

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0239, State of New Hampshire v. Timothy Bobola, the court on July 21, 2005, issued the following order:

Following a jury trial, the defendant, Timothy Bobola, was convicted of second degree assault. See RSA 631:2 (1996). On appeal, he contends that the trial court erred in: (1) allowing the State to introduce the victim's written statement into evidence; (2) denying the defendant's request for a jury instruction on mutual combat; (3) permitting the State to question the victim about his injuries despite the defendant's pretrial stipulation to serious bodily injury; and (4) denying the defendant's motion to dismiss at the close of the State's case. We affirm.

We accord considerable deference to a trial court's evidentiary rulings and will not reverse absent an unsustainable exercise of discretion. State v. Belton, 150 N.H. 741, 743 (2004). The trial court found that the State sought to offer the victim's prior statement to rebut the defense's implied charge that he was making statements in the criminal trial to support his pending civil lawsuits. Because the victim's prior statement significantly predated his filing of the civil lawsuits, we find no error in this ruling. See State v. McSheehan, 137 N.H. 180, 183-84 (1993) (prior consistent statement offered under New Hampshire Rule of Evidence 801(d)(1)(B) must predate supposed motive to falsify). Because the defendant neither asked for a limiting instruction nor objected to the trial court's failure to give one, he cannot now raise this issue as error. See State v. Pelletier, 149 N.H. 243, 253 (2003).

The defendant also argues that the trial court erred in failing to give an instruction on mutual combat. The purpose of jury instructions is to explain the rules of law applicable to a case. State v. DiNapoli, 149 N.H. 514, 520 (2003). We review the denial of a requested jury instruction in the context of the entire charge and all the evidence to determine whether the trial court adequately stated the relevant law; we will not reverse a conviction unless the instructions did not fairly cover the issues in a case. Id. While RSA 631:2-a provides that a misdemeanor charge of simple assault is reduced to a violation if committed in a fight entered into by mutual consent, State v. Place, 152 N.H. ___ (decided May 20, 2005), RSA 631:2 contains no such language. Because an instruction on mutual combat would not have explained any rule of law applicable to this case, we find no error in the trial court's instructions.

The defendant also argues that the trial court erred in allowing the State to question the victim about his injuries given the defense stipulation to serious bodily injury. We will assume without deciding that the defense stipulation

rendered evidence of the victim's injuries irrelevant. Even if this were correct, defense counsel's repeated references to the victim's pending civil lawsuits created questions about his motivation, thereby opening the door to evidence of his injuries. See State v. Rogan, 151 N.H. 629, 631 (2005) (opening the door doctrine applies when one party introduces evidence that reasonably created misimpression).

The defendant also contests the sufficiency of the evidence, arguing that the trial court should have granted his motion to dismiss at the close of the State's evidence. In an appeal challenging the sufficiency of the evidence, the defendant has the burden of proving that no rational trier of fact viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Flynn, 151 N.H. 378, 382 (2004); State v. Pittera, 139 N.H. 257, 260 (1994) (entire trial record is reviewed even though motion is made at close of State's case). In this case, the victim testified that the defendant attacked him and punched him five or six times, knocking him into his car. The injuries he incurred required at least two surgeries and caused permanent damage. Although the defendant and his brother testified and disputed the victim's account, two other disinterested witnesses contradicted their testimony. See State v. Flynn, 151 N.H. at 382 (in determining witness credibility, jury may accept some parts and reject other parts of testimony). Given the record before us, we find no error in the trial court's ruling.

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**