THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0314

State of New Hampshire

v.

Keith Chandler

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

REPLY BRIEF FOR THE DEFENDANT

Thomas Barnard
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 16414
603-224-1236
(15 minutes oral argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. THE COURT ERRED BY ADMITTING A PHOTOGRAPH OF A SCREENSHOT OF A FACEBOOK MESSAGE.

In his opening brief, Chandler argued, among other things, that the court erred by admitting a photograph of a screenshot of a Facebook message. DB* 24–38. In its brief, the State argues, among other things, that even if the court erred by admitting the photograph, any error was harmless. SB 32–33. The State has the burden to "prove beyond a reasonable doubt that the erroneously admitted [or excluded] evidence did not affect the verdict." State v. Mackenzie, ___ N.H. ___ (Apr. 8, 2022).

In arguing that any error here was harmless, the State relies on dicta in State v. Racette, ___ N.H. ___ (Apr. 26, 2022), purporting to modify the established harmless-error standard. SB 32. While the established standard is relatively demanding, the standard proposed in Racette is extremely permissive. Even assuming that a modification of the established standard is appropriate, this Court should adopt a more neutral, balanced standard than that proposed in Racette.

Prior to Racette, this Court's harmless-error analysis was well settled. An error was harmless only if "the other evidence of the defendant's guilt [wa]s of an overwhelming

---

* Citations to the record are as follows:
"DB" refers to Chandler's opening brief;
"SB" refers to the State's brief.

nature, quantity, or weight and if the improperly admitted [or excluded] evidence [wa]s merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." Mackenzie, ___ N.H. at ___ (emphasis added). In conducting this analysis, this Court considered both "the other evidence presented at trial [and] the character of the erroneously admitted [or excluded] evidence itself." Id. Over the course of at least 27 years, this Court articulated the standard, including the conjunctive, over one hundred times. See State v. Vandebogart, 139 N.H. 145, 158 (1994) (as modified on reconsideration, Jan. 19, 1995).

In Racette, this Court, after concluding that the trial court erred by excluding evidence offered by the defendant, stated, "We take this opportunity to clarify our harmless error standard." Racette, ___ N.H. at ___. Then, for the first time, this Court purported to replace the conjunctive "and" with the disjunctive "or" and asserted, "Either factor can be a basis supporting a finding of harmless error." Id. Under Racette's proposed standard, this Court could conclude that an error was harmless without considering "the character of the erroneously admitted [or excluded] evidence" at all.

This Court went on to note that the State did not argue that the evidence was overwhelming. Id. After concluding that the erroneously excluded evidence was not cumulative or inconsequential in relation to the evidence of the defendant's

guilt, this Court concluded that the error was not harmless. Id.

In Racette, the parties did not brief whether — and if so how — this Court should modify the established harmless-error standard. This Court did not address the stare decisis factors. See Appeal of New Hampshire Dep't of Transportation, 174 N.H. 610, 615 (2021). Because the disjunctive would result in a standard more favorable to the prosecution, the State had no incentive to seek reconsideration. And because Racette won reversal of his conviction, he too had no incentive to seek reconsideration. Moreover, because this Court did not find that either component was satisfied, its proposed modification of the established standard was dicta. See In re Est. of Norton, 135 N.H. 62, 64 (1991) (statements "not necessary to the decisions" are "truly dicta").

Even assuming that a modification of the established harmless-error standard is appropriate, substituting "or" for "and" is not the way to do it. As this Court acknowledged in Racette, the central question in the harmless error analysis is whether "the error . . . affect[ed] the verdict." Racette, ___ N.H. at ___. If there is a flaw in the established standard, it is that this Court considers the effect of the error only if it concludes that the evidence of guilt was overwhelming. If the

evidence of guilt is not overwhelming, then no error, no matter how trivial or inconsequential, can be harmless.

Substituting "or" for "and" solves this problem only by creating another one. Under the disjunctive standard, if this Court concludes that the alternative evidence of guilt was overwhelming, then, except for the rare "structural error," any error, no matter how prejudicial, must be deemed harmless. If the disjunctive standard is adopted, this Court will find some errors harmless based solely on its view of the strength of the alternative evidence, without any consideration of the error or its effect.

Courts have long cautioned against finding an error harmless based solely upon judges' opinion of the defendant's guilt. As the United States Supreme Court explained in Kotteakos v. United States, 328 U.S. 750, 763, (1946), "it is not the appellate court's function to determine guilt or innocence." Id. at 763. "Those judgments are exclusively for the jury." Id. While "[a]ppellate judges cannot escape such impressions[,] . . . they may not make them sole criteria for reversal or affirmance." Id. "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." Id. at 764. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's

own, in the total setting," although the Court acknowledged that the "difference" is "easy to ignore when the sense of guilt comes strongly from the record." Id.; see also Chapman v. California, 386 U.S. 18, 22 (1967) (reversing state supreme court's harmlessness determination, noting that court's "emphasis, and perhaps overemphasis, upon [its] view of 'overwhelming evidence'"); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (the harmless-error inquiry involves "a host of factors," of which "the overall strength of the prosecution's case" is but one).

Put simply, the question is "whether the error itself had substantial influence" on the result. Kotteakos, 328 U.S. at 765. While the strength of alternative evidence of guilt is a relevant factor in answering that question, it cannot be the only one. Id.

While the United States Supreme Court arguably has, more recently, strayed from this principle, this Court has not. In Neder v. United States, 527 U.S. 1 (1999), the United States Supreme Court held that a trial court's failure to instruct the jury on an element of the offense can be deemed harmless based solely on the "overwhelming" nature of the proof of that element. Id. at 7–20. This Court, however, noting that "Neder . . . has been widely criticized, . . . decline[d] to follow it." State v. Kousounadis, 159 N.H. 413, 428 (2009).

Permitting a finding of harmlessness based solely on judges' views of the strength of the evidence would have a profound effect on trial court practice. Once the evidence of guilt in a particular case reaches a level at which prosecutors and judges anticipate that this Court will call it "overwhelming," they can simply ignore the defendant's constitutional rights, the rules of evidence, and other court rules, confident that, except for the rare "structural error," no error, no matter how prejudicial, will result in reversal. The purpose of the harmless-error doctrine is to "promote[] public respect for the criminal process by focusing on the underlying fairness of the trial." State v. Dana, ___ N.H. ___ (Mar. 10, 2022). Incentivizing prosecutors and trial judges to disregard constitutional provisions, statutes and court rules, if, in their view, the evidence of the defendant's guilt is "overwhelming" will undermine, rather than promote, public respect for the criminal process.

If this Court concludes that modification of the established harmless-error standard is appropriate, then it should hold that "overwhelming" evidence of guilt is neither necessary nor sufficient to find an error harmless. Rather, the question is whether the improperly admitted or excluded evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. While the strength of alternative evidence of guilt is obviously a

component of this balancing, it cannot serve as the sole factor in determining that an error either was, or was not, harmless.[1]

Under any formulation of the harmless-error standard, the error here was not harmless. As noted in Chandler's opening brief, DB 38, the error was highly prejudicial because there was virtually no other corroboration of J.W.'s claims that Chandler sent her sexually explicit messages. The evidence of guilt, moreover, was not strong. This case turned largely on the jury's evaluation of J.W.'s credibility. During the time she claims that Chandler was sexually assaulting her, J.W. repeatedly told her counselor, police officers and social workers that everything at home was fine. She later accused multiple men of sexual assault, although she failed to recall several notable events and her testimony suggested that she suffered from paranoia. The evidence does not prove, beyond a reasonable doubt, that the erroneously admitted exhibit did not affect the verdict.

[1] The result in State v. Newton, ___ N.H. ___ (July 8, 2022), the only instance in which this Court has relied on Racette, is consistent with this modification. In Newton, this Court held that "the excluded evidence was cumulative and inconsequential in relation to the strength of the State's evidence of guilt," without determining whether that evidence was "overwhelming." Id.

CONCLUSION

WHEREFORE, Keith Chandler respectfully requests that this Court reverse, and, alternatively, vacate and remand.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 1,563 words.

Respectfully submitted,

By /s/ Thomas Barnard
Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Sam M. Gonyea, counsel for the State, through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: August 24, 2022