

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0341

State of New Hampshire

v.

Jami Castine

Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court

BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

Whether the court erred by entering convictions and imposing sentence on both of the first-degree assault verdicts.

Issue preserved by defense motion to set aside the verdict, the State's objection, and the court's ruling. App. 36; A21-A35.*

* Citations to the record are as follows:

"A" refers to the separate appendix containing pleadings and other relevant materials;

"App." refers to the appendix attached to, and paginated with, this brief containing the trial court order that Castine appeals;

"H" refers to the transcript of the pre-trial hearing held on December 7, 2017;

"T" refers to the consecutively-paginated transcript of the ten-day trial, held in March 2018;

"S" refers to the transcript of the sentencing hearing, held on June 8, 2018.

STATEMENT OF THE CASE

In 2017, a Rockingham County grand jury indicted Jami Castine with four charges alleging offenses against twin brothers IDR and JDR (born 9/6/14), who were given by their mother to Castine for keeping during periods in March and April, 2016. Three charges alleged first-degree assaults committed against JDR, with each distinguished by a distinct specified serious bodily injury. One indictment charged retinal hemorrhaging and detached retinas. T 139-40; A5-A6. A second charged “brain bleeds.” T 140; A7-A8. The third indictment, understood as an alternative theory if a single assaultive act caused all injuries, H 11; T 1774-79, specified retinal hemorrhaging, detached retinas, and brain bleeds. T 138-39. The fourth indictment, involving IDR, charged Castine with an enhanced felony version of second-degree assault premised on blows manifested by the presence of multiple bruises. T 139; A3-A4.

Castine stood trial over ten days in March 2018. The jury acquitted Castine on the alternative-theory JDR indictment specifying all the alleged injuries, but otherwise convicted her as charged. T 1935-43. The court (Delker, J.) sentenced Castine to consecutive, stand-committed terms totaling twenty to forty years for the JDR retinal hemorrhaging-detached retinas charge and for the IDR charge. The court pronounced a consecutive, suspended term

of ten to twenty years for the other JDR count. S 22-24; A36-
A41.

STATEMENT OF THE FACTS

By the spring of 2016, Lindsey Dubon-Romero faced significant challenges. She was unemployed and homeless, and after staying for brief periods with various family members and friends, moved into a family shelter in Manchester. T 203-223, 234-40, 255, 642. In September 2015, immigration authorities had arrested her husband and he remained in detention until deported to Honduras in April 2016. T 190, 193-94, 204, 463-70. Dubon-Romero thereafter became, for all practical purposes, the single mother of four children, the oldest of whom was three. T 471-72. The children were CC (born 1/10/13), the twins IDR and JDR, (born 9/6/14), and MDR (born 11/1/15). T 188, 190, 196, 206.

In late 2015 or early 2016, through a friend, Dubon-Romero met Jami Castine, herself the mother of three young children. T 213-15, 1027-28. Castine lived with her boyfriend Matt Hunt, their daughter, and, on a shared-custody basis with their fathers, her two other young children, in a trailer in Epping on property owned by Castine's parents, Tim and Joni Castine. T 911-12, 1027-28, 1466-69. Tim and Joni ran a towing and auto salvage business and they, along with several of their adult children and other relatives, lived in homes on the property. T 911-14, 944-45, 1029, 1466-68, 1750.

Upon hearing of Dubon-Romero's difficulties, Castine expressed sympathy and, in March 2016, Dubon-Romero asked Castine for help with the children. T 217-18. Castine agreed to take them in, and, on March 4, 2016, Dubon-Romero brought her three youngest children to stay at Castine's house for the first time. T 217-18, 222-23, 230, 235-37.

Thereafter, because Dubon-Romero had no car or driver's license, Castine or Hunt would drive to Manchester to pick up or bring back one or more of Dubon-Romero's children for varying periods of time, thereby allowing Dubon-Romero to move more easily around Manchester in search of a job and a residence. T 201, 252-54, 433-34, 473, 1045. Castine never asked for, and Dubon-Romero never gave, any money to cover the expenses Castine incurred in transporting and caring for Dubon-Romero's children. T 231, 270, 431-32, 1104. Rather, Castine told Dubon-Romero that she loved the children, missed them during periods they spent with Dubon-Romero, and was glad just to help. T 270, 272, 329, 343, 384, 439-42, 449, 677. Indeed, on a couple of occasions, Castine gave Dubon-Romero money. T 431. The two discussed the possibility that Castine might become eligible to receive state reimbursement for her expenses as the part-time caretaker of Dubon-Romero's children, but there was no evidence that

that possibility ever progressed to the point of action. T 343-44, 350.

On the evening of March 22, 2016, all of Dubon-Romero's children were back with her in the family shelter. T 254-59, 265, 280, 502. Dubon-Romero intended thereafter to keep all four children with her. T 283. However, finding that having them all was stressful and interfered with her efforts to find work, she asked Castine to take them back. T 283-87. On March 25, CC, JDR and IDR were brought to Castine. T 287-89, 454-55, 517. The following day, Castine returned CC to Dubon-Romero, and picked up MDR. T 290-92, 523-24.

On March 28, 2016, Castine had IDR, JDR, and MDR, while Dubon-Romero had CC. T 292. On that day, Castine texted Dubon-Romero that JDR seemed not well. T 292, 572-82. Hunt drove JDR to Manchester, picked up Dubon-Romero at the shelter, and took them to Elliot Hospital. T 293-94, 301, 453, 1038, 1053-54. Upon seeing JDR, Dubon-Romero did not think it necessary to take him to the hospital, but Hunt insisted that they do so. T 304, 1054, 1162, 1392-93. An emergency-room doctor at the hospital examined JDR and diagnosed dehydration and the flu. T 886-87, 893. JDR received treatment and was discharged that evening. T 891-92, 907.

That event constituted a significant point of reference in the trial, insofar as it was probable that JDR had not yet

suffered the injuries that returned him to the hospital ten days later, on April 8. If he already had the injuries, the doctor on March 28 would have noticed them. T 864-77, 886, 1201-02. Some evidence suggested that the April 8 brain injuries could have developed over time, T 1224-25, 1247, 1255, but even allowing for that possibility, there was little likelihood that the serious injuries JDR presented on April 8 resulted entirely from trauma suffered before March 28. T 1831-32 (retinal hemorrhages likely occurred after March 28); but see T 1816-18 (doctor noting that symptoms described on March 28 could be consistent with undiagnosed head injury).

There was conflicting evidence about when, after March 28, Dubon-Romero returned JDR to Castine. Dubon-Romero testified that she gave JDR to Castine on March 31 in exchange for MDR, and did not see JDR again until he went to the hospital on April 8. T 351-53, 360-61, 592. Much other evidence, though, including Dubon-Romero's statements to doctors and investigators on April 8, indicates that she returned JDR to Castine on April 4. T 596-608, 614-18, 1165-67, 1207, 1237-38, 1599-1601, 1630. On that version of events, JDR spent the period from March 28 to April 4 with Dubon-Romero. Given the impossibility of ascertaining the age of a bruise, T 1632, and given medical evidence suggesting that the bilateral subdural hematomas can, and here perhaps did, develop over time, the defense argued that

the injuries could have been inflicted before JDR returned to Castine on April 4, and therefore by Dubon-Romero. T 1875-77.

Between April 5 and April 8, CC, JDR and IDR stayed with Castine. T 368-71, 524-25. On the morning of April 8, Castine left with a friend, Alexandria Frank, to drive to the Manchester clinic at which Castine received her daily methadone dose. T 673, 1058, 1167, 1384-85. Shortly after Castine departed for Manchester, Hunt called her to report that JDR was unresponsive. T 1066, 1385. Hunt left the trailer to seek aid and encountered Tim, Joni, and Patrick Mills, the boyfriend of another of Tim and Joni's daughters and an occasional employee of the towing business. T 918, 1065-66, 1488-90, 1750-53. Upon entering the home, Mills, who had some training as an EMT, examined and attempted to treat JDR. T 919-23, 1065-68. Tim called 911, and the police and an ambulance quickly arrived on the scene. T 922, 929, 951, 955-56, 1066, 1491, 1756-58. Soon afterwards, Castine also arrived, having turned around in response to Hunt's call before reaching Manchester. T 931, 1385.

The ambulance took JDR to Exeter Hospital, from which he was soon transferred first to Elliot Hospital in Manchester, and then to Boston Children's Hospital. T 960, 977, 982, 1203, 1235-36, 1261-64. It emerged that JDR suffered bruising, a detached retina, retinal hemorrhaging, injury to

brain tissue, and bilateral subdural hematomas. T 1203-04, 1210, 1219-20, 1225-28, 1598, 1602-03, 1606-12. Expert medical testimony indicated that those injuries, or at least the eye injuries, could only have resulted from the application of significant force to JDR's head. T 1218-19, 1224-28, 1608-16, 1831-33, 1852-53, 1860; see also T 1680 (noting that subdural hematoma can result from fall).

On April 8, IDR did not have comparably serious injuries. He briefly remained in Castine's custody until removed later that day by DCYF. T 967-68, 1189, 1507. Subsequent examinations of IDR at Elliot Hospital that day and on April 20 disclosed the presence of several bruises. T 973, 983, 1289-1318, 1338, 1361. The doctor who performed the April 20 examination testified that the location of the bruises tended to suggest that they did not result from the kinds of accidental bumps and falls to which toddlers are prone. T 1295-1311, 1361. The doctor accordingly opined that the bruises resulted from physical abuse. T 1316. The doctor further testified that the bruises resulted from trauma inflicted at some point during the preceding three-week period. T 1354.

The crucial disputed issue at trial concerned the identity of the person who inflicted those injuries on JDR and IDR. Given the shifting of the children back and forth between

Castine and Dubon-Romero, the dispute raised the questions of when and how the injuries were inflicted.

The State took the position that Castine inflicted the injuries, most probably sometime between April 4 and April 8. The State therefore emphasized medical testimony suggesting that there would not be a significant latent period between the infliction of the force causing the injuries, and the manifestation of JDR's loss of consciousness on April 8. T 1224-25, 1247, 1255 (period of hours to days could intercede between the infliction of the injury and the manifestation of symptoms); T 1613, 1621-22, 1635-36 (trauma occurred within days to weeks of presentation at hospital, but "likely" within days or hours); but see T 1822-23 (doctor called by defense testified that trauma causing fluid to collect "had to have happened some days prior, potentially going back a week or more"; "week to ten days perhaps").

The State also sought to isolate Castine as the perpetrator, rather than Frank, Hunt, CC, or anybody else who had contact with the child between April 4 and April 8. Thus, Frank, Hunt and Joni all testified that they did not hit or otherwise injure JDR. T 685-86, 1069-71, 1185-90, 1478-79. The State contended that three-year-old CC, though sometimes aggressive toward his younger siblings, would not have been able to muster the force necessary to cause the injuries. T 1228-29, 1616.

In addition to that effort to demonstrate the innocence of other possible perpetrators, the State elicited testimony tending to cast suspicion on Castine. Frank testified that she saw Castine spank, push and kick JDR and refer to the children in derogatory or racially-insulting terms. T 697, 700-02, 709-10, 714. Frank claimed to have surreptitiously made a video-recording on her phone of one instance in which Castine physically abused the children. T 714-16, 756-58, 787, 1024-25. She testified that she told Tim and Joni about the video, prompting them to tell Castine. T 716-17, 833-34. As a result, Castine attacked Frank and took her phone away. T 717-20, 791-92, 829. According to Frank, Tim and/or Castine then scrolled through her phone to erase the video. T 719-20, 799, 803-04, 839. She alleged that this incident occurred on or just before April 8, and other evidence corroborated the existence of the fist fight. T 713-14, 758, 793-94, 802, 822, 833-34, 1091-93, 1096-97, 1445, 1762-63. Any estrangement, however, did not last long, as Castine and Frank rode together to Manchester on the morning of April 8. T 721-27.

The defense challenged Frank's claim to have made such a video, citing several inconsistent statements and other issues with Frank's credibility. T 762-63, 791-805, 823, 1098-99. Tim denied that Frank ever told him that Castine mistreated the children, and denied ever handling her phone

to delete a video. T 1761-64. Other evidence established that Frank did not mention the lost video to the police until after a police officer told her that Castine's defense would likely blame Frank for the injuries. T 1429-36, 1444-45.

The State also elicited testimony from Mohamed Zerguine and Dylan Czubaruk, two young men who visited Castine's home three times and saw her interact with the children. T 1509-62. Czubaruk testified that, after initially describing the twins as cute, Castine spoke of them in derogatory terms, describing them as "useless," "not like normal babies," "autistic," and "retarded." T 1511-12. He also testified that she referred to them using a racial epithet and made a bad joke about "smacking sense into them." T 1512-13, 1521-22; see also T 1543-44, 1553 (Zerguine's similar testimony). Czubaruk claimed that, on one occasion, Castine expressed anger toward the children and said that she would "smack the shit out of them." T 1524.

During one visit, Czubaruk arrived just after an event which left one of the twins "stunned" and "in distress and pain." T 1515-16. Castine seemed frantic and said that CC had just hit the child with a toy, but also expressed the fear that she would "get in trouble." T 1516. During the third visit, Castine asked whether Czubaruk thought the child's condition would improve. T 1519. Czubaruk testified that he

saw more bruises on the children on the third visit than he had seen during the earlier visits. T 1524-25.

Both men testified that the children seemed normal and happy when interacting with other adults but seemed stiff and emotionless when interacting with Castine. T 1526-27, 1548-49. Czubaruk and Zerguine claimed that, in their presence, Castine handled a child in an incautious and ungentle manner. T 1520-22, 1537, 1544-50. Concerned by what he had seen and prior to hearing about JDR's hospitalization, Zerguine went to the police on April 8 to report his observations. T 1540, 1551.

Hunt testified, however, that he never saw Castine use force on the children. T 1099-1100, 1191. In a similar vein, the defense elicited testimony from Courtney Witham, another visitor to the home during the time the twins were present. T 1728-29. She testified that Castine seemed frustrated by the children's impairments but behaved appropriately toward them. T 1728-31, 1735.

Finally, the prosecution called attention to some of Castine's statements and text messages. On April 6, after Joni Castine watched the twins for an hour, she expressed concern to Castine about the possibility that JDR had a brain injury. T 1473-77. Castine later texted Joni to ask her not to have "anyone call the State," while protesting: "I don't touch

these kids, mom.” T 1484. A follow-up text urged Joni not to “get cops involved.” T 1485.

A police officer testified that, at the scene on April 8, Castine denied knowledge of how JDR got his injuries, unless it was from a fall from a high chair. T 1375. During an interview at the police station the following day, Castine recalled also an occasion when CC punched JDR. T 1376-77, 1380-82. She also reported that, on the morning of April 8, CC “had run towards [JDR] as if to give him a hug and when he reached [JDR] he pushed him down.” T 1383.

For its part, the defense emphasized the possibility of other causes of the injuries. Hunt was the only adult present when JDR was discovered to be unconscious on April 8 and was also his sole adult caretaker during a period on the morning of April 6. T 1170-77. At one point after April 8, Hunt texted Castine a message expressing thoughts of suicide and a fear that he would go to prison because Castine had insisted on taking care of Dubon-Romero’s children. T 1182-84, 1188-89; see also T 1173-74, 1185, 1442-43 (describing text Castine sent to Hunt saying “don’t hit [JDR],” admitted for its relevance to Castine’s state of mind, and explained by Hunt as probably intended to say “don’t let [CC] hit [JDR]”).

For a similar reason, the defense focused on CC, a child who by many accounts manifested aggressive behavior toward his siblings. Dubon-Romero acknowledged that CC had

thrown toys that struck his brothers or had otherwise caused them injuries. T 297-99, 414-18, 498-506. Prior to April 8, Castine complained to Dubon-Romero about CC's behavior, prompting Dubon-Romero to acknowledge that CC could be, as she put it, an "asshole." T 372-78, 386, 458, 517-21, 572. Other observers and caretakers also saw CC act violently in such ways. T 508-09, 692-93, 1470, 1722, 1725, 1731-34.

Castine and Hunt both reported events on or shortly before April 8 in which CC hit JDR. T 402-03, 1056-57, 1062-63. According to the witnesses, in one such incident, CC overturned a high chair in which JDR was sitting, causing him to fall to the floor. T 402-03. Frank also was present during that incident and testified to hearing the chair fall. T 687.

SUMMARY OF THE ARGUMENT

The unit of prosecution with respect to first degree assault as charged here is the assaultive act, not the resulting injury. Thus, a court can enter only a single judgment of conviction and pronounce a single criminal sentence when a single assault causes more than one injury. Therefore, to enter convictions on both the first degree assault charge alleging brain bleeds, and the first degree assault charge alleging eye injuries, the State had to prove that different assaults caused each injury.

To prove that distinct acts caused the separate injuries alleged in the two indictments, it was not enough to prove that JDR had separate injuries. Nor was it enough to prove that Castine assaulted JDR more than once. Rather, as stated above, the State had to prove that separate assaults caused the eye and brain injuries. Because the State failed to prove that point, the trial court erred by entering separate convictions and sentences on those two charges.

I. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO SET ASIDE, FOR INSUFFICIENT EVIDENCE, ONE OF CASTINE'S TWO FIRST DEGREE ASSAULT CONVICTIONS.

The jury returned guilty verdicts on two counts of first-degree assault for offenses against JDR. T 1935-36. The indictments underlying those two charges differed only in that each alleged a different serious bodily injury. One alleged "retinal hemorrhaging and detached retinas," A5, while the other alleged "brain bleeds," A7; T 140.

After the verdicts, the defense moved to set aside one first-degree-assault verdict, arguing essentially that the two indictments alleged alternative theories of a single crime, rather than two separate crimes. A21-A29. In the motion, the defense referred to pre-trial litigation connected with a defense motion for a Bill of Particulars. A21-A22; see also A9-A13 (motion for Bill of Particulars). During that litigation, the defense expressed the view that, to record separate convictions for the two indictments, the State would have to prove that a separate blow caused the eye injury from the blow that caused the brain injury. A11-A12; H 6-20.

In connection with that motion, the court agreed with the defense premise that the unit of prosecution for first degree assault was the perpetrator's assaultive act, rather than the victim's injuries, such that if one assaultive act caused multiple injuries, only one conviction could be

entered. H 15-16. This Court’s caselaw likewise supports that understanding. See State v. Lynch, 169 N.H. 689, 708 (2017) (holding, in context of simple assault, that “[n]othing in the language of the statute suggests that the legislature intended to allow multiple punishments for a *single* criminal act against a *single* victim, simply because the act results in multiple injuries”) (emphases in original). Consistent with that understanding of the law, in the final jury instructions, the court told the jury that, to convict on both charges, it had to find, beyond a reasonable doubt, that a separate assaultive act caused the brain bleeds from the act that caused the eye injuries. T 1925-26.

In further support of the motion to set aside the verdict, counsel noted that no witness testified to having seen Castine inflict a blow that could have caused the injuries to JDR’s eyes and brain. A22-A23. Moreover, the testifying medical experts all agreed that it “could not be determined whether the injuries sustained by JDR occurred as the result of one act or separate acts.” A240A25; see also T 1230, 1251, 1613, 1624-25, 1628, 1835-37 (testimony of expert witnesses to that effect). Given that failure of the State to prove that the brain bleed and the eye injuries were caused by separate

blows, the defense argued that the court could only enter judgment on one of the first-degree assault convictions. A25.¹

The State objected. A30-A35. It did not, however, dispute that entry of judgment on both verdicts required proof that separate acts caused the brain bleeds and the eye injuries. Instead, it argued that the jury heard evidence from which it could reasonably conclude that separate acts caused the distinct injuries alleged in each of the two indictments. A31-A32.

In so arguing, the State focused first on the evidence of Castine's statements describing occasions when CC hit, kicked, and pushed JDR. A31. The State thus declared that "this evidence is demonstrative of the fact that JDR was assaulted on more than one occasion by the defendant." A31. The State further cited Joni's testimony that, on April 6, it appeared to her that JDR had "some sort of head injury [in] that he was clenching his teeth and . . . had a black eye." A31. Finally, the State claimed support for its view in the fact that, while the medical experts agreed that it was possible the injuries alleged in the two indictments resulted from a single blow, it was also possible that they resulted from separate blows. A32. In that regard, the State emphasized evidence of

¹ The motion to set aside also advanced other challenges to the convictions. Castine does not pursue those other arguments on appeal.

the presence of “new blood” and “old blood” in the subdural hematomas. A32.

The court did not hold a hearing on the motion. By a one-word order, the court denied the motion. App. 36. In so ruling, the court erred.

In State v. O’Neill, 134 N.H. 182, 184-85 (1991), this Court articulated the standards governing motions to set aside a verdict. When a defendant claims that the State introduced insufficient evidence to support a verdict (or, as here, insufficient evidence to support both of two verdicts), the claim implicates the familiar doctrines governing appellate review of the sufficiency of the evidence. Id. at 185; see also State v. Spinale, 156 N.H. 456, 463-64 (2007) (discussing standard).

Evidence is legally insufficient to prove an element of the offense if “no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt.” State v. Collyns, 166 N.H. 514, 517 (2014). The conviction of a defendant on legally insufficient evidence violates the Due Process Clause of the Fourteenth Amendment. Jackson v. Virginia, 443 U.S. 307, 317-318 (1979). Sufficiency of the evidence is reviewed *de novo*. Collyns, 166 N.H. at 517.

Special considerations apply when, as here, the evidence offered to prove a disputed element is entirely circumstantial. “It is a well-established rule of criminal law in this State that circumstantial evidence may be sufficient to warrant the finding by a jury of guilt beyond a reasonable doubt.” State v. Germain, 165 N.H. 350, 356 (2013). The law has also, though, long recognized a categorical difference between direct and circumstantial evidence. Id. at 357-58.

Direct evidence of guilt - such as a confession or eyewitness testimony to the commission of the crime - raises a question of credibility. When presented with direct evidence, the jury may convict upon concluding that it believes, beyond a reasonable doubt, that direct evidence to be true. Circumstantial evidence, by contrast, involves the drawing of an inference in addition to a decision whether to believe the testimony presented. Id. at 359. For that reason, in cases involving only circumstantial evidence of an essential element, “if from the circumstantial evidence it’s reasonable to arrive at two conclusions in the case, one that’s consistent with guilt, and one that’s consistent with innocence, then [the jury] must choose the reasonable conclusion consistent with innocence.” T 148-49.

Here, the circumstantial evidence standard applies because the State had no direct evidence that, by means of more than one assault, Castine caused JDR’s brain and eye

injuries. Castine did not confess to assaulting JDR even once, much less to doing so more than once. No eyewitness testified to seeing Castine assault JDR even once with such force as would cause the brain and eye injuries. The State's effort to prove that different assaults caused the injuries alleged in the indictments, therefore, depended on inferences from evidence. That reliance on inferences signifies that the State's case, at least on this element, rested on circumstantial evidence.

As noted above, circumstantial evidence can support a conviction if it excludes all rational conclusions other than guilt. Translated to the present dispute, that standard focuses the inquiry on the question whether a rational jury could find, beyond a reasonable doubt, that JDR's eye and brain injuries resulted from separate assaults. It was not enough to prove that JDR suffered separate injuries. Nor was it enough to prove that Castine assaulted JDR more than once. To prove this disputed element, the State had to prove that Castine assaulted JDR more than once and that separate assaults caused the eye and brain injuries.

The principal obstacle to the State's position appears in the expert medical testimony reporting that, on the basis of JDR's observed injuries, one cannot tell whether they resulted from one blow or from multiple blows. Indeed, some expert testimony indicated that, "commonly, [the injuries] would happen all together." T 1230. In other words, since one

rational conclusion consistent with the evidence is that the blow that caused the eye injury also caused the brain injury, the State cannot carry its burden of proving that separate blows caused those injuries.

None of the considerations advanced by the State renders the same-blow hypothesis unreasonable. First, the fact that Castine made statements describing various attacks by CC on JDR does not do so. It is possible that an assailant who attacked a child on multiple occasions would, when attempting falsely to protest innocence, invent several attacks by some other perpetrator. It is, however, equally rational to conclude that the assailant would invent multiple, alternative-perpetrator assaults to cover a single actual assault, especially when the invented alternative perpetrator is a three-year-old child. It might seem, to the true perpetrator who attempts to deflect blame onto a young child, that the child-perpetrator theory will be more plausible, given the relative lack of force at the command of a three-year-old child, if multiple incidents are invented to explain injuries actually caused in one blow by an adult assailant.

Moreover, the invention of multiple alternative-perpetrator assaults could also reflect merely a desire to explain bruising not causally-connected with the serious bodily injuries alleged in the first-degree assault indictments. For all these reasons, the evidence that Castine described

different attacks by CC on JDR does not prove that separate attacks by Castine caused JDR's eye and brain injuries.

An additional problem undermines the State's reliance on Castine's statements describing CC's several attacks on JDR. The State's argument assumes that Castine was aware not only that she inflicted multiple blows on JDR, but also that different blows caused the head injuries than had caused the eye injuries. For if Castine did not know that separate blows caused the brain and eye injuries, she cannot be supposed falsely to have invented separate attacks by CC to cover her own multiple, legally-significant assaults.

The expert medical evidence, however, established that even a doctor would not perceive that JDR had eye injuries unless the doctor used specialized ophthalmological equipment. T 1249-50, 1622-23, 1827-28. That being the case, there is no reason to suppose that Castine even knew that JDR had eye injuries, much less that those injuries were caused on an occasion different from the assault that produced his brain injury. If the perpetrator thus is not consciously aware of a separate injury, one cannot reasonably suppose that various false accounts of attacks by CC on JDR manifest an intention to cover up that separate injury.

Equally unpersuasive is the State's argument that Joni's testimony about JDR's demeanor on April 6 proves the occurrence of separate assaults causing the charged injuries.

Joni testified that she watched JDR and IDR for between forty-five minutes and an hour on April 6. T 1469-70, 1500. She testified that JDR sat beside her on the couch “giving [her] five and smiling. . . .” T 1471, 1476. She noted, though, that his “teeth were clenched” such that she “couldn’t open his mouth.” T 1473-74. However, when she did open his mouth, he ate and drank. *Id.* As a result, she wondered aloud to Castine whether JDR was “retarded, or [had] a brain injury.” T 1475-77; but see T 1633-34 (medical expert testifying the clenched teeth would not be symptom of brain injury); T 1812 (another expert testifying that a seizure could cause clenched teeth, and a head injury could cause a seizure). For present purposes, it is significant that that testimony could be consistent with a prior assault that caused the later-discovered and -charged injuries, or it could be consistent with prior assaults that, while not causing the later-discovered and -charged injuries, still caused JDR to behave in the lethargic manner Joni described.

First, the expert medical testimony demonstrates the reasonableness of the hypothesis that JDR’s injuries could have remained latent for a period of time after the blow that caused them, and before he suffered the seizure on April 8 that prompted the call for medical help. T 1224-25, 1247, 1255, 1613, 1621-22, 1635-36, 1822-23. On that view of the matter, JDR’s demeanor on April 6 could, just like his seizure

on April 8, have been caused by a single assault inflicted before Joni's observations on April 6. Joni's testimony, therefore, is just as consistent with a single-blow theory as with a multiple-blow theory. It cannot, therefore, supply the proof that makes the exculpatory single-blow theory any less rational than the multiple-blow theory.

Second, and more generally, Joni's testimony suffers the same flaw as most of the State's arguments on the point. Because JDR's eye and brain injuries were hidden from view beneath his skull, no external observer could know precisely what assault caused them, if more than one potentially causative assault happened. And if more than one potentially causative assault happened, it would be impossible to know whether, in the case of each such assault, that potential was realized. So, even if a potentially causative assault happened on or before April 6 and another such assault happened on April 8 immediately preceding the call for help, one cannot know whether the first assault, or the second, or each separately, caused the brain and eye injuries.

The final argument advanced by the State relied on the expert medical testimony describing the discovery of indications of "new blood" and "old blood" in JDR's MRI results. A32. The evidence reflects that JDR presented with two subdural hematomas – distinct areas of pooled blood

within the skull. T 1242, 1821-22. Doctors could not determine the age of those hematomas. T 1243.

At trial, the idea was expressed that the brightness of the areas of blood – as they appeared on diagnostic instruments – could suggest that some of the pooled blood was older than other pooled blood. T 1243. One of the medical experts testified, however, that “sometimes you have subdurals that look old but really aren’t, so I think the consensus is now that you really can’t age them based on CT [scan] alone.” T 1243-44; see also T 1612-13, 1822-23 (other experts similarly opining that one cannot precisely determine the age of a subdural hematoma); T 1675-76, 1819-23 (discussion of efficacy of CAT scan as screening test for “fresh blood” and “older blood”).

Indeed, the results of an MRI performed at Boston Children’s Hospital cast doubt on whether there was any recent bleeding, thereby suggesting that all the blood observed was “old blood.” T 1820-21 (“there’s no evidence found of acute blood. . . so I’m thinking more that what was seen in that first CAT scan was not acute blood but something perhaps easily confused with acute blood”); T 1836 (“I don’t think there’s any way to determine with any precision when these injuries happened, other than the subdural hematomas were not acute, not fresh”). Moreover, the medical experts could not say whether the two subdural hematomas

were inflicted at the same time or at different times. See T 1624-25 (expert agreeing that one “can’t say whether the bleeding was the result of one trauma or one injury”); T 1628 (agreeing that “[i]t would not be possible to determine whether [JDR] had any preexisting subdural hematomas because if there was a prior, the blood would just mix with the new blood....”); T 1835-36 (brain and eye injuries “could well have happened at the same time”).

For two reasons, this evidentiary record defeats the prosecutor’s efforts to find, in the “new blood”/”old blood” idea, proof that two separate blows caused the charged injuries. First, as noted above, the more sensitive instruments used at Boston Children’s Hospital substantially undermined the idea that “new” and “old” blood was present. Second, as indicated by the testimony, the presence of “new” and “old” blood does not necessarily signify the infliction of multiple injuries. It may just show that a single injury bled for a sufficiently long time as to account for “new” and “old” blood.

In the end, the State introduced substantial evidence describing JDR’s injuries. However, in the face of expert testimony that one cannot know whether the brain and eye injuries resulted from the same or separate blows, the State failed to prove the requisite separate blows necessary to support the separate convictions and sentences. Because the State thus failed to prove the requisite separate blows, the

trial court erred in finding the evidence sufficient to support separate convictions and sentences on both of the first-degree assault charges involving JDR. This Court must therefore order that one of the convictions be reversed, and that the case be remanded for re-sentencing.

CONCLUSION

WHEREFORE, Ms. Castine respectfully requests that this Court order that one first degree assault conviction be reversed, and the case be remanded for re-sentencing.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,

By /s/ Christopher M. Johnson
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CERTIFICATE OF COMPLIANCE

I, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5942 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Christopher M. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson

DATED: June 28, 2019

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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NOTICE OF DECISION

FILE COPY

Case Name: **State v. Jami Castine**
Case Number: **218-2016-CR-00907**

Please be advised that on May 03, 2018 Judge Delker made the following order relative to:

State's Motion to Extend Deadline to Respond to Defendant's Motion for Judgment Not Withstanding the Verdict: Granted.

Motion to Set Aside Verdict and for Judgment Not Withstanding Verdict: Denied.

May 10, 2018

Maureen F. O'Neil
Clerk of Court

(278)

C: Joseph C. Malfitani, ESQ; Eliana Forciniti, ESQ; Ryan Christopher Ollis, ESQ; Patricia G. Conway, ESQ; Neil J. Reardon, ESQ; Roger Conant Chadwick, Jr., ESQ; Dianne E. Ricardo, ESQ