

SUPREME COURT OF NEW HAMPSHIRE

State v. Michaud

146 N.H. 29 (2001) · Decided February 12, 2001

SUMMARY

The New Hampshire Supreme Court affirmed David Michaud’s convictions for simple assault, criminal trespass, and arson. The court held that limits on cross-examination and exclusion of specific-act character evidence were proper, that an unpreserved evidentiary issue in the trespass trial was not reviewable, and that the arson trial court properly denied dismissal, admitted a letter, and declined to review unpreserved closing-argument objections.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Broderick, J.; Brock, C.J.; Horton, J.; Johnson, J.; Thayer, J.
JURISDICTION	New Hampshire
DECIDED	February 12, 2001
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed convictions following three separate jury trials for simple assault, criminal trespass, and arson.
STANDARD OF REVIEW	Abuse of discretion for limits on cross-examination, character-evidence rulings, and admission of the letter; dismissal of an indictment for governmental misconduct requires prejudice and is reviewed under the court's supervisory-power standards; unpreserved claims are not considered on appeal.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	David Michaud v. State

TOPICS

- criminal procedure
- evidence
- sixth amendment
- appellate procedure
- preservation of error

PRACTICE AREAS

- criminal law
- criminal procedure
- evidence
- appellate procedure
- constitutional law

QUESTIONS PRESENTED

1. Whether limiting cross-examination of the defendant's ex-wife concerning alleged prior false accusations and a prior perjury warning violated the defendant's right to confront witnesses.
2. Whether the excluded evidence was admissible as victim-character evidence under New Hampshire Rules of Evidence 404(a)(2) and 405.
3. Whether the defendant could relitigate the evidentiary ruling in the criminal-trespass trial under collateral estoppel despite failing to offer or preserve the evidence in that trial.
4. Whether the arson charge should have been dismissed because the State's culpable negligence in permitting reconstruction of the fire scene destroyed potentially exculpatory evidence.
5. Whether the trial court abused its discretion by admitting a letter that the defense itself used during cross-examination.
6. Whether the State's allegedly prejudicial closing remarks warranted appellate relief despite the defendant's failure to object.

HOLDINGS

1. The trial court did not abuse its discretion by limiting cross-examination where the defendant had already been allowed to present substantial evidence supporting his claim that the ex-wife had a motive to lie and had lied in the past, making the excluded inquiries cumulative.
2. Specific instances of the ex-wife's alleged prior conduct were inadmissible under New Hampshire Rules of Evidence 404(a)(2) and 405 because her character was not an essential element of a charge, claim, or defense.
3. The evidentiary issue was not preserved because Michaud neither moved in advance of nor during the trespass trial to introduce the evidence, and collateral estoppel did not excuse the omission because the earlier evidentiary rulings did not determine issues of ultimate fact.
4. A showing of prejudice is required before an indictment may be dismissed based on the State's culpable negligence in allowing potentially exculpatory evidence to be destroyed; dismissal was properly denied because Michaud demonstrated no prejudice and the trial court imposed a sufficiently curative sanction.
5. The trial court did not abuse its discretion by admitting the letter as a full exhibit because the defense itself used it during cross-examination, thereby conceding its relevance; the defendant's arguments about the inferences to draw from it concerned weight rather than admissibility.
6. The authentication argument was waived because the defendant raised it in the notice of appeal but did not brief it.
7. The court would not consider the defendant's challenge to the State's closing argument because he failed to object when the remarks were made.

KEY QUOTATIONS

“Trial courts possess broad discretion to limit the scope of cross-examination to preclude repetitive or unduly harassing interrogation.” (146 N.H. at 31)

“The sanction of dismissal with prejudice is . . . reserved for extraordinary circumstances” (146 N.H. at 33)

“We similarly decline to hold that automatic dismissal is required upon a showing of culpable negligence alone.” (146 N.H. at 33)

FACTUAL BACKGROUND

Michaud's ex-wife accused him of simple assault and later of entering her home in violation of a restraining order, resulting in the assault and criminal-trespass charges. A fire occurred at the ex-wife's home while the parties were living apart, and the house was later reconstructed after the prosecutor allegedly allowed the ex-wife to proceed with rebuilding. The defense claimed that reconstruction destroyed potentially exculpatory evidence, including floor samples and the opportunity to show the structure to the jury. At the arson trial, the defense used a letter allegedly written by a witness who had implicated Michaud and later recanted, and the State introduced the letter as a full exhibit after the witness denied writing it.

PROCEDURAL HISTORY

Michaud was convicted in three separate proceedings in the New Hampshire Superior Court. The trial courts excluded or limited evidence concerning his ex-wife's alleged prior false accusations and perjury warning, denied his motion to dismiss the arson charge based on destruction of the fire scene, admitted a letter used during cross-examination, and allowed the State's closing argument. The Supreme Court of New Hampshire affirmed the convictions.

DISPOSITION

affirmed

CASES CITED

- State v. Ball, 124 N.H. 226, 231-33
- State v. Dixon, 144 N.H. 273, 278
- State v. Rodriguez, 136 N.H. 505, 508-09
- State v. Moses, 143 N.H. 461, 464-65
- State v. Huffman, 136 N.H. 149, 152-53
- State v. Isaacson, 129 N.H. 438, 441
- State v. Graf, 143 N.H. 294, 297
- State v. Porter, 144 N.H. 96, 99
- State v. Hoag, 145 N.H. 47, 52
- State v. Hutchins, 144 N.H. 669, 671
- State v. Cotell, 143 N.H. 275, 279, 281
- State v. Bain, 145 N.H. 367, 372-73
- State v. Murray, 129 N.H. 645, 650
- State v. Ranger, 142 N.H. 140, 143

- State v. Mountjoy, 142 N.H. 648, 652
- State v. Ross, 141 N.H. 397, 399

OPINION

BRODERICK, J.

BRODERICK, J. The defendant, David Michaud, appeals his convictions following three separate jury trials for: (1) simple assault, see RSA 631:2-a (1996); (2) criminal trespass, see RSA 635:2 (1996); and (3) arson, see RSA 634:1 (1996) (amended 1998). He contends that the Superior Court (Coffey, J.) erred in his simple assault trial by not permitting him to introduce evidence about his ex-wife's motive to lie and that the Superior Court (Fauver, J.) again erred when it excluded identical evidence in his criminal trespass trial.

Finally, he asserts that the Superior Court (Nadeau, J.) made several errors in his arson trial by not dismissing the charge, admitting a letter into evidence, and permitting the State to make prejudicial comments during its closing argument.

We affirm. I The simple assault charge arose from the claim of the defendant's now ex-wife that he assaulted her on May 5, 1996. The criminal trespass charge stemmed from later incidents in which the defendant entered his ex-wife's home, despite a restraining order prohibiting him from doing so. A The defendant first argues that the trial court violated his State and federal constitutional rights to confront witnesses when it prohibited him from cross-examining his ex-wife about: (1) her 1989 affair; (2) her alleged history of making false accusations against him and against her first husband; and (3) a warning about perjury that she received in the couple's 1989 divorce proceeding.

See N.H. CONST, pt. I, art. 15; U.S. CONST, amend. VI. The record shows, however, that the court permitted the defendant to inquire about his ex-wife's past infidelities and alleged false accusations against him. Thus, we examine only the trial court's *31 rulings regarding the ex-wife's allegedly false accusations against her first husband and the 1989 perjury warning.

We address the defendant's argument under our State Constitution, citing federal law only to aid in our analysis. See State v. Ball, 124 N.H. 226, 231-33 (1983). Because the federal standard provides the defendant no greater protection, we need not undertake a separate federal analysis. See State v. Dixon, 144 N.H. 273, 278 (1999). A defendant's right to cross-examine prosecution witnesses is not unfettered.

See State v. Rodriguez, 136 N.H. 505, 508 (1992). "Trial courts possess broad discretion to limit the scope of cross-examination to preclude repetitive or unduly harassing interrogation." Id. "In determining the limits of cross-examination, a trial court must balance the prejudice, confusion, and delay of the proffered testimony against its probative value." Id. at 509.

We will uphold the trial court's decision limiting the scope of cross-examination absent an abuse of discretion. See *State v. Moses*, 143 N.H. 461, 464 (1999). The defendant asserts generally that the precluded inquiries showed his ex-wife's "motive to lie" and that she had "been caught lying under similar circumstances in the past." Although the court precluded the defendant from inquiring into his ex-wife's allegedly false reports against her first husband, it permitted inquiry into the allegedly false reports against him.

Moreover, even though the court prohibited inquiry into the 1989 perjury warning, it permitted the defendant to introduce testimony that his ex-wife fabricated photographs in the 1989 proceeding and that a judge found them to be fabricated.

Thus, despite the precluded inquiries, the defendant "had all the ammunition he needed," *State v. Huffman*, 136 N.H. 149, 152-53 (1992), to argue that his ex-wife had a motive to lie and had lied in the past. Whatever evidence the prohibited inquiries might have yielded would have been cumulative at best.

The court was entitled to weigh, in its discretion, the materiality of this evidence against the potential unfairness and confusion which its admission might have engendered. See *State v. Isaacson*, 129 N.H. 438, 441 (1987).

We hold, therefore, that the trial court did not abuse its discretion by limiting the defendant's cross-examination of his ex-wife. See *Moses*, 143 N.H. at 465. Alternatively, the defendant argues that the trial court should have admitted evidence of his ex-wife's past false accusations and the perjury warning as "victim character" evidence under New Hampshire Rule of Evidence 404(a)(2).

We disagree. *32 "The trial court has broad discretion in ruling on the admissibility of character evidence, and we will not disturb its ruling absent an abuse of discretion." *State v. Graf*, 143 N.H. 294, 297 (1999) (quotation and brackets omitted).

Under Rules 404(a)(2) and 405, proof of specific instances of a victim's conduct is admissible "only when the victim's character or trait of character is an essential element of a charge, claim, or defense." *State v. Porter*, 144 N.H. 96, 99 (1999).

The victim's character was not an essential element of a substantive offense or defense in this case. Thus, proof of specific instances of her character was inadmissible. See *id.* B The defendant also asserts that the trial court erred when it did not permit him to introduce this same evidence in his criminal trespass trial. He concedes, however, that he never moved in advance of the trial to introduce it.

Nor did he move its introduction during the trial. Therefore, this issue is not preserved for appellate review. See *State v. Hoag*, 145 N.H. 47, 52 (2000). The defendant justifies his inaction

on the basis that the doctrine of “collateral estoppel” precluded him from relitigating the trial court’s earlier ruling in his assault trial.

We disagree. “In the criminal context, collateral estoppel mandates that an issue of ultimate fact that has been fully tried and determined [may not] again be litigated between the parties in a future prosecution.” *State v. Hutchins*, 144 N.H. 669, 671 (2000).

In this case, however, the court’s evidentiary rulings in the defendant’s simple assault trial did not involve issues of “ultimate fact” and, therefore, did not preclude their relitigation in the criminal trespass trial. II With respect to the defendant’s arson trial, we recite the pertinent facts as found by the court or as supported by the record.

In June 1996, a fire occurred at the home of the defendant’s ex-wife. At the time, the Michauds were married, but living apart. Shortly after the defendant was charged with arson, his attorney moved to preserve the condition of the house.

In July 1996, the defendant’s attorney learned that her client’s ex-wife planned to tear down and rebuild the house. She contacted the prosecutor who, in turn, instructed the ex-wife to forbear. The ex-wife testified that she had later conversations with the prosecutor who told her that she could now move forward with her plans. She began doing so in the spring of 1997.

The reconstruction was completed in July 1997. *33In November 1997, the defendant moved to dismiss the arson charge on the ground that the State had allowed “critical exculpatory evidence” to be destroyed by permitting the reconstruction.

The defendant claimed that the reconstruction deprived him of the opportunity to: (1) analyze floor samples to show that there were no accelerants present; and (2) show the property to the jury to demonstrate that his stepson’s observations of the fire were physically impossible. Following a hearing, the court denied the defendant’s motion, finding that although the State was “culpably negligent,” it had acted in good faith.

The court further ruled that to remedy any possible prejudice from the defendant’s inability to analyze floor samples, it would preclude the State from introducing evidence of the presence of accelerants, which was shown by chemical tests and detected by trained dogs.

The defendant first argues that the trial court erred when it refused to dismiss the arson charge. We disagree. “The sanction of dismissal with prejudice is... reserved for extraordinary circumstances,” *State v. Cotell*, 143 N.H. 275, 281 (1998), and may be imposed only upon a showing of prejudice. *Id.* at 279.

In addition, “[a] trial court exceeds the proper bounds of its supervisory power to order dismissal of an indictment with prejudice [unless it considers] whether less extreme sanctions might

maintain the integrity of the court without punishing the State for a prosecutor's misconduct." *Id.* at 281 (quotation and brackets omitted).

The defendant contends that no showing of prejudice is required where the State is culpably negligent. We disagree. We have recently declined to hold that automatic dismissal is required upon a showing of governmental bad faith. See *State v. Bain*, 145 N.H. 367, 372-73 (2000).

We similarly decline to hold that automatic dismissal is required upon a showing of culpable negligence alone. In this case, where the court found the State acted in good faith but with culpable negligence, we conclude that a showing of prejudice was required before the court could dismiss the indictment.

The defendant also argues that, even if a finding of prejudice is required, the State should bear the burden of proof. We need not reach this issue, however, because the record does not reflect any prejudice, and the court's sanction was sufficiently curative. See *id.* (court must consider whether less extreme sanctions have the intended punitive effect). *34The defendant's assertion that the floor samples would have revealed that no accelerants were present is speculative at best.

The State's chemical tests revealed the presence of accelerants, and it appears that the defendant had access to these test results. The defendant's assertion that had the property not been destroyed he would have shown it to the jury is equally speculative.

The court observed that because of the property's "extremely dangerous" condition, it was unlikely that the court would have permitted the jury to enter the property. Moreover, the defendant had access to 200 photographs of the property, including a view from the top of the stairwell.

The defendant also had access to two State videotapes of the property. Also, before the home was reconstructed, one of the defendant's experts inspected the fire scene himself for over three hours and photographed and videotaped it.

In these circumstances, the defendant suffered no prejudice. See *State v. Murray*, 129 N.H. 645, 650 (1987) (defendant unable to prove prejudice in arson case where building destroyed, but he had access to notes and photographs prepared by State's experts).

The defendant further argues that the court erred when it admitted a letter which the defense had actually used during its cross-examination of witness Virginia Doherty. We disagree. When Doherty first spoke with the police after the fire, she implicated the defendant. Later she recanted, but at trial admitted that she lied when she did so.

In the letter at issue, addressed to "Dave," the author states that she "didn't intend to lie" and that she was "afraid of the police." During cross-examination, defense counsel asked Doherty if she

recalled “writing to David a letter saying I am sorry about lying to the police.” Doherty said that she did not recall the letter, at which point the defense showed it to her.

Doherty stated that she did not write it. During re-direct examination, the court permitted the State to show Doherty the letter again and to ask if she wrote it. Again, Doherty denied authoring it. Later, over the defendant’s objection, the court ruled that the letter was admissible “as a full exhibit.” The defendant argues that the letter was not relevant because there was no evidence linking him to it.

To the contrary, the defendant conceded the letter’s relevance by using it himself. The defendant’s arguments regarding the reasonable inferences to be drawn from the letter go to the weight of this evidence, not its admissibility. See *State v. Ranger*, 142 N.H. 140, 143 (1997).

We hold that the trial court did not abuse its discretion in admitting the letter. *35Although the defendant asserts in his notice of appeal that the letter was inadmissible because it was not authenticated, see N.H.R. EV. 901, this issue is waived because it was not briefed. See *State v. Mountjoy*, 142 N.H. 648, 652 (1998).

Finally, the defendant argues that the trial court erred when it permitted the State to make prejudicial comments about him in its closing argument. He failed to object to these remarks, however, when the State made them.

Accordingly, we may not consider his argument made for the first time on appeal. See *State v. Ross*, 141 N.H. 397, 399 (1996). Affirmed. JOHNSON, J., sat for oral argument but retired prior to the final vote; THAYER, J., sat for oral argument but resigned prior to the final vote; BROCK, C.J., concurred; HORTON, J., retired, specially assigned under RSA 490:3, concurred.