, in relevant part, that the State had not established the "factual basis for the assertion that the incidences of prior 'erratic driving' were, as to the first two instances [Hull and the firefighters], actually committed by the accused, and as to the third instance [Belanger and Plant], relevant to the alleged offense on the grounds asserted by the State." Def.'s June 16, 2020 Objection, at ¶ 4.

3. On June 26, 2020, the Court granted the State's motion, finding the testimony admissible under 404(b), "subject, however, to the defendant's right to require the State to satisfy the clear proof prong at an evidentiary hearing conducted outside of the jury's presence at trial." June 26, 2020 Order, at p. 10.

4. On March 2, 2021, the defendant filed motion in limine regarding witnesses Kathleen Baye, James Astuto, and Daniel Corrigan. With regard to Corrigan, the defendant argued that his observations were inconsistent with the timing of the defendant's route and description of his truck. The State objected, pointing out the consistent timeframes and obvious consistency between Corrigan's description of the defendant's truck and the truck he observed driving recklessly. The State did not object to the exclusion of the testimony of Baye or Astuto.

5. On March 22, 2021, the Court issued an order, in relevant part, admitting Corrigan's testimony pursuant Rule 404(b), subject to the State satisfying the clear proof prong. Contrary to the defendant's assertion that this Court order a "testimonial hearing," Def.'s Mot., at ¶ 9, this Court ordered the State to satisfy the clear proof prong at "an evidentiary hearing conducted outside the jury's presence at trial." March 22, 2021 Order, at p. 3.

6. The defendant now moves the Court to schedule a pretrial hearing, and demands that the State present the live testimony of those "witnesses upon whose evidence the State relies…as live witness testimony, subject to cross-examination." Def.'s Mot., p. 5. The State agrees with

the defendant that a pretrial hearing on this matter is appropriate. The State objects, however, to the defendant's demands that the State call certain witnesses to satisfy its burden at the pretrial hearing and his attempt to turn a pretrial hearing into a full-blown trial.

7. At the outset, the defendant's position is unclear. In its June 16, 2020 objection, see paragraph 2, *supra*, the defendant's only issue with Belanger and Plant was the relevance of their testimony. The defendant did not claim there were any proof issues. Now, apparently the defendant demands the State offer clear proof for Plant and Belanger. Given this Court's prior orders and the defendant's instant pleading, the State interprets the defendant's pleading as demanding live testimony from: (1) Sally Hull, (2) Thomas Hartwell, (3) Paul Ingersoll, (4) Quintin Ross, (5) Anthony Plant, (6) Nicholas Belanger, and (7) Daniel Corrigan. The State objects to the defendant's demand for live testimony from these seven witnesses.

8. All but one of the aforementioned witnesses provided recorded statements to police in the immediate days after the crash. While the State has not mapped out the entirety of its hearing strategy, with leave from the Court, the State seeks to proceed to satisfy its clear proof burden through the introduction of, among other things, the recorded witnesses' statements and/or any written witness statements and/or any Zwicker letters sent by the State to defense, police reports, and other exhibits. The State is confident that it can satisfy its burden in presenting such trustworthy evidence at a pretrial hearing.

II. ARGUMENT

9. It is the State's burden to demonstrate the admissibility of prior bad acts. State v. Beltran, 153 N.H. 643, 647 (2006). "The 'clear proof' requirement is satisfied when the State presents evidence firmly establishing that the defendant, and not some other person, committed the prior bad act." State v. Lesnick, 141 N.H. 121, 126 (1996) (quotation omitted). "Whether there is clear

proof that the defendant committed the prior bad act is a preliminary determination concerning the admissibility of evidence, and the trial court is not bound by the rules of evidence in making this determination." State v. Ericson, 159 N.H. 379, 389 (2009) (quotation omitted).

10. There is neither a requirement that a trial court hold an evidentiary hearing on a motion to admit evidence under 404(b), nor a requirement for the State to present live witnesses, or in this case specific witnesses the defense takes issue with, at a pretrial hearing. State v. Haley, 141 N.H. 541, 545 (1997) (finding that there is "[n]o statute, court rule, or case law [that] requires an evidentiary hearing on Rule 404(b) motions" and due process does not necessitate "live testimony" either); see, e.g., State v. Ericson, 159 N.H. 379, 388 (2009) (noting that "[t]o establish clear proof, the State made an offer of proof"); State v. Simonds, 135 N.H. 203, 208 (1991) ("The State proceeded at the motions hearing with an offer of proof in which it indicated that the victim would testify at trial as to the incident…."). Whether there is clear proof that the defendant committed the prior bad act "is a preliminary determination concerning the admissibility of evidence, and the trial court is not bound by the rules of evidence in making this determination." Ericson, 159 N.H. at 388. Thus, while it is within this Court's discretion to require live witness testimony, see Haley, 141 N.H. at 544–45, there is no requirement beyond this Court's discretion for the State to call certain witnesses.

11. The defendant's reliance on Haley is misplaced. Absent any dicta therein, Haley stands for the simple proposition that the due process clause does not necessitate an evidentiary hearing or live testimony as a matter of constitutional law. With this premise established, the Court ruled that given the facts at issue, there was no requirement to hold any such hearing, even where the defendant claimed the State failed to meet the clear proof prong because there were discrepancies with the witness statements.

12. In Haley, the defendant was charged with sexually assaulting his step-granddaughter. Id. at 543. The sought to enter 404(b) evidence that the defendant had sexually assaulted the victim on other prior occasions, and other relevant conduct. Id. At the hearing, the trial court allowed the State forego calling live witnesses, but instead to use the victim's deposition testimony. Id. "The defendant argues[d] on appeal that the court's refusal to require live testimony from the victim violated his right to due process under the State and Federal Constitutions." Id. Because there was "[n]o statute, court rule, or case law" requiring an evidentiary hearing, the Court analyzed the defendant's claims under the due process clauses of the State and Federal Constitutions. Id.

13. The Supreme Court balanced the following factors:

> (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 544. As to the first prong, the Supreme Court found that the privacy interest in such a hearing is important, but not to the same level as a trial. The Court compared a 404(b) hearing to a juvenile certification hearing, where the juvenile's interest at stake "is not as compelling as in pretrial detention hearings." Id. (citing another source). As this Court is aware, the rules of evidence do not apply at a juvenile certification hearing and hearsay testimony is admissible. See, e.g., In re Jason Farrell, 142 N.H. 424 (1997). The Court's ruling on the first prong in Haley further supports the State's request to proceed through hearsay evidence, exhibits, and proffered evidence.

14. In finding the State satisfied the second prong, the Court noted that the State presented sworn deposition testimony and the defendant offered a written letter in rebuttal. Id. Based upon that evidence, the Court held that the victim's live testimony would not have "significantly

increased the accuracy of the court's evidentiary determination." Id. at 545. The same rationale applies here. As noted above, among other things, the State would introduce the witness statements, as well as any written statements and/or any Zwicker letters sent by the State to defense. Between the defendant's initial filings and the instant motion, the defendant's contention is clear, "the witness statements proffered by the State are inconsistent with each other." Def.'s mot., at ¶14.

15. In this case, at the evidentiary hearing the defendant will have the full opportunity to explain and detail how the witnesses' statements are purportedly inconsistent and unreliable. Just as the defendant in Haley had the opportunity to introduce rebuttal evidence, the defendant here will be able to introduce rebuttal evidence in support of his contention. Anything beyond that is outside the scope of an admissibility determination and should be solely within the purview of the jury.

16. As to the third prong, the defendant's opinion that the Court put "greater weight" on the fact the witness was a sexual assault victim is inconsistent with a plain reading of the opinion. Def,'s Mot., at ¶ 12. The Court's analysis on the third prong was as follows:

> The third prong of the test asks us to consider the government's interest in the procedure used. As in Eduardo L., the governmental interest here is compelling; namely, to avoid transforming a hearing into a full-blown trial, and to reduce fiscal and administrative burdens on the court, the prosecution, and law enforcement officials. The government *also* has an interest in sparing victims of sexual assault from the additional trauma of repeated questioning.

Haley, 141 N.H. at 545 (ellipses, quotations, and brackets omitted) (emphasis added). The heart of the Court's reasoning on the third prong is the State's compelling interest in preventing a full-blown trial before the actual trial. The Court simply noting that the State "also" has an interest sparing sexual assault victims does not even suggest it put "greater" emphasis on that consideration. In the instant case, the State's compelling interest in preventing defense from

transforming a pretrial hearing—that does not otherwise require testimonial evidence and is not controlled by the rules of evidence—into a full-blown trial is at its peak. There are few cases imaginable where defense's demand for not only an evidentiary hearing, but live testimony from each witness in questions, would morph a standard pretrial hearing into a quasi-trial.

17. The defendant is demanding that the State call at least seven witnesses to testify. Moreover, the witnesses are not being asked to testify to a discrete issue, the defense is seeking to cross-examine all seven witnesses on the full scope of their anticipated trial testimony. Nearly every day in this State, there are both misdemeanor and felony jury trials that require fewer witnesses than what the defendant is demanding in this pretrial hearing. Thus, the third prong weighs heavily in favor of the State's request to proceed with proffered evidence, hearsay testimony, and exhibits.

18. The State's position is further supported by cases such as Ericson, where even after Haley, the Supreme Court has evaluated a clear proof hearing that was satisfied by the State through offers of proof. See Ericson, 159 N.H. at 388–89. While the Supreme Court in Ericson, was not asked to consider whether offers of proof are sufficient as a matter of law, the Court found that the State's offer of proof was sufficient to satisfy the clear proof prong. Id. Not even in dicta did the Court suggest that an evidentiary hearing should have been held.

19. Based upon the foregoing, the State asks the Court to: (1) deny the defendant's demand for the State to call seven witnesses to a live testimonial pretrial hearing; and (2) authorize the State to proceed at the clear proof hearing by proffered evidence, hearsay evidence, and through exhibits.

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

(A) Deny the defendant's demand for the State to call the witnesses at issue at the clear proof hearing; and

(B) Grant the State's motion to proceed at the clear proof hearing by proffered and hearsay evidence, consistent with the rules of evidence; or

(C) Hold a hearing; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

October 21, 2021

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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.

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