

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0341

State of New Hampshire

v.

Jami Castine

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(10-minute 3JX argument)

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ISSUE PRESENTED

Whether the court erred by entering convictions and imposing sentence on both of the first-degree assault verdicts, where the medical testimony was not conclusive, but defendant claimed that JDR had been hit numerous times by his three-year-old brother and that the assaults by the brother caused the injuries, and where the jury was instructed to consider the claims separately.

STATEMENT OF THE CASE

In 2017, a Rockingham County grand jury indicted the defendant, Jami Castine, on four charges. Three charges alleged first-degree assaults against JDR, who was born in September 2014. One indictment charged retinal hemorrhaging and detached retinas. *See* RSA 631:1, I(A); RSA: 651:6, r(e); *see also* Tr.: 139-40; DBA2: A5-A6.¹ A second charged “brain bleeds.” *See* RSA 631:1, I(A); RSA: 651:6, r(e); *see also* Tr.: 140; DBA2: A7-A8. The third indictment listed all the injuries. T 138-39.

The victim in the fourth indictment was IDR, JDR’s twin brother. Tr.: 196. The fourth indictment, charged the defendant with an enhanced felony version of second-degree assault. *See* RSA 631:2, l(a); RSA: 651:6, I(e); *see also* Tr.: 139; DBA2: A3-A4.

In March 2018, the defendant stood trial. The jury acquitted the defendant on the indictment that included all the alleged injuries, but convicted her of the three other charges. T 1935-43. The court (*Delker, J.*) sentenced the defendant to consecutive, stand-committed terms totaling twenty to forty years for the JDR retinal hemorrhaging-detached retinas charge and for the IDR charge. S. Tr.: 22-24. The court imposed a consecutive, suspended term of ten to twenty years for the second charge involving the assault on JDR. S. Tr.: 22-24; DBA2: A36-A41.

¹ “DB: _” refers to the defendant’s brief and page number.

“DBA2: _” refers to the defendant’s supplemental appendix and page number.

“Tr.: _” refers to the trial transcript and page number.

“S. Tr.: _” refers to the sentencing transcript and page number.

STATEMENT OF FACTS

A. The State's Case

Lindsey Dubon-Romero is the mother of four children, CC who was born in January 2013 twin boys, IDR and JDR, who were born in September 2014, and a daughter MDR, who was born in November 2015. Tr.: 188, 196, 206. She married Maynor Dubon-Romero, the father of the twins and the daughter, shortly after CC's first birthday. Tr.: 190. Maynor was an undocumented immigrant. Tr.: 193-94. After they were married, the family moved in with Lindsey's mother. Tr.: 193. Thereafter, the family was repeatedly either homeless or on the verge of homelessness. The family moved to New Jersey for a time, but eventually returned to New Hampshire. Tr.: 197-99, 202. In Summer 2015, Lindsey learned that she was pregnant with her fourth child. Tr.: 201-02. At that point, the twins were five months old. Tr.: 201.

The family lived in a hotel for about two weeks. Tr.: 203-04. Maynor had been working and was paid off the books for the work. Tr.: 191. But when he went to pay the hotel bill, Lindsey "got a knock at the door for ICE, immigration, they had picked up my husband again, and put him in custody." Tr.: 204. Lindsey was six or seven months pregnant. Tr.: 205. Her daughter, MDR, was born in November 2015. Tr.: 206. At same point after January 2016, Maynor was deported. Tr.: 1011.

Although she had known the defendant in middle school, Lindsey reconnected with the defendant, who had three children, through Facebook. Tr.: 213-15. They would message each other about the "stress of living," "being a single parent, finding housing." Tr.: 214. Lindsey said that she

“basically vented” to the defendant. Tr.: 214. The defendant lived with her boyfriend Matt Hunt. Tr.: 911-12, 1027-28, 1466-69.

After moving in and out of a series of apartments, punctuated by stays with her mother, Lindsey got a job in Vermont and talked to the defendant about watching her three youngest children during the week while Lindsey worked in Vermont. Tr.: 217-18. CC would stay with his father’s cousin. Tr.: 218. The defendant agreed to watch the three youngest children. Tr.: 218. Lindsey, however, missed her ride to Vermont and wound up homeless. Tr.: 220.

On March 4, 2016, a family member drove Lindsey and the three youngest children to the defendant’s trailer in Epping. Tr.: 222-23, 288. They arranged to meet at a corner store. Tr.: 236. The defendant arrived with a friend. Tr.: 235. Lindsey told her that she had brought everything that the children needed. Tr.: 236. Lindsey gave the defendant “a couple outfits, some diapers, and formula inside the diaper bag.” Tr.: 236-37.

Lindsey said that she was “going to go look for a place to stay and look for a job.” Tr.: 237. The defendant responded that Lindsey should “[t]ake as much time as [she] need[ed].” The defendant told her, “The kids are fine with me. If you need anything, just text me and I can do what -- try to see what I can do.” Tr.: 237.

When she left the children with the defendant, JDR was “was a happy-go [lucky] child running around playing with his brothers, playing with toys. Bottomless pit, he ate everything in sight. Not very much of a picky eater.” Tr.: 231. He was transitioning to a sippy cup. Tr.: 232. IDR was “a normal child, up playing around with his brothers, with his toys.” Tr.: 232. IDR “was more of a picky eater; he didn’t like his fruits and

vegetables. More, he loved chicken nuggets and a lot of processed food; he would rather [eat] chips and all that good stuff. But he definitely didn't have a problem eating as well." Tr.: 232-33. Both boys were walking. Tr.: 234. MDR was overweight, but had no other health problems. Tr.: 233. CC was "a very hyper child," "very active." Tr.: 238-39. He "loved his brothers. He would say, they're my babies, my brudder. That's what he called them, his brudders." Tr.: 282. He tried to be helpful with the twins. Tr.: 282.

Lindsey was eventually placed with Families in Transition. Tr.: 244. She stayed at the shelter from March 8 through April 15, 2016. Tr.: 627. On the first evening, she stayed with her oldest son, CC. Tr.: 245. They stayed at the shelter for the rest of the week and MDR joined them there. Tr.: 249. JDR and IDR remained with the defendant. Tr.: 249. On March 22, 2016, all four children were staying with Lindsey at the FIT shelter. Tr.: 254-55.

The children went back and forth between the women. For example, on March 25, 2016, Lindsey brought CC and the twins to the defendant. Tr.: 287. The following day, the defendant brought CC back to Lindsey. Tr.: 292.

1. Accounts of Abuse

Alexandria Frank was the defendant's friend and had known her for several years. Tr.: 672-73. She remembered that the defendant cared for JDR, IDR, MDR, and CC at times. Tr.: 676. The defendant told Alexandria that she "had met somebody at the clinic and she was trying to help take

care of [the woman's] kids because [the woman] was having a hard time.” Tr.: 677. Frank said that CC was “mean” to both of his brothers, but that she was never concerned about the amount of force he used on them. Tr.: 693.

Frank recalled that the defendant, when angry, would call the children “little fucker,” “cunt” or “[r]etard.” Tr.: 697. On one occasion, the defendant “used the side of her foot and booted [JDR] in the butt, so he fell forward.” Tr.: 697. She said that she saw the defendant spank JDR “too many [times] to count.” Tr.: 706. She recalled that, when the defendant walked into the room, JDR would “shake,” and he would not talk, play, or eat. Tr.: 706. She said that she could “clearly tell that the little boy was afraid.” Tr.: 706. On one occasion, when she stopped to visit the defendant, JDR had a bloody lip. Tr.: 709. The defendant said that JDR had chapped lips. Tr.: 709. On occasion, Frank saw bruises on JDR. Tr.: 711.

Frank told the defendant that the boys should go back to their mother because she “didn’t think that they were in a safe spot.” Tr.: 710. She filmed one occasion, when the defendant kicked JDR and knocked him over, and, during an argument with the defendant, told the defendant, the defendant’s father, and the defendant’s brother that she done so. Tr.: 717-18. The defendant’s father took the phone from Frank and broke it. Tr.: 719. She was able to put the phone back together, but the video was gone. Tr.: 720. After the argument, the defendant contacted Frank and when Frank went to the defendant’s house to talk, the phone “went missing.” Tr.: 720-21.

Dylan Czubaruk and Mohamed Azziz Zerguine visited the defendant while the twins were staying with her. According to Czubaruk, at first the defendant referred to the twins as “cute,” but then “she started getting into how they were kind of useless or not like normal babies and they don't talk or do anything.” Tr.: 1511. She called them “autistic, retarded, n*gger babies.” Tr.: 1512. Czubaruk was embarrassed because Zerguine was African. Tr.: 1512. She “made a joke” about “smacking the sense into them.” Tr.: 1513.

The next time Czubaruk stopped by, the defendant “was on the phone on the porch frantic, just crying, screaming, had [IDR] in her hand.” Tr.: 1515. She hung up, showed Czubaruk an injury that IDR had and said, “[T]he baby is not okay... [and] I’m going to get in trouble.” Tr.: 1515. She blamed CC for the injury. Tr.: 1515. She said that she heard CC push IDR “down to like an alligator toy.” Tr.: 1516. She asked Czubaruk if he believed her. Tr.: 1517. Czubaruk said that it “just seemed really fishy from the start.” Tr.: 1517.

The third time he visited, this time with Zerguine, the defendant picked up IDR and started showing them his bruises. Tr.: 1520. She forced his mouth open and when he started to cry, she “got annoyed and then she picked [him] up by the arm and then called [him] a n*gger baby and threw” him into the Pack N Play. Tr.: 1520-21.

Although he did not know that JDR had been hospitalized, on April 8, 2016, Zerguine went to the Epping Police Department. Tr.: 1540. When he had visited with Czubaruk a few days before, the defendant had told them “how stupid [the twins] were” and “ripped one of them out of the crib in front of [them and] slammed him next to like [his] brother.” Tr.: 1544. He

said that the defendant grabbed the child “[p]retty violently” and “[p]retty rough.” Tr.: 1545. The twins laughed and giggled when the defendant was not there, but when she came into the room the twins looked “shocked, scared. Their eyes were wide open; just kind of like waiting to see what happens.” Tr.: 1550.

2. March 28, 2019

On March 28, 2016, Lindsey asked the defendant to bring JDR to her because the defendant had told her that the child was “puking again and that he wouldn’t eat or drink and that his lips [were] really dry.” Tr.: 292. The defendant’s boyfriend, Matt Hunt, took him to the hospital, picking up Lindsey along the way. Tr.: 1052-53. Lindsey brought JDR to the hospital because he “seemed very weak” and “he didn’t want to get out of his car seat, he just wanted to sleep.” Tr.: 302. Lindsey “tried giving him his bottle, he didn’t want nothing to do with the bottle.” Tr.: 302.

CC was with her. Tr.: 305. As they waited in the emergency room, the defendant sent her text messages. Tr.: 305-06. At one point, the defendant wrote: “[H]e was eating everything, but every time he move, he’s going to puke. That’s what [the defendant’s daughter] would [do], roll over and puke and dry heave.” Tr.: 306.

When the hospital released JDR, Lindsey said that he was “feeling better. He was drinking out of his cup” and eating graham crackers. Tr.: 338. On March 30, 2016, Lindsey allowed CC to go with Katie, the defendant’s sister, who had offered to help Lindsey. Tr.: 342.

On March 31, 2016, JDR was returned to the defendant and Lindsey took MDR. Tr.: 352-53. On April 4, 2016, Katie returned CC to Lindsey. Tr.: 362. The twins were still with the defendant. Tr.: 362-63. Then CC went back to the defendant. Tr.: 371-72. The defendant sent Lindsey numerous text messages telling her that CC was being aggressive with the twins. Tr.: 374-76.

3. April 8, 2016

On April 8, 2016, Lindsey got a phone call from the defendant telling her that JDR “was unresponsive, that [his] eyes were rolling in the back of his head, and that there was blood coming” out of either his mouth or his nose. Tr.: 387.

JDR was brought to the hospital in Exeter. Tr.: 388. A friend drove Lindsey there. Tr.: 388. The Exeter hospital transported JDR to Elliott Hospital in Manchester and Lindsey’s friend drove her there. Tr.: 390. JDR was then transported to Children’s Hospital in Boston. Tr.: 391. Lindsey’s friend drove her to Boston and, at that point, Lindsey sent the defendant a text message that Lindsey’s mother was coming to take IDR and CC because “DCYF wants my mom to grab both kids.” Tr.: 394 (internal quotation marks omitted). After his stay at Children’s Hospital, JDR went to Crotched Mountain for rehabilitation. Tr.: 422.

At some point, Lindsey asked the defendant how JDR had been hurt. The defendant told her that “she was feeding [JDR] and that [CC] had [run] up to him and pushed the chair that he was sitting in back, and he hit his head off the kitchen floor.” Tr.: 402. After this conversation, although

Lindsey had not accused her, the defendant sent Lindsey a text message, stating: "I'd never lay a hand on kids in my life." Tr.: 403-04 (internal quotation marks omitted).

On the morning of April 8, 2016, Frank stopped to see the defendant. Tr.: 722-23. The defendant needed to go to the methadone clinic and "was all worked up." Tr.: 724. Frank went outside to smoke a cigarette and the defendant told Frank, "[H]urry up, let's go, I'm going to fucking kill these kids." Tr.: 724.

As they drove to the clinic, the defendant received a call from Hunt, and, when she hung up, she told Frank that JDR was "having a seizure." Tr.: 728. The defendant said, "I have to go to the clinic and get dosed. Do you think I should turn around?" Tr.: 728. Frank told her to turn around and the defendant drove home, dropping Frank off before they reached her trailer. Tr.: 729. Frank then stated: "So it goes from seeing this little boy to being A-OK to next thing I know it, I'm looking at a picture of him on the front of the newspaper with black eyes and an oxygen mask on his face." Tr.: 730-31.

Epping Police Officer Stephen Soares responded to the defendant's trailer. Tr.: 923-24; Tr.: 933-34. When he arrived, the defendant and Matthew Hunt were outside. Tr.: 934. There were three adults in the trailer: the defendant's father and mother, and Patrick Mills. Tr.: 935. JDR was on the floor. Tr.: 935. JDR "wasn't moving." Tr.: 936. Officer Soares "checked for vitals," "checked for a pulse," and checked "to see if [JDR] was breathing, which he was." Tr.: 936. The ambulance arrived and took JDR. Tr.: 938.

Officer Soares then spoke to the defendant who told him that JDR was Lindsey's son. Tr.: 939. She told the officer that Lindsey had been homeless and that she had taken the children to help Lindsey. Tr.: 939. She told Officer Soares that CC was in the back bedroom because he "beat" JDR "a lot." Tr.: 940. She said that CC was "fixated with hitting or beating" JDR. Tr.: 940. She said that CC kicked JDR, would push him to the ground, and hit him with toys. Tr.: 940.

Epping Police Department Detective Sean Gallagher also responded. Tr.: 1362. The defendant showed him a chair and said that it had tipped over. Tr.: 1375. She said that "she didn't know... how else [JDR] could have been injured at that point in time." Tr.: 1275.

Epping Fire Department Paramedic Paul Hanley also responded to the 911 call. Tr.: 954-55. JDR was unconscious, but breathing, and he had "bruising just above the nose and the forehead area." Tr.: 956-57. He stayed with JDR during the ambulance drive and JDR was "[m]oaning," "groaning," and "[f]ussing." Tr.: 959.

Later that evening, Epping Police Officer Ann Kane went to Elliott Hospital and took photographs of bruises suffered by IDR and MDR, who were then in the custody of their grandparents. Tr.: 967-68, 973. MDR had bruising on her legs and left thigh. Tr.: 973. "There was bruising on each sides of the hips. And the buttocks had some bruising as well." Tr.: 973. IDR had "had a mark above his left eye" and "light bruising on the upper part of his back... and lower torso." Tr.: 973. IDR had "a red mark on the left eye" and cheek area. Tr.: 973.

4. Medical Testimony: March 28 and April 8, 2016

Thomas D'Aprix was an emergency room physician at Elliott Hospital. Tr.: 840. He saw JDR on March 28, 2016, when the child was brought to the hospital. Tr.: 840. JDR had suffered from a fever, vomiting, and diarrhea. Tr.: 854. The doctor said that he did not note in his report any bruises on JDR. Tr.: 860. On March 31, 2016, the doctor and the hospital "obtained some labs. Clinically, he looked like he might be a little bit dehydrated, so while we [were] waiting for lab results, we treated him for nausea with some nausea medicine. We also gave him some IV fluids while we were waiting for his labs to come back." Tr.: 886-87. JDR "responded well," "[h]is labs were all reassuring, and he was stable for discharge home." Tr.: 892.

The doctor was shown photographs of JDR taken on April 8, 2016. Tr.: 865-77. Dr. D'Aprix said that, if JDR had been bruised on March 28, 2016, the way that his bruises appeared in the photographs, his report would have reflected those bruises. Tr.: 865-77. Shown exhibit 17, which showed "bruising of the upper eyelid and of the lower eyelid," Tr.: 870, the doctor responded:

That is very concerning, and at that point, we would have probably done -- you know, in addition to calling the police, in addition to calling DCYF, I think this is the point where we would have started doing the skeletal survey, looking at all of the long bones in the body to see if there's evidence of fractures there that are acute, of healing and probably also would have done a CAT scan.

Tr.: 871.

Melina Chan, a physician specializing in pediatric critical care medicine, was working at Elliott Hospital on April 8, 2016. Tr.: 1195, 1202. She saw JDR that day. Tr.: 1202. She also reviewed the record from Elliott Hospital and Boston Children's Hospital medical on JDR. Tr.: 1201.

While at the hospital, JDR "started to become very lethargic" and so difficult that the hospital staff discussed whether "to put him on a ventilator to help his breathing." Tr.: 1209. She described JDR's bruises:

[H]e had multiple bruises over his left forehead. A linear bruise with -- with edema, or swelling, to his eyelid, his left eyelid. A bruise on his left cheek, an abrasion, or a scratch, on his right lower eyelid. A small bruise on his right forehead. A laceration, or a cut, with some bruising into his lower lip, multiple bruising on his left shoulder and left wrist, a bruise on his right upper arm, a bruise on the left side of his lower back, multiple bruises to his buttock extending towards the perineum or kind of in between his legs, and then palpable edema or -- or a swelling on his left buttock and linear red bruising below the buttock on his left leg.

Tr.: 1210. JDR also suffered two subdural hematomas and a "midline shift, meaning some of the brain was actually being pushed over because of swelling and blood." Tr.: 1219. Boston Children's Hospital also determined that JDR had "retinal hemorrhages and a retinal detachment," Tr.: 1225, as well as a "diffuse axonal injury," Tr.: 1229.

Dr. Chan said that the injuries were caused by "being shaken," "almost slamming of" a child. Tr.: 1226. She continued, "Usually holding them so that their head whips forward and backwards enough to tear blood vessels in their brain and it's the kind of shaking that any reasonable person would be horrified if they saw it." Tr.: 1226. The

injuries were inconsistent with falling off a high chair or being pushed by a three-year-old. Tr.: 1228. Even if a three-year-old had pushed JDR, the injuries Dr. Chan described could not have been caused by that act. Tr.: 1228.

Dr. Tanya Ianniello worked at the Boston Children's Hospital as in-patient pediatrician and served as a member of the hospital's child protection team. Tr.: 1586-87. On April 9, 2016, she examined JDR. Tr.: 1596-97. JDR was "intubated, meaning he had the breathing tube at that point, so he was given some medications to sedate him." Tr.: 1598. "He had a neck brace on at that point, lots of IVs and tubes for monitoring." Tr.: 1602. He had bruises, including "some bruising over the left eyelid, as well as on the left forehead." Tr.: 1603.

The doctor asked for an "ophthalmology consult" and learned that JDR "had extensive damage in the back of his eyes and the retina, which is the layer in the back of the eye." Tr.: 1605-06. When JDR was discharged, he went to a rehabilitation facility to help "getting back to his baseline as much as he could" because he had a brain injury and eye injuries. Tr.: 1607. He had suffered some permanent loss of vision. Tr.: 1607. The injuries were caused by "acceleration, deceleration trauma," consistent with "a motor vehicle accident or a fall from a high height." Tr.: 1609. The doctor stated that JDR's injuries were "[o]ne of the more severe cases of retinal injuries that I've seen." Tr.: 1611. She characterized the subdural hematomas and retinal hemorrhaging as inflicted trauma, not accidental trauma. Tr.: 1617.

5. The Defendant's Later Statements

On April 9, 2016, Detective Gallagher interviewed the defendant at the police station. Tr.: 1377. At that time, she said that JDR and IRD “got bruises from general playing and that on one occasion [IDR] sustained some bruising because she was changing his diaper and [CC] had come up and began punching him in the face.” Tr.: 1380. She said that CC was “a monster.” Tr.: 1380. “She believed that [CC] had grabbed the bottom of the chair and flipped it over and she demonstrated that in the interview.” Tr.: 1381. She also said that CC “had run towards [JDR] as if to give him a hug and when he reached [JDR] he pushed him down.” Tr.: 1383. She told the detective that she talked to CC after everyone had left to take JDR to the hospital and asked him why he had “done that to his brother.” Tr.: 1385-86. According to the defendant, CC responded, “[B]ecause I can.” Tr.: 1386.

At some point, the defendant told Frank to “go to court and be on her side and let everybody know that she did not do that to that little boy.” Tr.: 730. The defendant told Frank not to talk to the police. Tr.: 731. She told Frank to “stay out of it.” Tr.: 731. When Frank was incarcerated, the defendant wrote to her, promising Frank: “I’ll make sure you have a place to stay. I’ll give you a car.” Tr.: 731.

B. The Defendant's Case

The defendant called Dr. Jakob Kissel, an emergency room physician at Exeter Hospital. Tr.: 1652. On April 8, 2016, he was on duty when JDR was brought to Exeter Hospital and he treated him. Tr.: 1656.

He said that a subdural hemorrhage could be caused by a fall from a standing position but that it was “unlikely.” Tr.: 1680. He said that it was possible that the injury could have been caused by a sibling pushing JDR, but that a push was “not a lot of energy.” Tr.: 1680. He agreed that the injury could have been caused by a fall from a chair. Tr.: 1680.

Holly Stinnett, a child protective worker for DCYF, also testified. Tr.: 1719. In July 2016, she visited Lindsey’s children who were in the care of their maternal grandmother. Tr.: 1721. While she was there, she saw CC bite MDR. Tr.: 1722. When Stinnett told Lindsey, Lindsey said that she was “aware of his aggressive behaviors.” Tr.: 1725.

On April 5, 2016, Courtney Witham, the defendant’s friend, visited her when the twins and CC were staying with her. Tr.: 1728, 1734. She said that the children “didn’t act like normal children.” Tr.: 1730. The three-year old (CC), in Witham’s opinion, was “out of control” and “violent.” Tr.: 1731. At lunch, the twins sat and stared, which Witham found “really strange.” Tr.: 1732. Witham claimed that CC pulled JDR off the chair and grabbed him while he was on the floor. Tr.: 1733. JDR cried, but not for long, which Witham also found “weird.” Tr.: 1732-33.

Timothy Castine, the defendant’s father, testified. He recalled the argument between Frank and the defendant. Tr.: 1762-63. He testified that did not take the cell phone and did not recall anyone else taking it. Tr.: 1762-63.

Dr. Lawrence Ricci, who ran a child abuse evaluation center in Portland, Maine, reviewed JDR’s medical records. Tr.: 1801, 1808. He offered the opinion that JDR’s injuries observed on April 8, 2016 were the result of seizures. Tr.: 1825. He said that “really no way to assess how

old those retinal hemorrhages in [JDR] were on the 8th.” Tr.: 1828. He said that the retinal hemorrhages could have been caused by a “closed head injury.” Tr.: 1831. Dr. Ricci said that it was “not impossible” that JDR had possibly suffered retinal hemorrhaging when he was brought to the emergency room in March. Tr.: 1831. He said that he thought that the retinal hemorrhaging had occurred after that visit, but he was not sure. Tr.: 1832.

Dr. Ricci said that “falling on to the back of the head, particularly from a height of three or four feet on to a hard floor [could] cause pretty significant head trauma.” Tr.: 1833. He said that he thought that the retinal hemorrhage and the brain injury “could well have happened at the same time” but that “one can have subdural hematomas or bleeding on the surface of the brain without retinal hemorrhages, although the opposite is less true.” Tr.: 1835. The doctor stated that he did not believe that anyone could say “with any precision when these injuries happened, other than the subdural hematomas were not acute, not fresh.” Tr.: 1835. He added: “Discounting or leaving out the retinal hemorrhages, I would say that the presentation of the subdural hematomas, some brain dysfunction, seizures, is not specifically diagnostic of a child to be inflicted trauma.” Tr.: 1835.

C. The Jury Instructions

The court instructed the jury that it had to consider the acts separately. After closing arguments, the court told the jury: “The State has the burden of proving beyond a reasonable doubt a separate intent and

separate conduct for each of the crimes charged in the case.” Tr.: 1920. It continued: “you should consider each of those charges separately and determine whether the State has proven that -- each element of each charge beyond a reasonable doubt. So the fact that you may find the Defendant guilty or not guilty or any one of the charges, should not influence your verdict with respect to the other charges in this case.” Tr.: 1921-22. The court told the jury that it would have copies of the indictments. Tr.: 1922. The trial court told the jury:

My purpose in giving them to you is that you can keep track of the charges as you deliberate during your deliberations. And each of the charges is separated or is distinguished by a number here in the lower I guess right-hand corner of the document call -- and it's charge ID and each one has a unique number next to it.

Tr.: 1922.

The court then reiterated that the jury had to find separate acts:

[I]n order to find the Defendant guilty of both of these crimes you must find that the State has proven that the Defendant committed separate acts to inflict the injuries alleged in each of the respective indictments. So in other words, to convict the Defendant of both of these crimes, the jury must unanimously agree that the State has proven beyond a reasonable doubt that the Defendant committed one physical act resulting in the injuries in Charge ID ending with the number 683C and a separate physical act resulting in the injuries alleged in Charge ID ending with 684C.

Tr.: 1924-25.

At the conclusion of the instructions, the court asked, “Anything further? Okay, all right.” Tr.: 1929. Defense counsel raised not objection to the instructions, but it appears that he pointed out that the alternates should be selected. Tr.: 1929.

D. The Motion to Set Aside

After the verdicts were returned, the defendant filed a motion to set aside the verdict. DBA2: A21. The motion asked the court to set aside the verdicts with respect to the three charges that involved assaults on JDR. DBA: A23. The defendant contended that the medical experts who testified at trial “agreed that it could not be determined whether the injuries sustained by JDR occurred as the result of one act or separate acts.” DBA2: A25. The defendant contended that “the doctors could not determine the age of these injuries and, therefore could not determine whether the brain bleeds occurred at the same time as the retinal hemorrhages or some time before or after.” DBA: A25.²

The State objected. DBA2: A30. The State noted that the defendant had given different accounts of the injuries, always blaming CC for them. DBA2: A31. It recounted two different occasions when the defendant blamed CC for hurting JDR as he sat in a chair. DBA2: A31 (“[T]he defendant told Lindsey that on April 8 she was feeding JDR that morning when CC ran up and pushed JDR’s chair over causing JDR to hit his head. The defendant also claimed that on April 8 CC, JDR's brother, flipped

² The defendant also contended that there was insufficient evidence that the defendant caused injury to IDR. DBA2: A26. The motion also requested a new trial. DBA2: A28.

JDR's chair over.”). The State pointed out that the defendant said that CC had hit JDR with an alligator toy. DBA2: A31. The defendant had, on one occasion, sent Lindsey text messages that CC “repeatedly punched both IDR and JDR in the head when she was changing them on different occasions.” DBA2: A31. She also sent Lindsey text messages that CC had been “sucker punching, kicking, hitting, throwing chairs and throwing toys at his brothers.” DBA2: A31. The state concluded that “this evidence is demonstrative of the fact that JDR was assaulted on more than one occasion by the defendant. The defendant made these statements and sent these text messages to cover up her own assaultive behavior.” DBA2: A21.

On May 10, 2016, the trial court denied the motion. DBA1: 36.

SUMMARY OF THE ARGUMENT

The jury returned verdicts, after being properly instructed to consider the charges separately, of guilt on two of the three indictments involving assaults on JDR. Because the defendant told the police and others that CC had repeatedly assaulted JDR, the jury could have fairly concluded that his injuries were the results of more than one assault. Although the medical testimony did not prove that there was more than one assault, it did not prove otherwise. The evidence taken in the light most favorable to the verdict, which included the testimony that the twins were afraid of the defendant, supports the jury's conclusion that more than one assault took place, causing separate injuries. The trial court did not commit error erred by imposing two sentences on those two charges.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT THAT THE INJURIES TO JDR TOOK PLACE ON DIFFERENT OCCASIONS AND, THEREFORE, THE COURT COMMITTED NO ERROR IN IMPOSING THE SENTENCES.

The defendant contends that the two indictments alleging assaults against JDR could have occurred from a single act and, therefore, cannot result in two convictions. DB: 20. She points out that “[t]he indictments underlying those two charges differed only in that each alleged a different serious bodily injury.” DB: 20. “One alleged ‘retinal hemorrhaging and detached retinas,’ while the other alleged ‘brain bleeds.’” DB: 20 (citations to the record omitted).

To prevail upon his challenge to the sufficiency of the evidence, the defendant must prove that 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. When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation.

State v. Flodin, 159 N.H. 358, 362, 986 A.2d 470 (2009) (quotation omitted). This Court will “review the entire trial record because, even though the defendant is not required to present a case, if [the defendant] chooses to do so, [she] takes the chance that evidence presented in [her] case may assist in proving the State’s case.” *State v. Littlefield*, 152 N.H. 331, 349-50 (2005).

“[W]here the proof involves both direct and circumstantial evidence, a sufficiency challenge must fail if the evidence, including the jury’s credibility determinations, is such that a rational trier of fact could find guilt beyond a reasonable doubt, even if the evidence would support a rational conclusion other than guilt if the jury had resolved credibility issues differently.” *State v. Saunders*, 164 N.H. 342, 351 (2012). Direct evidence “is evidence which, if accepted as true, directly proves the fact for which it is offered, without the need for the factfinder to draw any inferences.” *State v. Kelley*, 159 N.H. 449, 454 (2009) (citation and internal quotation marks omitted). Direct evidence includes “the testimony of a person who claims to have personal knowledge of facts about the crime charged such as an eyewitness.” *State v. Newcomb*, 140 N.H. 72, 80 (1995) (quotation omitted).

The State presented the defendant’s repeated statements, through text messages and admissions to friends, that JDR had been repeatedly assaulted. Although she blamed CC, the three-year-old, for these assaults, the jury was free to believe part of her testimony. *See State v. Woodbury*, ___ N.H. ___, 214 A.3d 147 (2019) (“In determining witness credibility, the jury may accept some parts and reject other parts of testimony, and adopt one or the other of inconsistent statements by witnesses.”). Therefore, the jury was free to conclude that JDR had been repeatedly assaulted, but not by CC and not by being hit with a toy or being pushed out of a chair. Rather the jury was free to conclude that the defendant’s statements were evidence of consciousness of guilt because she had repeatedly hit JDR. *See State v. Evans*, 150 N.H. 416 (2003) (“[A]n innocent person does not usually find it necessary to invent or fabricate an

explanation or statement tending to establish [his or her] innocence.”) (citation and internal quotation marks omitted).

In addition to the admissions by the defendant, the reaction of the twins to her strongly suggests that they were repeatedly abused. Zerguine described them as ““shocked, scared. Their eyes were wide open; just kind of like waiting to see what happens.” Tr.: 1550. Frank recalled that, when the defendant walked into the room, JDR would “shake,” and he would not talk, play, or eat. Tr.: 706. She said that she could “clearly tell that the little boy was afraid.” Tr.: 706. On one occasion, when she stopped to visit the defendant, JDR had a bloody lip, which the defendant dismissed as a chapped lip. Tr.: 709. This testimony suggests that the twins were frightened because they knew that the defendant could harm them at any moment. *Cf. Harris v. State*, 964 N.E.2d 920, 925 (Ind. Ct. App. 2012) (A behavioral clinician said that, “when she asked [the victim] what would happen if she ever saw [the defendant] in person again, [the victim] would ‘clam up,’ clench her fists, and shake with anxiety.”).

The medical testimony was not conclusive as to the dates of the injuries, but this is not fatal to the convictions returned by the jury. “Questions about the weight and credibility of expert testimony are left to the fact finders.” *State v. Gay*, 169 N.H. 232, 251 (2016). Although Dr. Ricci suggested that the retinal hemorrhaging may have occurred before the March 28, 2016 visit, Tr.: 1830, none of the doctors was certain regarding the number of the assaults or the number of occasions that they had occurred.

This does not mean that their testimony was not relevant as “[a]n expert need not have an opinion on the ultimate question to be resolved to

satisfy the relevance requirement.” *Id.* at 250-51 (quoting *United States v. Allen*, 390 F.3d 944, 949 (7th Cir. 2004) (internal quotation marks omitted)).

But it does mean that Dr. Ricci’s testimony may have persuaded the jury that the injuries took place on two different occasions. Dr. Ricci’s statement that “one can have subdural hematomas or bleeding on the surface of the brain without retinal hemorrhages, although the opposite is less true,” Tr.: 1835, certainly left the possibility open that the injuries happened on separate occasions. Dr. Ricci testified that in March 2016, JDR “presented with symptoms that could have been related to pre-existing head trauma.” Tr.: 1831. On the other hand, Dr. D’Aprix testified that, if JDR had come into the hospital in March 2016 with “bruising of the upper eyelid and of the lower eyelid,” Tr.: 870, the hospital would have called the police and done a cat scan, Tr.: 871.

In other words, taking the testimony of these two doctors in the light most favorable to the State, JDR could have suffered head trauma before his March 2016 emergency room visit and additional trauma, causing the eye injuries, including retinal hemorrhaging, after that visit. Although the defendant had no obligation to present evidence, in doing so, she “[took] the chance that evidence presented in [her] case [would] assist in proving the State’s case.” *State v. Tabaldi*, 165 N.H. 306, 314 (2013). Dr. Ricci’s testimony may have done just that.

Not only that, but the defendant argued that the injuries to JDR could have happened at the same time. In his closing argument, defense counsel addressed JDR’s injuries, telling the jury:

But questions remain about that injury. The questions are how, when, who. How, when, who. Based simply on the nature of those injuries, there is no scientific way to determine when they occurred. There's also no way to determine whether they were the result of one trauma or two traumas. You heard each one of these doctors say that. Most recently Dr. Ricci. They can't say if it happened as a single event or multiple events.

Tr.: 1872. He pointed out that "Dr. Chan of the Elliott Hospital, the one that was dealing with an emergency, was of the opinion that the subdural hematomas and the retinal bleeding injuries could have occurred at the same time, possibly not." Tr.: 1876. *Cf. State v. Shannon*, 125 N.H. 653, 663 (1984) ("The defendant thus was given ample opportunity to present his theory and the jury was free to consider it.").

Finally, the court repeatedly reminded the jury to consider the charges separately. Tr.: 1920-22, 1924-25, 1929. Juries are presumed to follow instructions. *State v. Smith*, 149 N.H. 693, 698 (2003). And in this case, because the jury acquitted on the third indictment, it seems logical to conclude that it did follow the instructions. This is particularly significant as the jury acquitted the defendant of the very theory pressed here: that the injuries took place on the same occasion. *See* Tr.: 34-35 ("[I]t's further alleged that Ms. Castine committed this offense by inflicting nonaccidental trauma in the form of brain bleeds, retinal hemorrhaging, and detached retina."); *see also* Tr.: 1936 (returning a verdict of not guilty to this charge). On this record, the trial court did not commit error in imposing sentences for each of the injuries suffered by JDR.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a ten-minute 3JX oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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October 21, 2019

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CERTIFICATE OF COMPLIANCE

I, Elizabeth E. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,846 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.

October 21, 2019

/s/Elizabeth C. Woodcock
Elizabeth Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Christopher M. Johnson, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

October 21, 2019

/s/Elizabeth C. Woodcock
Elizabeth Woodcock