

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0930, State of New Hampshire v. Alan Pelletier, the court on March 6, 2008, issued the following order:

Having considered the briefs and oral arguments of the parties as well as the record submitted on appeal, the court concludes that a formal written opinion is unnecessary for the disposition of this matter. The defendant, Alan Pelletier, appeals his convictions by a jury in Superior Court (Nadeau, J.) for felonious sexual assault and endangering the welfare of a child. See RSA 632-A:3, II (2007); RSA 639:3, III (2007). We affirm.

On appeal, the defendant challenges five of the trial court's evidentiary rulings. We accord the trial court considerable deference in determining the admissibility of evidence, and we will not disturb its decision absent an unsustainable exercise of discretion. State v. Giddens, 155 N.H. 175, 179 (2007). To demonstrate that the trial court exercised unsustainable discretion, the defendant must show that the ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

The defendant first argues that the trial court erred when it admitted the testimony of the victim's stepfather regarding a summary that the defendant's brother prepared of the defendant's cell phone records. The victim's stepfather testified that the summary stated that two phone calls were made to "a girl [the defendant] was dating in Nashua." Other evidence established that the phone calls were made to a cell phone belonging to the victim's natural father.

The trial court admitted this testimony under New Hampshire Rule of Evidence 801(d)(2)(C), pursuant to which a statement is not hearsay if it is "a statement that is offered against a party and is . . . a statement by a person authorized by the party to make a statement concerning the subject." The trial court found that the defendant authorized his brother to summarize his cell phone records and to tell the victim's family what the defendant said about the records. Thus, the trial court ruled, the victim's stepfather's testimony was admissible because statements in the summary were offered against the defendant by a person he authorized to make a statement about his cell phone records.

The defendant argues that this was error because: (1) Rule 801(d)(2)(C) requires that a declarant be an agent of the party-opponent against whom the admission is offered; and (2) the evidence does not support a finding that the

defendant's brother was acting as his agent when he relayed the defendant's statement to the victim's stepfather. We assume, without deciding, that Rule 801(d)(2)(C) requires that a declarant be an agent of the party against whom the admission is offered. We conclude, however, that the evidence was sufficient to support a finding that the defendant's brother was acting as his agent when he relayed the defendant's statement to the victim's stepfather.

Although the defendant argues that we should apply the rule of agency recited in Sabel v. Mead Johnson & Co., 737 F. Supp. 135, 138 (D. Mass. 1990), we decline his invitation to do so and, instead, apply our own common law rule of agency. Under New Hampshire law, a person is another's agent if: (1) the principal authorized the agent to act for him; (2) the agent consented to so act; and (3) the parties understood that the principal was to exert some control over the agent's actions. See Boynton v. Figueroa, 154 N.H. 592, 604 (2006).

There was evidence from which the trial court reasonably could have found that the defendant's brother was his agent for the purpose of preparing a summary of his cell phone calls and relaying his statements about them to the victim's family. The victim's stepfather testified that the defendant "was going to get his phone records and send them to [his brother]. The two of them for the sake of [the defendant's] privacy were going to go through the records themselves. They were going to blacken out the last four digits of any phone numbers to . . . honor his privacy." He further testified that the defendant's brother was going to give the victim's family the defendant's phone records and tell them what the defendant said about the records. The victim's stepfather also testified that the defendant's brother sent him a summary of the records and stated that he had gone over all of the records with the defendant "line by line." From this testimony, the trial court reasonably could have found that: (1) the defendant's brother had the defendant's actual or apparent authority to summarize his phone records for him and to relay his comments to the victim's family; (2) the brother consented to so act; and (3) the parties understood that the defendant was to exert some control over his brother's actions. See *id.*

The defendant next asserts that the trial court erred when it precluded his brother from giving corroborating testimony regarding a certain phone number. Specifically, the defendant argues that the trial court erroneously prevented his brother "from giving his account of what [the defendant] actually said [about the number]." We conclude that this was not error as the brother's testimony about what the defendant said to him constituted hearsay and does not fall within any recognized exception to the hearsay rule. See N.H.R. Ev. 801. Contrary to the defendant's assertions, the State did not open the door to this testimony by introducing the testimony of the victim's stepfather. As previously discussed, contrary to the defendant's contentions, the step-father's testimony did not constitute hearsay.

The defendant next contends that the trial court erred by excluding “consciousness of innocence” evidence. Specifically, he asserts that the trial court erred when it precluded him and his expert witness from testifying about efforts to obtain cell phone tower records to prove his location. We hold that the trial court did not err in these respects.

The record shows that the trial court excluded his expert witness’s testimony on this subject to sanction the defendant for failing to provide the State with a summary of the expert’s expected opinion. See Super. Ct. R. 98(C)(2). We review the trial court’s imposition of a discovery sanction under our unsustainable exercise of discretion standard. See State v. Belton, 150 N.H. 741, 745, cert. denied, 543 U.S. 1028 (2004). In determining whether evidence should be excluded for a violation of discovery rules, the trial court may consider several factors, including: (1) whether the violating party made a good faith effort to comply or provided a pre-trial warning to minimize surprise; (2) the ability of the court to limit the scope of testimony or evidence to minimize surprise; and (3) the availability of lesser sanctions or procedural curative measures. *Id.* In light of the dearth of evidence that the defendant made a good faith effort to comply or provided a pre-trial warning to minimize surprise, we conclude that the trial court did not unsustainably exercise its discretion when it precluded the expert from testifying about his efforts to obtain cell phone tower records.

The record demonstrates that the trial court precluded the defendant from testifying about efforts to obtain cell phone tower records under Rule 403 because of concerns about misleading and confusing the jury. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” We accord the trial court considerable discretion in balancing the factors under Rule 403, and we will not disturb its decision absent an unsustainable exercise of discretion. See State v. Miller, 155 N.H. 246, 252 (2007).

We are unable to conclude that the trial court unsustainably exercised its discretion when it prevented the defendant from testifying about efforts to obtain cell phone tower records. Had the jury learned of these efforts, it might have improperly inferred or speculated that such records existed and could show the defendant’s location. As defense counsel conceded at trial, “the record is that [cell phone tower records] do not [exist].” “Such speculation would have led the jury away from the central issues in the case.” State v. Dugas, 147 N.H. 62, 71 (2001). Thus, although the evidence might have been relevant, we cannot say the trial court unsustainably exercised its discretion when it ruled that the defendant’s proposed testimony would elicit evidence

that would tend to confuse the issues, or otherwise would mislead the jury. See id.

The defendant argues that the trial court's decision to preclude testimony about the search for cell phone tower records violated his state constitutional right to present all proofs favorable to his defense. See N.H. CONST. pt. I, art. 15. We disagree. "The constitutional right to produce all proofs gives the defendant the right only to produce witnesses, not their inadmissible testimony." State v. Dale, 146 N.H. 286, 289 (2001).

To the extent that the defendant argues that the trial court's decision also violated certain federal constitutional rights, we decline to address this argument because he has not briefed it sufficiently for our review. See State v. LeCouffe, 152 N.H. 148, 152 (2005). Moreover, we observe that "[w]hile the [Federal] Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, . . . [it] permits judges to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice or confusion of the issues." Holmes v. South Carolina, 547 U.S. 319, 326-27 (2006) (quotations, citations, ellipsis and brackets omitted).

Finally, the defendant argues that the trial court erred when it prohibited his friends from testifying about what he told them regarding a phone call with the victim. The defendant asserts that what he told his friends about the phone call was admissible as a present sense impression.

Under Rule 803(1), "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" constitutes an exception to the hearsay rule. "To constitute a present sense impression, the statement must be essentially contemporaneous with the event." Simpkins v. Snow, 139 N.H. 735, 738 (1995) (quotation omitted); see N.H.R. Ev. 803 Reporter's Notes. One reason for this requirement is to assure that there is little time for calculated misstatement. Simpkins, 139 N.H. at 738.

Here, the defendant testified that he left his poker game at approximately 11:30 and had two phone calls with the victim. One call with the victim lasted "slightly less than an hour," and the other call with the victim lasted "a few minutes." In one of these calls, the victim told the defendant that if he let her parents know "what had been going on throughout the week, . . . [he] would regret it." After hearing this, the defendant "made another call to another person, walked inside and told [his friends] what had just happened."

From this testimony, the trial court reasonably could have found that some lapse of time occurred between the defendant hearing the victim's alleged threat and relating the threat to his poker game friends, giving the defendant time to reflect on the event. *See id.* We cannot say, therefore, that the trial court erroneously determined that the defendant's statements to his friends were not present sense impressions. *See id.* at 738-39.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**

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