THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0361

State of New Hampshire

v.

Adrien Stillwell

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County (North) Superior Court

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
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(15 minutes oral argument)

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TABLE OF AUTHORITIES

QUESTION PRESENTED

1. Whether the court erred by permitting the State's expert to relate testimonial hearsay in violation of the Confrontation Clause.

Issue preserved by the State's motion to admit, A1-A6, Stillwell's objection, A7-A8, the parties' arguments, M1 75-86, and the court's order. Supp. 24-26.*

* Citations to the record are as follows:
"DB" refers to Stillwell's opening brief;
"SB" refers to the State's brief;
"A" refers to the Appendix filed with Stillwell's opening brief;
"M1" refers to the motion hearing held on April 6, 2017;
"Supp." refers to the Supplement filed with Stillwell's opening brief;
"T" refers to the transcript of the trial held on April 27-28 and May 1-5, 2017.

STATEMENT OF THE CASE AND OF THE FACTS

In his opening brief, Stillwell advances three arguments, the first of which contends that the trial court erred in permitting the State's expert to relate testimonial hearsay in violation of the Confrontation Clause. On that issue, the State advances in its responsive brief, among other arguments, a claim that any error was harmless beyond a reasonable doubt. This reply brief addresses the State's harmless error argument.

I. THE COURT ERRED BY ADMITTING TESTIMONY FROM THE STATE'S EXPERT IN VIOLATION OF STILLWELL'S RIGHT TO CONFRONTATION.

The State makes two arguments in support of its claim that any error in the admission of the challenged evidence was harmless. First, the State argues that the other evidence overwhelmingly established that Stillwell shot M.P. SB 28-29. Second, the State argues that overwhelming evidence established Stillwell's guilt of first degree murder, even if he was not the shooter. SB 29-30. Bearing in mind that the State has the burden to demonstrate harmlessness beyond a reasonable doubt, State v. Page, __ N.H. __ (decided March 19, 2019) (slip op. at 9), this Court must reject both arguments.

The conclusions of its expert, Perlin, were crucial to the State's case because they contradicted Burman's testimony identifying Younge as the shooter. Burman distinguished the three men by their distinctive and "very obvious[ly]" different-colored sweatshirts. T 233-34, 243-44. Burman watched the man in the black sweatshirt charge across the street to M.P.'s house where the gunfire began. T 231-32, 244, 249; see T 250 ("I watched him because I was curious as to why he was running across the street."). As the gun fired, Burman saw the "one in the white hoodie," Stillwell, run away. T 247, 250. Through several police interviews and at trial, Burman

remained certain that the man in black was the shooter "because . . . he was in all black and was very much distinguished from the other two." T 251. From the videos taken immediately prior to the shooting, it is undisputed that Stillwell wore the white sweatshirt and Younge wore the black sweatshirt. T 305-06, 1410. Thus, Burman identified Younge as the shooter. T 1379.

Burman's exculpatory testimony contradicted the State's claim that Stillwell, and not Younge, killed M.P. To counter Burman's testimony, the State otherwise relied on the testimony of co-defendants, two of whom reached exceptionally favorable plea deals just before Stillwell's trial began, and of a jailhouse informant with a history of seeking leniency in exchange for testimony attributing murder confessions to other prisoners. Only Perlin's testimony that Stillwell's DNA was on the gun, while Smith's and Younge's were not, brought the force of scientific validation to the State's claim that Stillwell fired the shots.

In its summation, the State argued that Perlin's testimony indisputably proved that Stillwell (rather than Younge) was the shooter:

> The scientific evidence demonstrates beyond any doubt that the Defendant's DNA, not Michael Younge's, not Nathaniel Smith's, was on the grip and on the hammer of that weapon, exactly where you'd expect the shooter's DNA

> to be. . . [Perlin] concluded by telling you that a match between the Defendant's DNA and the DNA found on the gun was 88.4 trillion times more likely than a coincidental match, 88.4 trillion. For some perspective, the[re] are less than 10 billion people on Earth. Based upon that statistic, there is no reasonable doubt that the Defendant's DNA was on a gun. And likewise, there is no reasonable doubt that Nathaniel Smith and Michael Younge's DNA is not on the gun.
>
> . . .
>
> Think of all the ways that the shooter in this case had to handle the gun. . . . [I]f Michael Younge had handled the murder weapon to that extent, then his DNA would be on the gun. You don't need a PhD to know that. But the fact of the matter is Michael Younge's DNA is not on that gun. The Defendant's DNA is. And the Defendant's DNA is on that gun because, just like Nathaniel Smith and Michael Younge and Scott Collier told you, [Stillwell] is handling that gun on November 3, 2015. And while he was handling it, the Defendant used it to shoot [M.P.] in the back.

T 1412-14.

The erroneously-admitted evidence formed a powerful link between Stillwell and the shots fired at M.P. See T 409 (lead detective describing "Mr. Stillwell's DNA being on the

murder weapon" as "obviously huge" and "a big piece of evidence" supporting the conclusion that Stillwell was the shooter). Under these circumstances, the State cannot prevail on its claim that the erroneous admission of such "obviously huge" evidence was harmless beyond a reasonable doubt.

Second, this Court must also reject the State's alternative argument that the identity of the shooter did not matter because the State had overwhelming evidence of Stillwell's guilt as an accomplice. At no point in closing did the prosecutor argue that the jury should convict Stillwell even if he did not shoot M.P. On the contrary, as quoted above, the State committed itself entirely to the theory that Stillwell fired the fatal shots. See, e.g., T 1404 ("Fact[], the defendant shot [M.P.] in the back before running away and dropping that gun..."); T 1405-07, 1411-14, 1427 (similar statements); see also T 1410-11 (criticizing reliability of Burman's testimony); 1411-16 (disputing claim that Younge fired shots).

As a result, the parties did not engage on the question whether, if Stillwell did not fire the shots, the other evidence proved him to have been an accomplice. See RSA 626:8 (defining criminal liability for conduct of another). To prove accomplice liability, the State must prove both that the accomplice had the purpose that the crime succeed, and that the accomplice performed the requisite act of aiding the

principal. RSA 626:8, III(a). For present purposes, the question is not whether the State elicited evidence sufficient to justify a conviction on an accomplice theory. Rather, the question is whether, despite having failed to argue the accomplice theory to the jury, the evidence of guilt on that unargued accomplice theory is so overwhelming as to make harmless beyond a reasonable doubt the erroneous admission of powerful evidence on the theory the State did argue – that Stillwell shot M.P. Here, even accepting the evidence that Stillwell was present at the scene, the nature of the crime – the shooting of an unarmed and unsuspecting man standing on a public street – is not such as necessarily requires assistance or aid. The two men who accompanied the shooter but did not themselves shoot could readily be found – even if they shared the shooter's purpose – not to have done anything that amounted to aid. Undoubtedly for this reason, the prosecution chose to focus on the claim that Stillwell fired the shots. For the same reason, this Court cannot find the evidence supporting the accomplice theory so overwhelming as to render harmless beyond a reasonable doubt the erroneous admission of evidence tending strongly to support the Stillwell-as-principal theory.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Mr. Stillwell's opening brief and those to be offered at oral argument, Mr. Stillwell respectfully requests that this Court reverse his convictions.

This brief complies with the applicable word limitation and contains no more than 1307 words.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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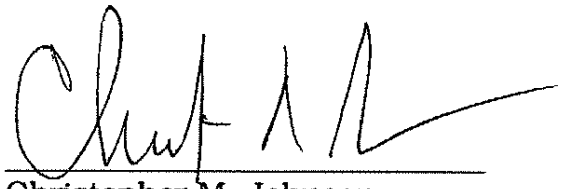

Christopher M. Johnson

DATED: April 29, 2019