THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0072, State of New Hampshire v. Charles Ellis, the court on February 4, 2009, issued the following order:

The defendant, Charles Ellis, appeals his convictions for negligent homicide and possession of a controlled drug. He argues that the trial court erred when it: (1) admitted evidence of his uncharged misconduct relative to his drug use; (2) admitted a forensic medical report in violation of the State Confrontation Clause; (3) denied his motion to dismiss the negligent homicide indictments for failing to articulate how his actions caused the victim's death; and (4) allowed the negligent homicide indictments to go to the jury because the State failed to present sufficient evidence both of his impairment and his negligence. We affirm.

We review a trial court's admission of evidence pursuant to New Hampshire Rule of Evidence 404(b) under our unsustainable exercise of discretion standard. State v. Pepin, 156 N.H. 269, 276 (2007). To establish that the trial court's ruling was unsustainable, the defendant must demonstrate that it was clearly untenable or unreasonable to the prejudice of his case. State v. Lambert, 147 N.H. 295, 296 (2001).

On appeal, the defendant appears to challenge the admission of evidence of his prior illegal drug use on both lack of notice and relevance grounds. A review of the trial transcript, however, indicates that he did not raise a lack of notice issue before the trial court; it has therefore not been preserved for our review. See State v. Blackmer, 149 N.H. 47, 48 (2003) (contemporaneous and specific objection required to preserve issue for appellate review).

We turn then to the defendant's challenge to the State's argument that the evidence was relevant to show the defendant's experience and familiarity with the effects of drug use. He has cited no cases in support of his argument that drug dependent individuals may have a lesser awareness of the dangers of driving while impaired. The trial court is accorded substantial deference in its determination of whether the prejudice of admitting evidence outweighs its probative value. State v. Dushame, 136 N.H. 309, 317 (1992). As we have previously noted, the State bears a difficult burden to establish that a defendant was aware of a known risk and that he knew of circumstances the disregard of which would be determined to be a gross deviation from the conduct that a law-abiding person would observe in a given situation. Id. "The unlikelihood of developing direct testimony on the defendant's state of mind calls for consideration of all proper proof that can be proffered by the prosecution." Id. at

317-18. In this case, given the other evidence of the defendant's drug use and the detailed limiting instruction provided by the trial court, we find no error in its ruling.

The defendant next argues that the trial court erred in admitting a forensic medical report (NMS report) in violation of the Confrontation Clause of the New Hampshire Constitution. We will assume without deciding that this issue has been preserved for our review. As the State notes, admission of the NMS report was cumulative; the defendant did not object to testimony presenting the similar, and arguably more damaging, findings of the State laboratory. Accordingly, to the extent that there may have been any error in admitting the NMS report, it was harmless. See State v. Deschenes, 156 N.H. 71, 80 (2007) (State bears burden of proving that error is harmless beyond reasonable doubt; error may be harmless if inadmissible evidence is merely cumulative or inconsequential in relation to State's evidence of guilt); cf. State v. Hall, 152 N.H. 374, 379 (2005) (applying harmless error analysis to alleged violation of Confrontation Clause).

The defendant also argues that the trial court erred in failing to dismiss the negligent homicide indictments because they did not articulate how he caused the victim's death. He does not argue that the indictments failed to include the elements of the charged offense but rather that they failed to allege any nexus between the acts of driving and causing the death of the victim.

The purpose of an indictment is to advise the defendant of the charges he must be prepared to address at trial and to prevent him from being twice placed in jeopardy for the same offense. State v. Hilton, 144 N.H. 470, 475 (1999). "[O]nce a specific offense has been identified, there is no further and independent requirement to identify the acts by which a defendant may have committed that offense." State v. Pelky, 131 N.H. 715, 719 (1989) (quotations omitted). The defendant does not argue that he did not know the facts giving rise to the indictment nor that any alleged insufficiencies affected his ability to prepare his defense. Nor does he argue that his protection against double jeopardy has been impaired. In the absence of these factors, he has failed to establish any prejudice.

Finally, the defendant argues that the trial court erred in allowing the negligent homicide indictments to go to the jury because the State failed to present sufficient evidence of his impairment and his negligence. As discussed at oral argument, the defendant failed to include a list of questions presented in his brief, along with the requisite "specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue." Sup. Ct. R. 16 (3)(b). The defendant subsequently filed an assented to motion to amend brief, which motion is hereby granted. The motion included a list of issues presented; the list, however, failed to include any reference to indicate that the issues had been raised before the

trial court. We note also that neither the notice of appeal nor the recently submitted motion lists the negligence issue. See State v. Blackmer, 149 N.H. at 49 (issue not raised in party's notice of appeal not preserved for appellate review).

The record before us provides no evidence that the trial court was ever given an opportunity to consider either of the sufficiency of the evidence issues raised by the defendant on appeal. For the foregoing reasons, they have not been preserved for our review. See id. at 48.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk