THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0066, State of New Hampshire v. Gary Messerschmidt, the court on February 4, 2009, issued the following order:

The defendant, Gary Messerschmidt, appeals his conviction for knowing second degree murder. See RSA 630:1-b, I (a) (2007). He argues that the trial court erred in: (1) allowing the State to impeach his credibility with a prior conviction; and (2) instructing the jury with respect to his false exculpatory statements. We affirm.

We review a trial court's ruling to admit evidence of prior convictions under an unsustainable exercise of discretion standard. State v. Deschenes, 156 N.H. 71, 76 (2007). To establish an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

New Hampshire Rule of Evidence 609 (b) provides in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he or she was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The record in this case indicates that the defendant was convicted in 1997 on two felony counts of sale of a controlled drug for which he received two consecutive sentences of 1 1/2 – 3 years. He argues on appeal that the trial court erred in admitting this evidence because the probative value of admitting it was outweighed by its prejudicial effect.

Factors to consider in balancing a conviction's probative value against its prejudicial effect include the impeachment value of the prior conviction, the date of the conviction and the witness's subsequent history, the degree of similarity between the past crime and any conduct of the witness currently at issue, the importance of the witness's testimony, and the centrality of the credibility issue. Id. at 76-77. Lack of trustworthiness may be evinced by a defendant's abiding

and repeated contempt for laws which he is legally and morally bound to obey. State v. Demeritt, 148 N.H. 435, 442 (2002). In this case, the defendant's convictions coupled with his admissions of continued drug use demonstrated an abiding contempt for the law. That the convictions approached the ten-year presumptive bar of Rule 609 (b) did not require their exclusion, particularly in light of the defendant's continuing illegal drug use. See State v. Deschenes, 156 N.H. at 78. The drug sale convictions were dissimilar from the offense for which the defendant was tried. See id. at 78-79 (where defendant is the witness, analysis of prejudicial effect of convictions for offense that does not involve dishonesty or false statement requires consideration of crime's inherent ability to arouse jury's sympathies or sense of horror and similarity between conviction introduced for impeachment purpose and offense for which defendant is on trial). Given these factors, the importance of the defendant's testimony and the extensive testimony about illegal drug use in this case, we find no error in the trial court's decision.

The defendant also contends that the trial court erred in instructing the jury with respect to his false exculpatory statement. The scope and wording of jury instructions is generally within the sound discretion of the trial court. State v. Evans, 150 N.H. 416, 420 (2003).

The trial court instructed the jury:

> Now, evidence has been introduced regarding statements made by the defendant to third parties in connection with this case. If you find the defendant intentionally made statements tending to demonstrate his innocence or to influence a witness and the statements are later discovered to be false, then you may consider whether the statements show a consciousness of guilt and determine what significance, if any, to give such evidence.

The defendant argues that the trial court erred in including language allowing the jury to consider whether he made false exculpatory statements "to influence any witness." He contends that the false exculpatory witness instruction is limited to attempts to influence those individuals who witnessed his commission of the charged offense. We decline to construe the language so narrowly.

The false exculpatory evidence instruction informs the jury that it may infer evidence of guilt from a false statement if, in light of all of the other evidence presented at trial, the jury concludes that the defendant knew the statement was false when he made it. State v. Fischer, 143 N.H. 311, 319 (1999). "It is reasonable to infer consciousness of guilt from a defendant's false exculpatory statement because an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his or her innocence." State v. Evans, 150 N.H. 416, 420 (2003) (quotations and

brackets omitted). In this case, where the defendant made several false and exculpatory statements to individuals about his actions, and the statements could be construed as attempts to create testimony that he had acted in self-defense, we find no error in the trial court's instruction. See, e.g., State v. Stott, 149 N.H. 170, 172-73 (2003) (defendant's statements made to police in course of investigation of aggravated felonious sexual assault admissible as evidence of his consciousness of guilt).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk