

NEW HAMPSHIRE SUPREME COURT

No. 2021-0429

State of New Hampshire

Appellee

v.

David Tufano

Appellant

**ON APPEAL FROM JUDGMENT
OF THE STRAFFORD COUNTY SUPERIOR COURT**

**BRIEF AND ADDENDUM
OF APPELLANT DAVID TUFANO**

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QUESTIONS PRESENTED

1. Under Rule 404(b), the trial court denied Mr. Tufano's motion to preclude prior acts of trapping cats, in a prosecution for cruelty to animals based on putting a trapped cat in a bin and spraying it with water. The prior acts were not relevant for any purpose other than to show Tufano's propensity to catch cats in a trap, and were substantially more prejudicial than probative of any issue in dispute. Did the court unsustainably exercise its discretion in admitting this evidence?
2. The trial court denied Mr. Tufano's motion to cross-examine a prosecution witness with her prior conviction for unsworn falsification, employing an analysis that was premised on the court's own independent determination that the witness was innocent of the conduct for which she was convicted. Did the trial court unsustainably exercise its discretion in questioning the validity of the conviction, and more generally in its application of the balancing factors for admissibility of convictions more than 10 years old?

STATEMENT OF THE CASE

David Tufano was charged by complaint in the Strafford County Superior Court with Cruelty to Animals, a misdemeanor, alleged to have occurred on May 26, 2019, outside his residence in Somersworth. App. 1.¹ The complaint alleged that Tufano negligently mistreated a cat, by placing a trapped cat in a plastic container, and filling the container with water. App. 1. Prior to trial, the lower court denied Tufano's motion in limine to exclude prior acts, and instead, granted the prosecution motion to admit evidence that he had trapped neighborhood cats in the past. App. 2, 4, 28. The lower court denied a motion to reconsider that ruling. App. 13, 28. The lower court also denied Tufano's motion in limine to allow him to cross-examine a prosecution witness with her prior conviction for unsworn falsification. App. 20, 28.

After a two-day jury trial, the jury convicted Tufano on this charge. T-Verdict 3. The trial court (Ruoff, J.) recorded the conviction as a Class B Misdemeanor and imposed a

¹ References to the record are as follows:

“Add. [#]” refers to the Addendum to this brief;

“App. [#]” refers to the Appendix to this brief;

“T-MH. [#]” refers to the transcript of the June 21, 2021 motion hearing;

“T-MH. [#]” refers to the transcript of jury selection;

“T1. [#]” and “T2. [#]” refer to the separate transcripts of each day of the jury trial;

“T-Verdict [#]” refers to the transcript of the verdict.

\$1,000 fine. Add. 48. The court also made an unusual order in its sentence:

This will be recorded as a Class B Misdemeanor. The defendant was convicted of a negligent act, which means he was convicted of an offense in which he did not intend to commit a crime, nor did he intend a particular result - he simply failed to become aware of the risks his conduct created.

Add. 49.

STATEMENT OF FACTS

Colonial Village in Somersworth is a mobile home park with approximately 160 units in which occupants typically own their trailers but lease the land. T1. 54. David Tufano lives in Colonial Village, as do Richard Roberge, John Williams, and Sharon Barry. T1. 53, 108, 133, 183. Roberge's property faces the back end of Tufano's property. Despite their close proximity, the two did not know each other, aside from exchanging pleasantries once from their mailboxes. T1. 54, 60.

Roberge testified that on May 26, 2019, he heard a loud, low-pitched moan coming from Tufano's property, which caught his attention. T1. 55. Roberge followed the noise to Tufano's home and saw Tufano standing before a plastic container with a hose in his hand, the container "filled up with water," just about to the top. T1. 56, 100. Inside the plastic container was a Havahart trap with a cat inside of it. T1. 56-57. Roberge testified that Tufano was holding the trap down, and that although he didn't know how long this had been going on, he claimed the cat was close to drowning. T1. 58, 99-100. Upon seeing this, Roberge yelled at Tufano to get the trap out of the bucket, which, Roberge said, prompted Tufano to do so and release the cat. T1. 59.

Roberge further testified that the cat ran away "sopping wet," but did not appear to be injured. T1. 59. Roberge

testified that Tufano told him that he had hit the cat and was trying to “put it out of its misery.” T1. 62. Roberge testified that after Tufano released the cat, Roberge started walking back to his home and saw John Williams, another Colonial Village resident, parked in the street. T1. 71-72. Roberge testified that he did not mention anything to Williams about what happened. T1. 84. Roberge did not immediately report what he saw to police. T1. 60-61. When asked about his failure to promptly report the incident, he said that everyone deserves a “second chance.” *Id.*

Later, however, a conversation with his neighbor, Sharon Barry, prompted Roberge to report the cat-trapping incident to the police. T1. 60-61. Specifically, Barry told Roberge that Tufano had a history of trapping cats. T1. 61. After he heard that, he decided to report the incident to police, four days after the incident. T1. 55, 61; T2. 168. When reporting the incident, Roberge did not claim that Tufano said he was “trying to put the cat out of its misery.” T1. 105.

Williams testified that on May 26, 2019, he was driving through the neighborhood when he noticed Tufano grabbing for a cat, and then saw a soaking-wet cat run across the street. T1. 108-09. Upon seeing this, Williams parked his truck in front of Roberge’s house and got out. T1. 111. He did not hear any words between Tufano and Roberge, but he did hear Tufano say that the cat was hurt and that he was “trying

to put it out of its misery.” T1. 111-12. Williams testified that he did not have a conversation with Roberge that day about what happened. T1. 112. However, on cross-examination Williams acknowledged that he and Roberge did speak about what happened at the time of the incident. T1. 114.

Sharon Barry testified that on May 26, 2019, she heard “a lot of yelling” coming from Tufano’s property, right across the street from her own. T1. 133-34. She was able to tell that it was two males yelling but could not tell what they were yelling about. T1. 134-35. Barry did not hear or see the cat on the day in question, but she had a conversation about it the next day with Roberge. T1. 135, 145-46. She knew Roberge was one of the two men yelling because she saw Tufano chase Roberge back to Roberge’s trailer. T1. 136. When they had their conversation, Barry told Roberge about a prior cat trapping incident. T1. 142.

Ms. Barry testified that in September 2018, Barry and Tufano had a discussion that upset her regarding Tufano placing a Havahart trap on his property. T1. 142-44. Barry, who routinely let her two cats roam the park freely without identifying collars, went to Tufano’s property to speak with him about the trap. T1. 143. Tufano told Barry that he was trying to catch cats in his trap because he had just put up a birdfeeder and did not want cats to mess with the birds, which made Barry upset. T1. 144. Tufano told Barry to get off

his property and she responded, “this ain’t your property,” and refused to leave. T1. 153, 157. Tufano then called the police to remove Barry from his property. T1. 144-45, 157. After speaking with police, Tufano agreed to remove the trap from his property. T1. 145.

Following Barry’s testimony, the court issued a limiting instruction to the jury regarding Barry’s testimony about Tufano’s prior use of a trap. T1. 160. The court instructed the jury that the testimony about Tufano’s prior use of a trap was admissible for the following reasons:

[T]o show the defendant’s familiarity with the trap, how it works...that it’s his; to show his intent regarding his use of the trap, his prior use of a trap and how it was different the prior time or this time now in May of 2019, and to explain how Roberge reported the case.

T1. 160-61.

Tufano testified in his own defense, agreeing that the core of the story is true but providing context for what happened. Over the preceding couple years, Tufano had been having issues with cats causing damage to his property. T2. 184. These cats, some strays and some uncontrolled pets, would jump on cars and scratch them, and there were incidents in which they would get into cars and urinate and defecate in them. T2. 184-85. When Tufano put bird feeders

up in his yard, cats repeatedly attacked the birds, prompting him to take the bird feeders down. T2. 185.

Among the cats attacking the birds on Tufano's property were Sharon Barry's cats. T2. 185. Barry did not put collars on her cats as required by the community rules. T2. 186. When Tufano approached her about her cats attacking the birds, she was not willing to do anything to stop it because "that's what the cats do." T2. 186. These issues with cats prompted Tufano to place a Havahart trap in his yard. T2. 187.

Upon learning about the trap in Tufano's yard, Barry entered Tufano's property in an attempt to disarm the trap. T2. 187. After having a conversation about the trap, Tufano called the police after Barry told Tufano to "go F [himself]" and refused to leave his property. T2. 188. Tufano removed the trap and had Barry served with a no trespass order. T2. 189.

Tufano testified that on May 26, 2019, he was driving through his neighborhood when a cat ran in front of his car and did not come out from underneath his car. T2. 195-96. When Tufano exited his vehicle to see what happened, he saw the cat on the ground not moving. T2. 196. The cat's eyes were closed but it was still breathing. T2. 197. Tufano picked up the cat, carried it to his yard, and retrieved a Havahart trap from his shed. T2. 198. The trap was 36" long, 12" high,

and 10” deep. T2. 198-99. At this time, the cat had opened its eyes but was not moving. T2. 202-03. Tufano put it into the trap. T2. 202-03.

Intending to transport the cat to the local humane society, Tufano retrieved a 50-gallon plastic container and some tuna fish to feed the cat. T2. 205, 206. He put the trap in the container to protect the interior of his car; as he explained, the trap had sharp edges, was dirty, and the cat might expel waste. T2. 205. When Tufano attempted to feed the tuna fish to the cat, it lunged at him and bit his hand. T2. 206. Tufano quickly withdrew his hand from the trap, scraping it along the metal of the trap, and causing him to bleed. T2. 209.

At this point, Tufano decided to let the cat go since it had revived and did not appear to be injured. T2. 212. When he tried lifting the trap out of the container, the container came up with the trap because it was lodged in there. T2. 213. When Tufano would grab the sides of the trap attempting to remove the trap, the cat would attack his fingers, prompting Tufano to get the hose. T2. 217-18.

Tufano testified that he sprayed the hose into the tub, setting it to a “fog pattern,” and causing the cat to move to the back of the trap, which allowed Tufano to grab the trap without his fingers being attacked. T2. 218-19. This “fog pattern” hose setting was a “light mist.” T2. 219. At that

point, Roberge approached Tufano and began yelling at him. T2. 218. Tufano told Roberge that he had hit the cat with his car and explained what he was doing. T2. 220. There was only a “residual” amount of water in the tub, as Tufano had only been spraying water for five to ten seconds. T2. 223. Tufano testified that he was not trying to drown the cat. T2. 223.

Officer Nicole Lefebvre, who testified in the State’s case-in-chief that she investigated the case and interviewed witnesses, was recalled on rebuttal. T2. 270. She testified that Tufano told her that he had sprayed the cat in an attempt to calm it down. T2. 271-72. She also testified that Tufano gestured with his hands to demonstrate how much water was in the bucket. T2. 272. Based on Tufano’s demonstration, Lefebvre estimated that there were about four inches of water in the bucket. T2. 272. Lefebvre acknowledged that although she had recorded the interview, she failed to preserve a copy of the recording. T2. 273-74.

SUMMARY OF ARGUMENT

First, the trial court unsustainably exercised its discretion by denying Tufano's motion in limine to exclude evidence of a prior cat trapping episode, to the prejudice of his case. Rule 404(b) requires application of a three-prong test to determine admissibility of prior acts that have a tendency to inflict prejudice. The evidence of prior trapping failed the first prong of the test because it was not relevant for a purpose other than to show Tufano's disposition to trapping cats and had no bearing on any issue actually in dispute. The evidence also failed the third prong of the test because the danger of unfair prejudice to Tufano in admitting this evidence substantially outweighed any minimal probative value it may have had. The fact that Tufano had previously attempted to catch neighborhood pets in a trap appealed to the jurors' sense of outrage and carried a substantial risk of unfair prejudice.

Second, the trial court unsustainably exercised its discretion by denying Tufano's motion in limine to impeach prosecution witness Sharon Barry with evidence of a prior conviction for Unsworn Falsification. The court improperly determined that Ms. Barry was factually innocent of the offense to which she pled nolo contendere and was in fact convicted, rather than assessing the conviction for what it represented on its face: Ms. Barry was convicted of Unsworn

Falsification for falsely accusing an intimate partner of domestic assault. The impeachment value of Ms. Barry's conviction was high. Ms. Barry was an important witness, as she was the one who escalated the situation to the level of police involvement, encouraging another witness to call the police, when the witness had not seen fit to report an incident to the police on his own. Thus, the trial court unsustainably exercised its discretion when it employed a balancing test to exclude the impeachment evidence.

I. THE TRIAL COURT UNSUSTAINABLY EXERCISED ITS DISCRETION BY DENYING TUFANO'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR ACTS OF CAT TRAPPING.

Trial counsel for Mr. Tufano filed a motion in limine, seeking to exclude Sharon Barry's testimony regarding Mr. Tufano's alleged history of trapping cats on his property. App. 2. The State filed an objection, arguing that it should be able to admit evidence of "the defendant's admission, and Ms. Barry's and Mr. Williams' awareness, that [Tufano] has, in the past, trapped and released cats." App. 6. The State contended that the evidence, while falling within the scope of Rule 404(b), was "relevant to the defendant's intent and plan when he trapped the cat on this occasion as well as his knowledge of the trap used." App. 7.

The court (Houran, J.) denied Tufano's motion and ruled the evidence admissible, incorporating into its ruling the arguments made by the State. App. 11-12. Mr. Tufano filed a motion to reconsider about a year later as the trial was about to get underway. App. 13. The State filed an objection, and the court (Ruoff, J.) denied the motion to reconsider after a hearing. T-MH. 6-15; App. 18, 28. The Court unsustainably exercised its discretion in denying the motion in limine because the evidence served no purpose other than to show that Tufano had the propensity to engage in the conduct charged, and because if it did have any minimal probative

value, it was substantially outweighed by its prejudicial effect.

A. Rule 404(b) – general principles.

Evidence of prior acts is not admissible to prove the character of a person in order to show that the person acted in conformity with such character. N.H. R. Evid. 404(b). Evidence of prior bad acts “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Rule 404(b)(1). “The purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs.” *State v. McGlew*, 139 N.H. 505, 509 (1995) (quotation omitted). In the lower court, the State bore the burden of proof in demonstrating the relevance of the bad act evidence. *State v. Glodgett*, 148 N.H. 577, 579 (2002).

Prior act evidence may be used for non-propensity purposes, if the following three-prong test is met: (1) The evidence is relevant for a purpose other than proving the defendant’s character or disposition; (2) there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair

prejudice to the defendant. Rule 404(b)(2); *Glodgett*, 148 N.H. at 579. On appeal, Tufano disputes that the questioned evidence met the first and third prongs of this test.

B. The standard of review.

To prevail on appeal, Tufano must demonstrate that the trial court's ruling admitting evidence pursuant to Rule 404(b) was an unsustainable exercise of discretion. *State v. Colbath*, 171 N.H. 626, 632 (2019). "For the defendant to prevail under this standard, he must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." *Id.* (quotation omitted). The trial court's order was an unsustainable exercise of discretion because the evidence did not meet the first or third prongs of the Rule 404(b) test.

C. The evidence did not meet the first prong of the Rule 404(b) test.

In order to be relevant under the first prong of the Rule 404(b) test, evidence of a prior act must have had "some direct bearing on an issue actually in dispute." *State v. Bassett*, 139 N.H. 493, 496 (1995) (quotations and citation omitted). Further, "there must have been a clear connection between the particular evidentiary purpose, as articulated to the trial court, and the ... [disputed evidence]." *Id.*

The State argued that the cat-trapping evidence was relevant for several purposes other than propensity: To prove

“intent and plan,” to prove the defendant’s “knowledge of the trap used,” and to prove “context.” App. 7. These arguments will be addressed separately.

1. Tufano’s alleged history of trapping neighborhood cats was not relevant to prove the non-propensity of his “intent.”

First, the State argued that Tufano’s history of trapping neighborhood cats was relevant to prove the non-propensity purpose of his “intent... when he trapped the cat on this occasion....” App. 7. The State did not argue “plan” separately from “intent,” App. 7-8, so this brief analyzes them together.

“To be relevant to intent, evidence of other bad acts must be able to support a reliable inference, not dependent on the defendant’s character or propensity, that the defendant had the same intent on the occasions of the charged and uncharged acts.” *State v. Pepin*, 156 N.H. 269, 277 (2007) (quoting *State v. Bassett*, 139 N.H. 493, 499 (1995)). “The Court will find sufficient support for a reliable inference of intent only if the defendant’s intent in committing other bad acts and the defendant’s intent in the charged offenses is closely connected by logically significant factors.” *Pepin*, 156 N.H. at 277 (quotation omitted).

The State did not, however, argue that the prior act evidence was relevant to intent in the sense of Mr. Tufano’s intent to commit the crime. This was not a specific intent crime, and the State only had to prove that Tufano acted

negligently. Instead, the State argued that the prior act evidence was relevant to show that Mr. Tufano's story of how the cat came to be in the trap in the first place was not true.

The State framed its argument as follows: While Tufano claimed to have struck the cat with his car, rendering it unconscious, the evidence would show that the cat was well enough to run away on its own when released. App. 7. The State contended that the prior act evidence bolstered its case as follows:

[T]here is a reasonable inference that the defendant trapped the cat on this particular day not because it was injured, but because it was on his property. When the cat became agitated, he then took a hose to the cat out of malice and frustration.

App. 8.

Thus, the State began with the premise that an animal rendered unconscious by a blunt force impact probably would not later regain consciousness and run away from a perceived threat, so Tufano must have been dishonest in his account to the police. From there, the State sought an answer to a question: If Tufano was dishonest to the police, then what was his intention in putting a cat in a trap? And from there, the State arrived at its conclusion: In the past, Tufano's intent in trapping cats was to remove them from his property, and since his story to the police seemed improbable in the

State's view, his intent must have been the same on this occasion.

Interestingly, the central premise of this argument, the perceived contradiction between a cat being unconscious and motionless at one point in time, and yet conscious and capable of running at a later point in time, does not implicate Rule 404(b) at all. The State always had the ability to make that argument, and to use it to question the credibility of Tufano's story. The issue before the court was whether the prior act evidence had any further probative value intending to prove Tufano's intent. If it did, it was only in the propensity sense: since Tufano trapped cats in the past for the purpose of protecting his property from feline intruders, he must have trapped the cat at the center of this case for the same purpose, to protect his property.

In other words, this argument fails under Rule 404(b) because it does not establish that the defendant's intent in the past and with respect to the charged offenses were closely connected by logically significant factors. It is nothing more than saying that he did it before to protect his property, so he must have done it this time to protect his property. As this court stated in *Hastings*, quoting from a treatise:

To bridge the temporal and spatial gap between the two incidents, the prosecutor must assume the accused's propensity to entertain the same intent in similar situations. That assumption is

the inescapable link between the charged and uncharged crimes. The trier of fact can reason from the starting point of the uncharged crime to a conclusion about the mens rea of the charged crime only through an intermediate assumption about the accused's character or propensity.

State v. Hastings, 137 N.H. 601, 605 (1993) (quoting Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea*, 130 Mil. L. Rev. 41, 51-52 (1990)).

The court's analysis in *Hastings*, a case with analogous underlying circumstances, supports reversing Tufano's conviction because of the lower court's error. In *Hastings*, the trial court admitted evidence of the defendant's subsequent unlawful firearm possession in Vermont, in the defendant's New Hampshire felon in possession trial, for the purported purpose of proving the defendant's intent and knowledge. *Id.* at 602. The court reversed *Hastings*' convictions, because the evidence of the subsequent federal firearm convictions "was not only not connected in some significant way with the previous event, but it was not in any way connected." *Id.* at 605. The evidence was "at best weak evidence of the defendant's state of mind at the time of the alleged offense" and "at worst show[ed] the defendant to be disposed to possess guns, an impermissible use of the evidence." *Hastings*, 137 N.H. at 605. Similarly, here the prior act evidence was, at best, weak evidence to bolster the State's

theory that Tufano misled the police and actually trapped the cat in a manner and for a reason similar to prior cat trappings, and at worst showed Tufano to be disposed to trap cats, an impermissible use of the evidence.

Prior cases in which prior act evidence is used to prove intent typically involve a much closer connection between the uncharged and charged acts. For example, in *Pepin*, evidence of a prior threat was admissible to prove intent in the defendant's attempted murder and assault trial, where the threat was directed at the same victim and in a similar context as in the charged offense. *Pepin*, 156 N.H. at 278. The prior threat made it more likely than not that his later act of violence toward the victim was intended to cause death or great bodily injury. *Id.*; see also *State v. Cassavaugh*, 161 N.H. 90, 98 (2010) (upholding admission of prior threat against same victim because directly relevant to whether the defendant intended to kill the victim when he shot her, and whether his actions were deliberate and premeditated).

Again, it is important to evaluate the State's "intent and plan" argument in the context of a trial where the lower court made clear that Tufano's intent to abuse an animal was not at issue. When Tufano sought to put on character witnesses that would testify to his peaceful character and affectionate disposition towards animals, arguing that the character evidence was "probative to prove that he is not the kind of

person that would engage in the charged conduct and he has been affectionate toward and nurtured other animals in the past,” the lower court ruled the evidence inadmissible:

It is persuasive to the Court that the defense in this case is solely focused on a lack of intent. There is no dispute that the defendant had a cat in a Havahart trap and that he applied water to it. The defendant admitted to such. Moreover, the Court notes that the defendant is accused of acting with criminal negligence, which means that the State does not have to prove that the defendant intended to harm the animal. Thus, his proffered lack-of-intent evidence is not probative of any issue in the case – because it is offered to rebut something that the State does not need to prove.

App. 28.

If the lower court was right in its reasoning with respect to the character evidence, it was wrong in not applying the very same reasoning to exclude the prior act evidence. Just as Tufano’s proffered lack-of-intent evidence was not probative of any issue in the case, the State’s proffered intent evidence was not probative of any issue in this case.

2. The evidence was not admissible to show the non-propensity purpose of Tufano’s knowledge of the trap used.

The second argument made by the State, that Tufano’s prior cat-trappings were probative of the non-propensity purpose of his “knowledge of the trap used,” also fails. Specifically, in its motion, the State argued that it “will also

be important for the jury to understand that the defendant was familiar with using this particular type of trap and had successfully used it in the past.” App. 8; see T-MH. 7. But Tufano’s knowledge of the trap was not probative of any evidence in dispute. Tufano never denied that he owned a Havahart trap. T2. 287-88. When Roberge came upon Tufano, the cat was in the trap, so there was no question that Tufano knew that the purpose of the trap was to securely house an animal.

Thus, the State’s argument is indistinguishable from cases in which the State unsuccessfully argued that a defendant’s possession of a firearm and ammunition on a later occasion tends to show his knowledge of firearms and possession of such on a prior occasion; *Hastings*, 137 N.H. at 605, or that the defendant’s possession of illegal drugs on one occasion is admissible to show his knowledge of drugs and therefore his possession of drugs on a different occasion. *Hastings*, 137 N.H. at 605. (discussing *United States v. Garcia-Rosa*, 876 F.2d 209, 221 (1st Cir. 1989)). With respect to the latter, the *Hastings* Court endorsed a similar ruling by the First Circuit that resonates here:

We agree with the First Circuit Court of Appeals' conclusion in a drug case where knowledge was at issue: ‘We fail to understand how the jury could make the inference ... require[d] -- that possession of cocaine at one point in time implies possession

of cocaine nineteen months earlier -- without relying on an assessment of the defendant's character, which is exactly what Rule 404(b) is designed to prevent.”

Hastings, 137 N.H. at 606 (quoting *Garcia-Rosa*, 876 F.2d at 221).

If anything, a firearm is a more complicated machine than a Havahart trap, because it has to be properly loaded, there is a safety, the round must be advanced into the chamber, it must be fired, and misuse of a firearm is far more hazardous than misuse of a box trap. If possession of a firearm on one occasion is not probative to show the defendant's knowledge of how to use a firearm on another occasion, then the accused's use of a trap on a prior occasion is not probative of his knowledge of how to use it on the day in question.

3. The evidence was not admissible to show the “context” of Tufano's actions.

Finally, the State argued in its motion, very briefly, that the prior acts should be admitted because “[i]t will be important for the jury to have the knowledge of the defendant's prior trappings in order to place his anger on this particular day in context.” App. 8. If the State raises that argument in its responsive brief, it should be held unpreserved because it garnered so little attention in the State's pleading below. Putting aside the preservation issue,

the only context supplied by the prior act evidence was that Tufano had the propensity to catch cats that torment and kill birds that visit his bird feeder or leave feline waste on his property. For all the reasons discussed above, the context argument must be rejected.

D. The evidence fails to meet the third prong of the rule 404(b) test.

The admission of evidence of prior cat trapping fails the third prong of the test because the probative value of the prior act evidence is substantially outweighed by the danger of unfair prejudice to the defendant. In evaluating this prong, courts consider the following factors: (1) whether the evidence would have a great emotional impact on the jury; (2) its potential for appealing to jury's sense of resentment or outrage; and (3) the extent to which the issue upon which it's offered is established by other evidence. *State v. Costello*, 159 N.H. 113, 123 (2009).

First, as discussed above, the probative value of the evidence for purposes other than propensity is either weak or nonexistent. There was no dispute that Tufano owned a trap and knew that its purpose was to trap and house an animal. The fact that at some point in the past, he had used the trap to catch an unwelcome animal visitor to his property, does not establish that every time he uses the trap, the same attendant circumstances must have occurred.

Second, the unfair prejudice inflicted by the evidence was substantial. Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, or provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision upon something other than the established propositions in the case. *State v. Beltran*, 153 N.H. 643, 649 (2006). This was a trial where many prospective jurors expressed strong opinions about animal abuse and cruelty to animals. T-JS. 15, 21, 23, 26, 48, 62. While there is no shortage of advice on the internet about how to catch a cat with a trap,² it's reasonable to assume that many people would be horrified to hear about a person catching neighborhood pets with a box trap. Indeed, prosecution witness Sharon Barry had to be removed from Tufano's property by the police when she confronted him about cat-trapping activities. T1. 144-45, 157.

The limiting instruction provided by the lower court did not remove or mitigate the prejudicial effect of the prior acts evidence, because it did not limit the jury's consideration of the evidence to benign inferences such as evidence that Tufano knew how to operate a trap. Rather, the limiting instruction expressly permitted consideration of the evidence

² *E.g.*, <https://www.alleycat.org/community-cat-care/tips-for-hard-to-trap-cats/>, visited on 03/10/2022.

“to show [Tufano’s] intent regarding his use of the trap, his prior use of a trap and how it was different the prior time or this time now in May of 2019....” T1. 160-61. As discussed above, *see* Section I(c)(1), consideration of the evidence with respect to Mr. Tufano’s ‘intent’ cannot be disentangled from consideration of the evidence to show Tufano’s propensity to engage in the acts. Thus, the evidence of prior acts was inherently prejudicial and would have carried substantial weight with the jury. *State v Michaud*, 135 N.H. 723, 728 (1992).

II. THE TRIAL COURT ERRED IN DENYING TUFANO’S MOTION TO IMPEACH A PROSECUTION WITNESS WITH HER PRIOR CONVICTION FOR UNSWORN FALSIFICATION.

Prior to trial, Tufano filed a motion in limine seeking to impeach a witness, Sharon Barry, with two of her criminal convictions, but only one of those is pursued on appeal: A 1999 conviction for Unsworn Falsification. App. 20. The State objected, and included an offer of proof in which it related Barry’s explanation of the circumstances underlying the conviction. App. 22-24. The court (Houran, J.) scheduled a hearing. App. 27. After holding a hearing, the court denied Tufano’s motion with respect to the Unsworn Falsification charge. App. 28-29. The court erred in doing so.

A. Rule 609-general legal principles and standard of review.

When attacking a witness's character for truthfulness with evidence of a criminal conviction, the evidence must be admitted if the court can readily determine that one of the elements of the crime required proving a dishonest act or false statement, and if the conviction is less than ten years old. N.H. R. Evid. 609(a)(2). However, if more than ten years have passed since the witness's conviction, "[e]vidence of the conviction is admissible only if: (1) Its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." N.H. R. Evid. 609(b).

Here, the conviction was about 20 years old, so the lower court was required to apply the balancing test. When balancing probative value and prejudicial effect, some pertinent factors include: "[T]he 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." *State v. Hebert*, 158 N.H. 306, 311 (2009)(quotation omitted). On appeal, this Court applies the unsustainable exercise of discretion standard of review. *State v. Mayo*, 167 N.H. 443, 457 (2015).

With respect to the first factor, the impeachment value of the prior conviction, *Hebert*, 158 N.H. at 311, the State argued that the probative value of the unsworn falsification conviction to Barry's credibility was minimal because, in essence, Barry was innocent of that crime, and wrongly convicted. The State supported this highly unusual argument as follows: It had conducted an investigation of the circumstances underlying the conviction, by interviewing Barry and gathering some case documents. App. 24; T-MH. 22. Based on that investigation, the State made the following offer of proof.

The State represented that on or about February 12, 1999, one Brian Laus was "arrested for a domestic violence incident" where he had allegedly assaulted an intimate partner, Ms. Barry. App. 24; T-MH. 22. On February 22, 1999, Ms. Barry prepared an affidavit "recanting the domestic violence incident." *Id.* On August 9, 1999, "Ms. Barry was arrested for unsworn falsification, essentially for ... the false report to police." *Id.* at 22-23. Barry pled *nolo contendere* to that charge, and was found guilty. *Id.* at 23. The State further represented that if questioned on the stand in Tufano's trial, Barry would testify that she did *not* make a false report to the police, that her "initial report to the police was correct, and that she recanted, essentially, to help out her intimate partner." *Id.* at 23; *see* App. 24.

The lower court endorsed the State's reasoning in its order, finding that because Barry would testify that she was wrongfully convicted and was factually innocent of Unsworn Falsification, and because "this kind of recantation-scenario in domestic violence cases is quite common," the conviction lacked probative value. App. 29. Based on these considerations, the court ruled that impeachment by the conviction would be "confusing and prejudicial," and was inadmissible. App. 29.

In opining that recantations in domestic violence cases are common, the court seemed to imply its further belief that those recantations are usually or always true. This is because if the court held the contrary belief that many recantations may be truthful, then the logic of the court's reasoning would not hold. Ms. Barry's claim of a false recantation could simply be a self-serving way of incorrectly proclaiming her innocence post-conviction, making her conviction probative of her credibility. The court erred, because by accepting as an article of faith that Barry's recantation was false and her conviction was wrongly entered, and by ignoring that a false recantation to the police regarding a pending criminal prosecution is itself highly probative of a witness's credibility, the court misapplied the Rule 609 balancing test.

This appeal provides an opportunity for this Court to clarify that when courts employ the Rule 609 balancing test,

while it is appropriate for the court to examine “the impeachment value of the *conviction*,” *Hebert*, 158 N.H. at 311 (emphasis added), it is not appropriate for the court to conduct a collateral proceeding to determine whether the prior conviction was wrongfully entered. It is hardly uncommon for criminal defendants to claim that their past criminal convictions were wrongful convictions. Common sense and experience tell us that some of those claims are true, and some (probably, most) of those claims are not true.

The purpose of Rule 609 is to allow a party to impeach a witness by prior conviction, as opposed to Rule 608(b), which allows a party to impeach a witness based on a fact pattern that did not result in a conviction but is probative of credibility. If the witness challenges the Rule 609 impeachment by claiming that it was a wrongful conviction, this merely gives the jury more information to judge the credibility of the witness. If the jury believes the witness, then it will apply no impeachment value to the prior conviction. If the jury suspects the witness’s claims of factual innocence are merely a self-serving denial of responsibility, this will strengthen the force of the impeachment, as the witness is not only a convicted criminal, but continues to falsely deny guilt.

The lower court invaded the province of the jury by short-circuiting this process and determining, based solely on

an offer of proof, that Ms. Barry had suffered a wrongful conviction. Even the offer of proof itself was weak, as it did not include any corroborative evidence that Ms. Barry had lied when she recanted, as opposed to lied when she accused her intimate partner of assault. And, the court had no factual basis other than its own opinion to conclude that recantations in domestic violence cases are usually false. In sum, the lower court had no evidence from which to draw these conclusions, and no basis to rule out the alternate assumption that Barry lied to the police about being assaulted and recanted to prevent her false accusation from going any further.

But even if the lower court sustainably exercised its discretion by looking beneath the conviction to assess what it perceived to be the underlying facts, the court overlooked that a false recantation is itself highly probative of witness credibility. The State made clear in its offer of proof that Ms. Barry had admitted that she made a false statement to law enforcement authorities for the purpose of manipulating the outcome of a court case. What could be more probative of witness credibility, than an effort to falsify evidence to derail a criminal prosecution?

There is another rule of evidence that allows the lower court to undertake such inquiries, Rule 608(b), which addresses impeachment by prior acts of dishonesty that did

not result in a conviction. When addressing requests to impeach a witness under Rule 608(b), a trial court must determine, among other things, whether the prior act was really an act of dishonesty. *State v. Brum*, 155 N.H. 408, 413 (2007). But under Rule 609, that inquiry should be limited to the “impeachment value of the conviction,” not the trial court’s independent investigation of whether, years prior, the facts underlying the conviction were actually true. Otherwise, there would be no need for Rule 609, as the circumstances underlying prior convictions could be analyzed under Rule 608(b), and the inclusion of Rule 609 in the rules of evidence would have been superfluous.

Once any consideration of Barry’s claim of wrongful conviction is removed from the analysis, the impeachment value of her conviction for Unsworn Falsification is high. The crime is defined as follows:

641:3 Unsworn Falsification. – A person is guilty of a misdemeanor if:

I. He or she makes a written or electronic false statement which he or she does not believe to be true, on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable; or

II. With a purpose to deceive a public servant in the performance of his or her official function, he or she:

(a) Makes any written or electronic false statement which he or she does not believe to be true; or

(b) Knowingly creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) Submits or invites reliance on any writing which he or she knows to be lacking in authenticity; or

(d) Submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he or she knows to be false.

RSA 641:3.

All of the different ways to commit this crime involve the knowing or purposeful making of a false statement. Barry allowed herself to be convicted, without requesting a trial, of a type of unsworn falsification that is particularly probative of credibility in a criminal trial: Giving a false statement to a law enforcement officer that causes a person to be arrested. Other than perjury, it is hard to imagine a conviction that is more probative of the credibility of the witness.

The second *Hebert* factor, the age of the conviction (about 20 years), is the only factor that supports the lower court's balancing of the factors. But that being said, this was not a 60-year-old being impeached by a conviction entered when the person was a teenager. This is not a time period so long, that it flushes out the highly-probative value of a witness's past attempt either to falsely accuse an innocent

man, or to manipulate and derail a criminal prosecution by providing a false recantation to law enforcement officers.

The third *Hebert* factor, “the witness’s subsequent history,” was not developed in the record below. But it is striking that Barry has not sought to petition to annul the conviction, or at least, the State never mentioned any such effort in its argument. Misdemeanor Unsworn Falsification is a conviction that can be annulled under RSA 651:5, 3 years after the misdemeanant “has completed all the terms and conditions of the sentence and has thereafter been convicted of no other crime, except a motor vehicle offense classified as a violation other than driving while intoxicated....” RSA 651:5, III & III(c) & V. If Barry was eligible for annulment, it seems likely, given the prosecutor’s representations about Barry being a wrongfully-convicted victim of domestic violence, that the prosecutor would have mentioned providing that information to Barry at some point during these proceedings. In other words, while the record is silent as to Barry’s subsequent history, it would not be appropriate to read from that silence that she had no further convictions after 1999.

The fourth *Hebert* factor, “the degree of similarity between the past crime and any conduct of the witness currently at issue,” weighs against the lower court’s order. Mr. Tufano’s theory of defense was, in part, that Barry, out of malice, had influenced Roberge to report and perhaps

exaggerate an incident that, until Robert met with Barry, he saw no need to report to the police. T2. 300, 304. The unsworn falsification conviction, on its face, was based on Barry influencing a police officer to arrest her intimate partner based on a false statement. Thus, the prior conviction bears a degree of similarity to conduct of the witness at issue that weighs in favor of allowing the impeachment.

For that same reason, the final *Hebert* factors, the “importance of the witness” and “the centrality of the credibility issue,” weigh in favor of allowing the impeachment. Barry was an important witness at trial, as she was the one who escalated the situation to the level of police involvement. Roberge, who discovered Tufano with the cat, was not going to report the incident to police until he spoke with Barry, who encouraged him to go to police. T1. 41, 88-89. A reasonable jury could have concluded that, but for Barry, there never would have been police involvement or an arrest in the matter. If the jury had known of Barry’s conviction for Unsworn Falsification, it would have a far greater basis to conclude that her involvement in pushing this case forward may have arisen out of the corrupt influence of her own prior dispute with Tufano that ended with her removal from his property by police, rather than out of good faith desire to protect animals from abuse.

“Trial courts have broad discretion to fix the limits of proper areas of cross-examination, including attacks upon a witness’s credibility...The trial court, however, may not completely deny a defendant the right to cross-examine a witness upon a proper matter of inquiry and must permit sufficient cross-examination to satisfy a constitutional threshold.” *Brum*, 155 N.H. at 416. Here, the lower court’s errant ruling inflicted prejudice, and was not harmless error, because it deprived the jury of an important tool to determine whether Barry, or Tufano, testified truthfully at trial.

Accordingly, this Court must reverse Tufano’s conviction and remand for a new trial.

CONCLUSION

Based on all the foregoing, Mr. Tufano respectfully requests that this Court reverse his conviction and remand for a new trial.

Undersigned counsel, who would present oral argument, requests 15 minutes.

Respectfully submitted,



/s/ _____
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Attorney Lothstein acknowledges the substantial and extremely helpful work performed by third year UNH School of Law student and Lothstein Guerriero PLLC employee, James Simpson, in the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, copies of this brief were distributed to all registrants subscribed to this e-filing matter, including Sam Gonyea, Esq., New Hampshire Attorney General’s Office, and one copy was sent by electronic mail to David Tufano.



/s/ _____
Theodore Lothstein

CERTIFICATE OF WORD COUNT

I further certify pursuant to New Hampshire Supreme Court Rules 16(11) and 26(7), that the body of this brief, exclusive of pages containing the table of contents, tables of citations, and any addendum, contains less than the limit of 9,500 words.



/s/ _____
Theodore Lothstein

NEW HAMPSHIRE SUPREME COURT

No. 2021-0429

**State of New Hampshire
Appellee**

v.

**David Tufano
Appellant**

**ON APPEAL FROM JUDGMENT
OF THE STRAFFORD COUNTY SUPERIOR COURT**

**ADDENDUM OF APPELLANT
DAVID TUFANO**

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

Case Name: **State v. David J Tufano**
Case Number: **219-2019-CR-00417**

Name: **David J Tufano**, 19 Colonial Village Park Somersworth NH 03878
DOB: September 04, 1965

Charging document: Complaint

Offense: Cruelty to Animals	GOC:	Charge ID: 1668140C	RSA: 644:8	Date of Offense: May 26, 2019
---------------------------------------	-------------	-------------------------------	----------------------	---

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Misdemeanor

Sentence: see attached

August 24, 2021
Date

Hon. David W. Ruoff
Presiding Justice

Kimberly T. Myers
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **Stafford County House of Corrections**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: _____
Clerk of Court

SHERIFF'S RETURN

I DELIVERED THE DEFENDANT TO THE **Stafford County House of Corrections** and gave a copy of this order to the Superintendent.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Katelyn Elizabeth Henmueller, ESQ Defendant Defense Attorney Stephen C. Brown, ESQ
 Sex Offender Registry Other _____ _____ Dist Div. _____

The State of New Hampshire SUPERIOR COURT COMPLAINT

RECEIVED

SEP 17 2019

Case Number: 219-2019-CR-417

STRAFFORD SUPERIOR COURT
Charge ID: 1668140c

<input type="checkbox"/> VIOLATION	MISDEMEANOR	<input checked="" type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> UNCLASSIFIED (non-person)
	FELONY	<input type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> SPECIAL <input type="checkbox"/> UNCLASSIFIED (non-person)

You are to appear at the: **Strafford Superior Court**
 address: **259 County Farm Road Dover NH 03820**
 in: **Strafford County**
 at:
 on:

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT:

<u>Tufano</u>	<u>David</u>	<u>J.</u>
Last Name	First Name	Middle
<u>19 Colonial Village Park</u>	<u>Somersworth</u>	<u>NH</u>
Address	City	State
		<u>03878</u>
		Zip
<u>Male</u>	<u>White</u>	<u>5'06</u>
Sex	Race	Height
		<u>180</u>
		Weight
		<u>Brown</u>
		Eye Color
		<u>Brown</u>
		Hair Color
<u>09/04/1965</u>	<u>09TOD65041</u>	<u>New Hampshire</u>
DOB	License #	OP License State
<input type="checkbox"/> COMM. VEH.	<input type="checkbox"/> COMM. DR. LIC.	<input type="checkbox"/> HAZ. MAT.
		<input type="checkbox"/> 16+ PASSENGER

AT: Somersworth, NH
 On or about Between 5/26/2019 in the above county and state, did
 commit the offense of:

RSA Name: **Cruelty to Animals**
 Contrary to RSA:
 Inchoate:

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:
negligently beat, tortured, or in another manner mistreated an animal, to wit a cat, by trapping the cat, placing the trap in a contained, and adding water to said container

Additional allegations are attached. Jury Verdict: Guilty
 against the peace and dignity of the State. June 25, 2021
 Date: 09/10/2019 *Katelyn E. Henmueller*

Katelyn E. Henmueller 266703 **Katelyn E. Henmueller** **Strafford County Attorney**
 Prosecutor's Signature NH Bar ID # Printed Name Prosecuting Attorney's Office
 Assistant County Attorney

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: Strafford Superior Court
Case Name: State v. David J. Tufano
Case Number: 219-2019-CR-417 Charge ID Number: 1668140C
(if known)

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: Guilty	
Crime: Cruelty to Animals	Date of Crime: 05/26/2019

A finding of GUILTY/TRUE is entered.

CONVICTION

This conviction is for a Misdemeanor

- A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.
- B. The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:

OR The defendant is cohabiting or cohabited with victim as a _____

OR A person similarly situated to _____

CONFINEMENT

_____ of the sentence is deferred for a period of _____.
The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____.

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

- C. The sentence is consecutive to case number and charge ID _____
 concurrent with case number and charge ID _____

- D. The court recommends to the county correctional authority:
- Work release consistent with administrative regulations.
 - Drug and alcohol treatment and counseling.
 - Sexual offender program.
 - _____

Case Name: State v. David J. Tufano

Case Number: 219-2019-CR-417

HOUSE OF CORRECTIONS SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.

Effective: Forthwith Upon release from _____
The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Field Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

A. **Fines and Fees:**

Fine of \$ \$1000, plus a statutory penalty assessment of \$ ~~0.00~~ \$240.00 to be paid:

Today

By 8-30-21

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

B. **Restitution:**

The defendant shall pay restitution of \$ _____ to _____

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

C. **Appointed Counsel: NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State v. David J. Tufano

Case Number: 219-2019-CR-417

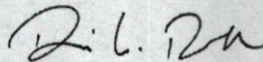
HOUSE OF CORRECTIONS SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. The defendant's _____ in New Hampshire is revoked for a period of _____ effective _____
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the _____
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.

For Court Use Only

Note: This will be recorded as a Class B Misdemeanor. The defendant was convicted of a negligent act, which means he was convicted of an offense in which he did not intend to commit a crime, nor did he intend a particular result - he simply failed to become aware of the risks his conduct created.



Honorable David W. Ruoff

August 24, 2021