THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0790, State of New Hampshire v. Matthew Lewis, the court on July 14, 2009, issued the following order:

The defendant, Matthew Lewis, appeals his conviction for second-degree assault. See RSA 631:2, I(b) (2007). He argues that the trial court's refusal to compel the State to immunize a defense witness or dismiss the case violated his due process rights under the State Constitution. We affirm.

The State argues that the motion to compel immunity or dismiss was untimely. We assume, without deciding, that the motion was timely filed. The only issue, therefore, is whether the State's refusal to immunize a defense witness violated the defendant's due process rights under Part I, Article 15 of the State Constitution. Because the defendant does not argue that the trial court's decision violated his rights under the Federal Constitution, our analysis is limited to the State Constitution, citing federal cases for guidance only.

Pursuant to RSA 516:34 (2007), the State, with authorization from the attorney general or county attorney, may grant a witness use immunity and request a trial court to order the witness to testify. Under the immunity statutes, trial courts cannot grant immunity sua sponte. See State v. Rogers, 158 N.H. __, __ (decided July 2, 2009). Although immunity grants are generally within the control and discretion of the State, we have recognized that "situations could arise in which to deny immunization from prosecution would deprive a defendant of due process on the facts of [his] case." State v. Kivlin, 145 N.H. 718, 721 (2001) (quotation omitted). Our analysis requires application of a two-part test. First, "[n]o such violation will be recognized . . . without a showing by the defendant that the testimony sought would be directly exculpatory or would present a highly material variance from the tenor of the State's evidence." State v. Monsalve, 133 N.H. 268, 270 (1990). Second, "[i]f the defendant demonstrates that [his] case falls within these narrow circumstances, we then decide whether, on the facts of the defendant's case, the executive branch's refusal to immunize a defense witness denied the defendant a fair trial." Kivlin, 145 N.H. at 721 (quotation and ellipsis omitted).

The first part of our analysis, whether the proffered testimony was directly exculpatory or of a highly material variance, requires the defendant to meet a high burden. In conducting our review, we look to whether the proffered testimony would have prevented the defendant's conviction. Rogers, 158 N.H. at __; Kivlin, 145 N.H. at 722; State v. MacManus, 130 N.H. 256, 259 (1987); see Blissett v. Lefevre, 924 F.2d 434, 441-42 (2d Cir. 1991) (stating defendant must

make showing that the testimony is material, exculpatory and not cumulative, as well as that he cannot obtain the evidence from another source), cert. denied, 502 U.S. 852 (1991). Furthermore, a variance from the tenor of the State's evidence is only "highly material" when the variance is irreconcilable with the State's case. State v. Winn, 141 N.H. 812, 816 (1997).

In this case, the defendant's friend, Matt Harris had fought with the victim, Ben Blasi, earlier that day. After the fight, Harris enlisted the help of Matt French, Rachael West and the defendant to go back to the house where he had been "jumped" by Blasi and his friends. Once there, the defendant and French, both armed with handguns, yelled until the occupants emerged; a fight ensued. West pushed Megan O'Day and the two began to wrestle, while the others kicked O'Day. Blasi, who had been asleep inside, came outside wearing only his shorts. He saw French with a gun and somebody on the ground being kicked; he moved toward the defendant. The defendant heard Blasi running, thought he had something in his hands, and shot him in the abdomen when he was eight to ten feet away. The defendant and his friends ran away.

At trial, the defendant argued that he acted in self-defense, that he thought Blasi had something in his hands, and that he fired "accidentally as a reflexive response." To support this claim, he called West to testify that she saw the defendant pull his gun and back away from Blasi before shooting him. West, however, declared her intention not to testify, unless under a grant of immunity, because she was facing charges arising from the same transaction.

Based upon the evidence adduced at trial and the defendant's proffer of West's testimony, we hold that the trial court did not err in denying his motion to compel immunity or dismiss. West's testimony would not have prevented conviction because her testimony could not place the defendant elsewhere or preclude the possibility that the defendant, beyond a reasonable doubt, acted knowingly in shooting Blasi. See Rogers, 158 N.H. at __; Kivlin, 145 N.H. at 722-23; State v. Farrow, 118 N.H. 296, 306 (1978) (affirming denial of immunity when proffered testimony would not have provided defendant with alibi or otherwise exculpated him). Indeed, West admitted in a statement to the police that she could not see much of anything as a result of her struggle with O'Day. Furthermore, the variance between her proffered testimony and the State's case, namely, that the defendant was walking backward when he fired his weapon and that Blasi was closer than eight feet away, is not irreconcilable with the State's theory. See Winn, 141 N.H. at 816. The defendant, armed with a handgun, returned to the scene of the earlier fight to seek retribution. The jury could infer from such conduct that he acted knowingly, albeit hastily, in shooting Blasi.

Because West's proffered testimony was neither directly exculpatory nor presented a highly material variance from the tenor of the State's case, we need not reach the second step of the analysis. Kivlin, 145 N.H. at 721.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk