The State of New Hampshire

SUPREME COURT

Case No. 2019-0608

2019 TERM

STATE OF NEW HAMPSHIRE
V.
BRENNA CAVANAUGH

RULE 7 APPEAL OF JURY VERDICT FROM THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF THE DEFENDANT BRENNA CAVANAUGH

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N.H. RSA 627:4

I. A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. However, such force is not justifiable if:

(a) With a purpose to cause physical harm to another person, he provoked the use of unlawful, non-deadly force by such other person; or

(b) He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, non-deadly force; or

(c) The force involved was the product of a combat by agreement not authorized by law.

II. A person is justified in using deadly force upon another person when he reasonably believes that such other person:

(a) Is about to use unlawful, deadly force against the actor or a third person;

(b) Is likely to use any unlawful force against a person present while committing or attempting to commit a burglary;
(c) Is committing or about to commit kidnapping or a forcible sex offense; or
(d) Is likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage.
II-a. A person who responds to a threat which would be considered by a reasonable person as likely to cause serious bodily injury or death to the person or to another by displaying a firearm or other means of self-defense with the intent to warn away the person making the threat shall not have committed a criminal act.
III. A person is not justified in using deadly force on another to defend himself or herself or a third person from deadly force by the other if he or she knows that he or she and the third person can, with complete safety:
(a) Retreat from the encounter, except that he or she is not required to retreat if he or she is within his or her dwelling, its curtilage, or anywhere he or she has a right to be, and was not the initial aggressor; or
(b) Surrender property to a person asserting a claim of right thereto; or
(c) Comply with a demand that he or she abstain from performing an act which he or she is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or serious bodily harm, the person has provoked the use of force against himself or herself in the same encounter; or
(d) If he or she is a law enforcement officer or a private person assisting the officer at the officer's direction and was acting pursuant to RSA 627:5, the person need not retreat.

N.H. RSA 634:2

I. A person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages property of another.

II. Criminal mischief is a class B felony if the actor purposely causes or attempts to cause:

(a) Pecuniary loss in excess of $1,500; or

(b) A substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public service; or

(c) Discharge of a firearm at an occupied structure, as defined in RSA 635:1, III; or

(d) Damage to private or public property, real or personal, when the actor knows that the property has historical, cultural, or sentimental value that cannot be restored by repair or replacement.

II-a. Criminal mischief is a class A misdemeanor if the actor purposely causes or attempts to cause pecuniary loss in excess of $100 and not more than $1,500.

III. All other criminal mischief is a misdemeanor.

N.H. R. Evid. 611(a)

Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.

N.H. R. Evid. 613(b)

Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

N.H. R. Evid. 803(2)

Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

N.H. R. Crim. Pro. 245(b)(6)

Re-Examining and Recalling Witnesses. Redirect examination shall be limited to topics covered on cross-examination except for good cause shown. Prior to being dismissed, a witness is subject to recall by either party. After being dismissed, a witness may be recalled with the court's permission.

QUESTIONS PRESENTED

1. Whether the trial court erred when it refused to give a self-defense jury instruction? Issue preserved by Defendant's Notice of Self Defense, State's Objection, and trial court's ruling. Addendum 49 – 53, TR 637 – 46.

2. Whether the State presented sufficient evidence to prove the charges of accomplice to first degree assault and accomplice to criminal mischief? Issue preserved by Defendant's Motion JNOV, State's Objection, and trial court's ruling. Addendum 54 – 77.

3. Whether the trial court erred in allowing statements of a witness under the excited utterance exception to the hearsay rule and whether the trial court erred in refusing to allow the Defendant to recall a dismissed witness to bring in other statements based on the excited utterance ruling? Issue preserved on the record. TR 406 – 12, 500 – 03.

4. Whether the trial court erred in refusing to allow extrinsic evidence of prior inconsistent pre-trial statements of a witness unless the State was allowed to illicit prior consistent statements of the witness? Issue preserved on the record. TR 362 – 98.

STATEMENT OF THE CASE

This appeal follows a jury trial in the Rockingham Superior Court. Following trial, the defendant, Brenna Cavanaugh (Cavanaugh) was found guilty of accomplice to attempted first degree assault and accomplice to criminal mischief. The defendant was found not guilty of criminal solicitation to first degree assault and criminal solicitation to reckless conduct.

The defendant was sentenced, *inter alia*, to twelve months incarceration on the attempted first-degree assault charge with all but four months suspended. The defendant remains on bail pending the outcome of this appeal.

STATEMENT OF THE FACTS

I. The Intruder

On August 18, 2018, O.L., a juvenile at the time of trial, took his father's truck without permission and without having a driver's license. TR 156, 186 – 87. O.L. drove to Cavanaugh's residence on Summer Street in Portsmouth at approximately 3:00 a.m. Id. O.L. entered Cavanaugh's residence and proceeded to climb the stairs. TR 188. Cavanaugh testified that she woke to a creaky noise and saw the intruder in her bedroom located on the third floor of the house. TR 660-61. Startled, Cavanaugh woke Mark Gray (Gray), telling him there was an intruder (TR 703) and to get his gun. Id.

The intruder disappeared from Cavanaugh's view at which time she heard a door close. TR 664. Frightened and confused, Cavanaugh fled the house as she was concerned the intruder was not alone. TR 662 – 663. After fleeing the home, Cavanaugh stopped on the front stoop of her house where she saw an unfamiliar vehicle directly across the street with its engine running. TR 664. Instinctively, Cavanaugh proceeded to cross the street and bent down to obtain the license plate number to provide to the police. TR 664 – 65.

II. The Shooting

Cavanaugh and O.L. disagree on the timing of the shooting. Cavanaugh told police and later testified at trial that the truck's engine was revving, and its headlights were shining directly in her eyes as she tried to read the license plate. TR 666 – 67. When the truck flew into reverse, Cavanaugh jumped onto the sidewalk as the truck crashed into a telephone

pole with such force that debris was flying everywhere, and the pole had to be replaced. Id. Cavanaugh described the situation as "just chaos. It's – the debris is flying, the tires are squealing, the engine's revving, the pole – I mean, the –it smashed the pole. It was so loud." TR 668. Cavanaugh remembers rounds being fired as O.L. drove towards them. TR 671, State's Exhibit 18 from 6:27:22 – 6:28:07, 6:43:00 – 6:44:00. Immediately after the shots were fired, Cavanaugh called 911. TR 671.

At trial. O.L. testified that he left the scene and stopped at a gas station and threw up. TR 176. He knew his father's truck was damaged and was thinking that he "might get in trouble for this." TR 176 - 77. He also thought that because his father's truck was damaged, he was going to get grounded for that. TR 177. After reflecting on the situation, O.L. then drove home, went to his basement, and started texting his friends. Id.

O.L. testified that about ten minutes after returning home, he was picked up by two friends and driven back to Cavanaugh's house. TR 179 – 180. O.L. noted that he went back to tell the cops it was him hoping "it wouldn't be a big investigation, and they wouldn't come looking for [his] dad's truck and get him in trouble." TR 180.

III. The Investigation

Officer Maloney (Maloney) was the first to arrive at Cavanaugh's Summer Street residence less than one minute from when he heard the gun shots. TR 350. Maloney spoke to Cavanaugh and Gray while other officers looked for the intruder, whose identity was unknown. TR 349 – 51. When O.L. eventually returned to the scene and identified himself as the intruder, Maloney stated that O.L. appeared scared and very nervous.

TR 357 – 58. At the scene, O.L. spoke with Maloney and gave a statement. TR 358.

Officer Pearl (Pearl) testified that he heard gun shots when he was assisting on a traffic stop. TR 404. Pearl called dispatch and while heading to the scene received a description of the vehicle involved in the shooting. TR 404. Pearl searched for the vehicle in the surrounding area and then drove to the scene when he was unsuccessful in locating the intruder's vehicle. Id. Pearl spoke with Gray and Cavanaugh about the intrusion and events following and attempted to secure the crime scene before returning to the police station. Id. Pearl was later called back to the scene when O.L. had returned to the scene. TR 405 – 06. Pearl, who O.L. described as a family friend, notes that he spoke with O.L. briefly at the scene and then Pearl and O.L. drove to the station together. TR 181, 406 – 07.

At the police station, Pearl brought O.L. to the lunchroom and provided O.L. with a drink and some food. TR 407. It was then that O.L. "started to talk to [Pearl] about what had happened…." Id. O.L. testified that he sat in "their lunchroom for probably four hours." TR 181. During this time, O.L. told Pearl about the incident. Id. It was during this conversation, that O.L. allegedly told Pearl that Cavanaugh said, "shoot him," "shoot him." TR 410 – 11. O.L. was then brought home by Pearl and returned to the police department the next day for a recorded interview. TR 411 – 12, 460 – 75.

IV The Trial

O.L.'s testimony was inconsistent with statements he made to police during the investigation. TR 151 – 83. Counsel cross examined O.L. on all but one inconsistent statement. TR 183 – 227.

Following O.L.'s testimony, the defendant moved to impeach O.L. with prior statements he made to Maloney under Rule 613. TR 362 – 98. The trial court denied the Defendant's motion to impeach O.L. indicating that impeachment was not proper because O.L. did not deny his prior statement. TR 371 – 76. The trial court explained that O.L. "didn't deny saying anything to Ofc. Maloney. He, in fact, testified repeatedly that he doesn't remember what he told the police." TR 383. The trial court stated that "[m]y notes then reflect that on multiple occasions [O.L.] testified, 'I don't remember saying it to the police.' My notes are replete with that. 'My memory of the different points are hard. My memory has changed on points. Yes, prior statement, I listened to it within the last week. The written reports were not reviewed. I recall talking to the police. I don't remember when. I know it was in the morning.' And then you were asking him questions about the stairs. And my notes continue to say, 'I don't remember saying.' 'I don't remember saying.' 'I don't know what I said to the police.' You asked him about the pistol being in the hand. 'I don't recall saying it.' Tell police where Mark Gray was standing. 'I don't recall.' So my notes are replete with him telling you over and over again that he doesn't remember what he told the police." TR 367.

The trial court further noted that Rule "613 requires a finding, by me, that he – that it's inconsistent. And I don't make that finding based upon the record before me." TR 376. Counsel sought to clarify to the trial court that the inconsistency lies in the fact that what was said to the police before trial was inconsistent with what the witness said at trial. TR 377 – 78. The trial court wrongly disallowed impeachment with extrinsic evidence concluding that O.L.'s lack of memory of making the statements

did not make the prior statements inconsistent and therefore were not eligible under Rule 613. TR 383. After discussion with counsel, the trial court ruled that it would only allow defense counsel to impeach O.L. with extrinsic evidence of prior inconsistent statements, if the State would be allowed to rehabilitate O.L. through the same means with prior consistent statements. TR 384. On cross examination of Maloney however, the trial court limited the defense to illicit pretrial statements of O.L. specifically asked to O.L. but did not impose this same limitation on the state. TR 395.

After Maloney testified, the State called Pearl as a witness. Pearl testified about O.L.'s demeanor at the scene. TR 406. Pearl testified that O.L. was "very disheveled, very upset, nervous." Id. He said they "had to calm him down multiple times, because he was very shaken by whatever had happened." Id. Pearl further testified as to O.L.'s demeanor after he was transported to the police station. TR 407. Specifically, Pearl noted that after he gave O.L. something to drink and eat, O.L. began talking about what happened earlier at Cavanaugh's Summer Street residence. Id. Pearl noted that O.L. "was very upset, intermittently crying, and his hands would be shaking. At some point, his voice was trembling. He was – appeared to be very upset from what he was just involved with." Id. Following this testimony, the State questioned Pearl about O.L.'s statements at the police station. TR 407 – 08. The defendant objected arguing the statements were hearsay. TR 408. The trial court found O.L.'s statements to Pearl admissible as excited utterances. TR 409. The trial court ruled that "based upon Ofc. Pearl's testimony and the prior descriptions of [O.L.] when he was conversing with the police laid a foundation that all of the statements

he's made thus far to the police would be excited utterances…." Id. The State then elicited O.L.'s description to Pearl of the incident. TR 408 – 11.

Subsequently, and during the State's case-in-chief, the Defendant requested to recall Maloney. TR 500 – 03. Maloney was the first person to speak with O.L. at the scene and O.L. made statements that were inconsistent with his trial testimony. TR 347 – 99. The trial court denied the Defendant's request stating that it "was waiting for someone to suggest that his testimony would be allowed under the excited utterance. No one asked." TR 502 – 03. Counsel explained that he did not think the excited utterance exception applied to O.L.'s statements for the reasons he articulated in his objection when the State sought to introduce them through Pearl. TR 501. The trial court wrongly viewed this as a trial tactic and refused to allow the defense to recall an excused witness. TR 503.

The State again sought to introduce hearsay evidence from Officer Eric Widerstrom (Widerstrom). TR 612. Specifically, the State asked Widerstrom about the direction Gray pointing. Id. Defense counsel objected on the basis that such was non-verbal conduct intended as an assertion, as it was done in response to a question. TR 613. During the discussion of this issue at sidebar, the trial court was *sua sponte* flipping through the hearsay exceptions in an apparent effort to see if any applied. TR 614. Counsel noted this conduct on the record based on the trial court's prior indication that it refused to allow certain evidence it thought was admissible under a hearsay exception because no party raised the exception. Id.

SUMMARY OF ARGUMENT

I. The trial court erred when it refused to give a self-defense jury instruction. The trial court incorrectly found Cavanaugh to be the initial aggressor and consequently determined Cavanaugh was not entitled to the self-defense jury instruction. Cavanaugh was awoken to an intruder standing in her bedroom in the middle of the night. Her instinctive act to flee her home and obtain the intruder's license plate did not make Cavanaugh the aggressor. Cavanaugh had a legal right to be where she was when the unknown intruder revved his engine, drove backwards smashing into a pole and then forward towards Cavanaugh. Under these facts, there was sufficient evidence to demonstrate Cavanaugh's reasonable belief that the intruder posed an imminent deadly threat.

II. The State failed to introduce sufficient evidence to prove Cavanaugh guilty of accomplice to attempted first degree assault because it failed to disprove the reasonable conclusion that Gray fired the gun of his own accord, completely and independently of Cavanaugh's actions. Similarly, the State failed to prove beyond a reasonable doubt that Cavanaugh's actions in any way aided Gray in his action of shooting the gun. Further, the State failed to produce any evidence to prove pecuniary loss to the owner of the truck. The law requires not only damage but also proof of pecuniary loss.

III. The trial court erred in admitting statements as an excited utterance exception to the hearsay rule based on the time between the event, the intervening events, and the opportunity to contrive or misrepresent before the statements were made to the police. If this Court finds the trial court did not err when it admitted statements under the excited utterance

exception, then the trial court abused its discretion when it refused to allow the defense to recall a prior witness based on this ruling. The trial court previously prevented the defense from eliciting statements O.L. made to police shortly after the incident as impeachment despite the court's stated belief that they were admissible substantively.

IV. The trial court erred when it only allowed the Defendant to impeach O.L. with prior inconsistent statements if it permitted the State to introduce extrinsic evidence of prior consistent statements as well. The trial court demonstrated clear bias in favor of the State when it believed O.L.'s out of court inconsistent statements were admissible substantively but did not say so to the defense. The trial court continued to demonstrate clear bias when it later attempted to assist the State with introducing hearsay, over the Defendant's objection, by flipping through the rules of evidence in search of an exception.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE A SELF-DEFENSE JURY INSTRUCTION.

Prior to trial, Cavanaugh filed a notice of self-defense (Addendum. 48-49), to which the State objected (Addendum. 50-52). Cavanaugh advised the trial court that she may rely on RSA 627:4 (Physical Force in Defense of a Person"). Cavanaugh requested the trial court give the self-defense jury instruction, but the court refused. TR 637 - 46. Failing to instruct the Jury of self-defense is reversible error. State v. McMinn, 141 N.H. 636, 645 (1997) (citing State v. Hast, 133 N.H. 747, 749 (1990)); State v. Etienne, 163 N.H. 57, 70 (2011). A requested instruction on a party's theory of defense must be given if such a theory is supported by some evidence in the record that would support a rational finding in favor of the defense, even if the evidence is not overwhelming. State v. Mayo, 167 N.H. 443, 454 (2015); State v. Vassar, 154 N.H. 370, 373 (2006) (some evidence means that there is more than a minutia or scintilla of evidence).

RSA 627:4 defines parameters of the justified use of "physical force in defense of a person." In searching the record for evidence supporting the defendant's requested jury instruction, this Court considers whether the victim posed an imminent threat to the defendant. State v. Chen 148 N.H. 565, 570 (2002). Self-defense is a "pure defense, and, thus, negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt." Etienne, 163 N.H. at 81. When there is evidence that conflicts, it is the province of the jury to reconcile

inconsistent trial testimony. State v. Haycock, 146 N.H. 5, 11 (2001); State v. Santamaria, 145 N.H. 138, 142 (2000).

a) There was sufficient evidence for a jury to find that Cavanaugh reasonably believed the intruder was going to imminently use deadly force.

The State objected to the self-defense instruction stating that there was no conduct on the part of O.L. to indicate that he was a threat and that gunfire was not a proportionate level of force. Addendum 50-52. A person is justified in using deadly force against another person when he reasonably believes that the other person is about to use unlawful deadly force against himself or a third person, and he reasonably believes that the amount of force he uses is necessary under the circumstances. State v. Rice, 169 N.H. 783, 787-88 (2017). Therefore, one may be entitled to a self-defense instruction even if, in fact, he was wrong in that belief. See State v. Ke Tong Chen, 148 N.H. 565, 570 (2002). A defendant is not required to retreat before using deadly force if the other is about to use deadly force against the actor or third person. N.H. Rev. Stat. § 627:4 II (a). "To disprove the defendant's justification defense, the State had to prove, beyond a reasonable doubt, that the defendant was not justified "in using force" upon the victim because his belief that such force was necessary . . . was unreasonable." State v. Clickner, No. 2018-0682, 2019 WL 4861368, at *2 (N.H. 2019).

Here, there was sufficient evidence – much more than a minutia or scintilla or evidence - to show that a reasonable person in Cavanaugh's

position would believe the intruder was going to imminently use deadly force. N.H. Rev. Stat. § 627:4 II (a). An intruder entered Cavanaugh's home at three o'clock in the morning and was discovered by Cavanaugh when she awoke to a sound and saw him standing in her bedroom. TR 160, 163-64, 667. Cavanaugh was unsure if the intruder was alone so when he abruptly disappeared from Cavanaugh's view she fled from the house in fear for her life. TR 662 – 63. When Cavanaugh fled from the house a running truck in the road caught her eye. TR 164-65, 664. Instinctively, Cavanaugh moved closer to the truck hoping to obtain the license plate number for police. TR 164 – 164, 172, 201, 667. At no point did the driver identify himself or otherwise make himself known to Cavanaugh. Id. As Cavanaugh bent down in front of the truck, the driver abruptly shifted the vehicle into gear causing Cavanaugh to believe he was going to run her over. Id.; Sanchez v. Obando-Echeverry, 716 F. Supp. 2d 1195, 1204 (S.D. Fla. 2010) (discussing how a person caught engaging in suspicious behavior involving a burglary, can pose a risk of dangerousness or flight, "even though he may not have raised a fist or broken out into a sprint," especially when the burglary was brazen); see State v. Furgal, 164 N.H. 430, 434 (2012) ("Self-defense does not require actual danger to the defendant; rather, the defendant must reasonably believe that the other person was about to use unlawful deadly force. Deadly force means any assault or confinement which an actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury.").

The evidence showed that Cavanaugh did not recognize the driver at the time of the incident nor did the driver attempt to identify himself to her.

TR 164 – 65, 172, 201, 666. Cavanaugh awoke to an unknown man in her bedroom in the middle of the night and minutes later was facing a truck revving its engine and driving towards her as she attempted to obtain the license plate. Id. Cavanaugh reasonably believed the intruder was going to use deadly force by running her over. Cavanaugh's 911 call, immediately following the incident, clearly states that the intruder tried to hit her with his car. State's Ex. 21 from :26 - :30. At trial, Pearl testified that upon arriving on the scene, Cavanaugh was visibly distraught and physically shaking by the event that she had just experienced, clearly demonstrating the threat was real to her. TR 415-16, 667; State v. Gorham, 120 N.H. 162, 163 (1980) (discussing how a defendant need not have been confronted with actual deadly peril, as long as he could reasonably believe the danger to be real).

Given the evidence, deadly force was objectively reasonable and proportionate under the circumstances. Cavanaugh was immediately within the trajectory of a vehicle that was being driven by a person suspected of breaking into her home causing her to fear serious harm. A person in these circumstances would reasonably believe that death or serious bodily injury is possible, in fact likely, by being run over by a vehicle. TR 164-65, 201-02, 666-67, 671; see Waterman v. Batton, 393 F.3d 471, 474-76, 475 n.6 (4th Cir. 2005) (describing that officers who used deadly force were justified when the officers were standing in or immediately adjacent to the car's forward trajectory, and the car "lurched forward" and "began to accelerate," such that the officers reasonably believed that the car was going to run them over). The evidence presented at trial was sufficient to allow a jury to find that Cavanaugh could reasonably believe the danger to

her was real. See State v. Gingras, 162 N.H. 633 (2011) (describing how the defendant was charged with, among other offenses, criminal threatening and reckless conduct arising out of a road-rage incident during which he pointed a gun at the other motorist and threatened to shoot him if he did not back away; the defendant claimed he acted in self-defense, and the State conceded that the evidence produced at trial was sufficient to require a jury instruction on the issue).

b) Cavanaugh did not provoke the encounter.

The State argued that the Defendant provoked the incident, and the trial court placed particular emphasis on this and denied the self-defense jury instruction. TR 644-46. Cavanaugh's instinctive act of fleeing her home does not warrant the conclusion that she provoked the confrontation beyond a reasonable doubt. The term "provoke" connotes speech as well as action to bring about a fight in which he intended at the outset to harm his opponent and is sufficient to destroy his legal defense of self-defense. State v. Gorham, 120 N.H. 162, 164 (1980). O.L. testified that after Cavanaugh discovered him in her home, he heard her only say "someone's here." O.L. testified that Cavanaugh did not make any verbal threats or take any threatening action inside or outside her home prior to him starting the vehicle. TR 162, 164-65, 192, 201-02, 644, 667-68; Compare State v. Bashaw, 147 N.H. 238, 240 (2001) (acknowledging that one may provoke with words alone, but simply starting an argument when there is no evidence that the defendant intended at the outset to kill or seriously injure his opponent is not a correct circumstance in which a defendant is

unjustified in using deadly force to defend themself); with State v. Santamaria, 145 N.H. 138, 142 (2000) (describing how evidence was adduced from which the jury could have found that the defendant initially provoked the victim verbally by making rude comments to the victim, and saying "who the f--- are you?").

Cavanaugh's attempt to obtain the license plate number of the vehicle cannot be construed as provoking the incident, as she was unarmed and only looking for information. TR 164-65, 201-02, 665; see State v. Vassar, 154 N.H. 370, 373-74 (2006) (there was no mention of provocation and self-defense instruction was given by the court even though after witnessing an altercation between his mother and brother, the defendant acquired a gun and followed the victim to his room twenty seconds after he left, and shot the victim while he crouched behind a table because he thought he was an imminent threat). The trial court viewed the fact that Cavanaugh left the house after O.L. and crossed the street to get a license plate as provocation because it views this as starting an altercation outside. TR 642. However, Cavanaugh had no way of knowing who else was in that house that could pose a threat, or what sort of threat O.L. could pose to life and property even though he was outside of the house. TR 655. Additionally, the facts do not conclusively prove that O.L. completely withdrew from the incident because he made no attempt to withdraw verbally— he just sat in the car silently for thirty seconds, and according to the 911 call, no shots were fired until he started his car and tried to hit Cavanaugh with his car. TR 164, 663, 667-68, State's Ex. 21 from :26 - :30; Id.; State v. Buggs, 806 P.2d 1381, 1385 (Ariz. App. 1990) (describing

that "after a fight has broken off, one cannot pursue and kill merely because he once previously feared for his life.").

Even though the 911 call by Cavanaugh attests to her boyfriend getting the gun out of the nightstand after discovering the intruder, and on cross-examination, she said she told Gray to get the gun, there is evidence presented by O.L. that this gun was not used to provoke because not only did he not hear Cavanaugh tell Gray to get his gun, but he also did not even see it until after it was fired. TR 162, 200-01, 207, 220. Gray was the last person out of the house, behind both O.L. and Cavanaugh. TR 200-01, 204. The evidence shows that Gray's presence outside with a gun was unknown to O.L. until after he fired in response to O.L. driving the car towards Cavanaugh, in which Cavanaugh thought was meant to hit her.[1] TR 204, 667. Because O.L. did not know that Gray was armed, Gray could not have threatened O.L. with a gun nor taken action to provoke the encounter from O.L.'s perspective. TT 171, 204. This means that there was some evidence, specifically O.L.'s testimony, that shows Cavanaugh made no threatening gestures, acts, or verbal assaults on O.L. to indicate she intended to provoke him; the altercation began when O.L. unlawfully

[1] This fact was missed by the trial court when it found that O.L. was not the provoking party. The court indicated that "his provocation of them ended when he ran from the house. They then chose, for whatever reason, to run after the person who they believed had just left the house, out into the outside area. And then not only that, they stood in front – or in the path of the car that the person was in. They did so, with comments already having been heard, that Ms. Cavanaugh said, there's someone in the house, get your gun" (emphasis added) (TR 644) and "[b]oth Ms. Cavanaugh and Mr. Gray put themselves adjacent to that car with a gun in his hand, having already overheard – Ms. Cavanaugh instruct Mr. Gray to get his gun because there's an intruder, so I don't find that under these facts that there – that [O.L.'s] the provoking party." TR 645. The focus on "they" is also important because the trial court gave the self-defense instruction in the trial of State v. Mark Gray, who was found not guilty. Since the trial court viewed them as acting together, it defies logic that Gray, the armed shooter, would get the instruction, but not Cavanaugh, the unarmed spectator.

entered Cavanaugh's home in the middle of the night. C.f. State v. Pennock, 168 N.H. 294, 308 (2015), as modified on denial of reconsideration (Dec. 3, 2015) (evidence at assault trial was sufficient to support finding that defendant did not act in self-defense but rather was the aggressor; there was evidence that, upon returning home, defendant became upset with the Victim, started to yell at her, and call her names, then he put his hand in her face and, when she pushed it away, then threw her against the wall and wrapped his arm around her neck, and that when victim bit him to get away, defendant pushed her down onto the ground and wrapped his hand around her neck and applied pressure).

c) Cavanaugh had a right to stand in the road to obtain identifying information.

In the State's objection to the self-defense jury instruction, the State contended that Cavanaugh could have moved to safety, or retreated, and was wrong to have exited her home and to attempt to obtain the intruder's license plate. TR 641. However, RSA 627:4 III (a) gives an exemption to the use of deadly force to defend oneself without having to retreat, if "he or she is within his or her dwelling, its curtilage, *or anywhere he or she has a right to be, and was not the initial aggressor*. N.H. Rev. Stat. Ann. § 627:4 III (a) (emphasis added). Cavanaugh and Gray had the right to leave their home in an attempt to escape and to obtain the intruder's license plate number from the truck parked in front of their home. Id.; see Thomas v. State, 224 So. 3d 688, 693 (Ala. Crim. App. 2016) (describing that defendant had no duty to retreat because of stand your ground law unless he

was acting in a way that was unlawful or was at a place where he did not have the right to be, and was warranted in murder prosecution; as the evidence indicated defendant was not prohibited from being at the residence where the shooting occurred and was not engaged in any unlawful activity while at residence); State v. Richter, 145 N.H. 640, 641 (2000) (explaining that a vehicle's license plates are in plain view of the public); Opinion of the Justices, 94 N.H. 501, 505 (1947) ("It is well settled that the right to use a public highway includes the right to use it in all the modes now customarily in use in the locality and others which may arise with the natural development of means of transportation."). Cavanaugh was not the aggressor nor did she provoke the incident. The intruder entered her home in the middle of the night without her permission. The intruder testified that Cavanaugh made no threatening gestures, acts, or verbal assaults to indicate she wanted to start an altercation with him. TR 162, 164-65, 201, 665, 667. Simply running outside of her home unarmed to escape and then looking at a license plate does not support the conclusion that she was the aggressor. Id.

The trial court erred in failing to provide the self-defense instruction that Cavanaugh requested, as there was evidence, much more than a minutia or scintilla of evidence, even viewed in a light most favorable to the State, that the use of force was a reasonable response to defend oneself or another against the imminent use of unlawful force in this scenario. The ultimate decision of whether Cavanagh was the initial aggressor is a decision for the jury and not the trial court.

II. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE RELATIVE TO THE CHARGES OF ACCOMPLICE TO FIRST DEGREE ASSAULT AND ACCOMPLICE TO CRIMINAL MISCHIEF.

To prevail on appeal when challenging the sufficiency of the evidence, "[t]he 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." State v. Fandozzi, 159 N.H. 773, 782 (2010) (citation omitted). Since Cavanaugh opted to put on a case after the denial of her motion to dismiss, this Court must view the entire trial record to determine whether the evidence was sufficient to support the conviction. State v. Shepard, 158 N.H. 743, 745 (2009). Moreover, "[w]hen the evidence presented to prove an element of the offense is solely circumstantial, that evidence 'must exclude all rational conclusions except guilt.'" State v. Duguay, 142 N.H. 221, 225 (1997) (citating State v. Laudarowicz, 142 N.H. 1, 5 (1997)); see also State v. Wilmot, 163 N.H. 148, 154 (2012).

a. There was insufficient evidence as to the charge of accomplice to first degree assault.

The defendant was charged with being an accomplice to attempted first degree assault. The indictment alleged that

> [a]cting with a purpose that the crime of first degree assault be committed, Brenna Cavanaugh, acting in concert with or aided by Mark Gray, caused 6 bullets to be discharged by means of a firearm in the direction of O.L., (DOB: 1/15/02),

> which under the circumstances as she believed them to be constituted a substantial step toward the commission of the crime of First Degree Assault.

The State failed to introduce any direct evidence showing Cavanaugh's actions aided Gray or "caused 6 bullets to be discharged by means of a firearm in the direction of O.L." since Gray did not testify at trial. The State asked the jury to infer that Cavanaugh aided Gray in causing the discharge.

The circumstantial evidence introduced by the State with the intent of demonstrating Cavanaugh's actions aided Gray and caused the discharge of 6 bullets was not sufficient. When the State relies solely on circumstantial evidence to prove an element of the crime, this requires the burden to shift to the defendant to establish that the evidence does not exclude all reasonable conclusions except guilt. State v. Germain, 165 N.H. 350, 361 (2013). According to Germain, the reviewing court must evaluate the evidence in the light most favorable to the prosecution and determine whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. Id. at 361 – 362.

Here, an alternative reasonable conclusion consistent with innocence exists. Gray could have discharged the firearm for any number of reasons, none of which were impacted by Cavanaugh's actions. Gray could have felt Cavanaugh was in danger and acted to protect her. Gray could have felt he was in danger and acted to defend himself. Each of these are reasonable conclusions based on the state of the evidence. Further, the State failed to

introduce any evidence demonstrating that Gray heard Cavanaugh say the words attributed to her by O.L.

In the absence of direct evidence on the issue of whether Cavanaugh's actions aided Gray in causing the discharge of a firearm, there remains a conclusion consistent with innocence that Gray acted of his own accord. As a result, no rational juror could find beyond a reasonable doubt that the State proved the circumstances presented were consistent with guilt and inconsistent with any reasonable hypothesis of innocence.

b. There was insufficient evidence as to the charge of accomplice to criminal mischief.

The defendant was charged with being an accomplice to criminal mischief. The complaint alleged that

> Brenna Cavanaugh, acting in concert with or aided by Mark Gray, caused bullets to be discharged by means of a firearm at a vehicle occupied by O.L., DOB 1/15/02, causing pecuniary loss in excess of $100.

RSA 634:2 declares that a person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages the property of another. RSA 634:2 II-a makes criminal mischief a class A misdemeanor if the actor purposely causes or attempts to cause pecuniary loss in excess of $100 and not more than $1,500. Thus, in order to convict Cavanaugh of a class A misdemeanor, the state was required to prove not only damage, but also that the alleged victim suffered a pecuniary loss beyond a reasonable doubt.

State v. Horton, 151 N.H. 688, 690 (2005). RSA 634:2 does not define "pecuniary loss." In interpreting this statute, this Court has previously held that it means "loss of money, or of something by which money or something of value may be acquired. State v. Paris, 137 N.H. 322, 327 (1993). In Paris, the Court found sufficient evidence of pecuniary loss when the state introduced evidence of an insurance estimate to repair damage caused by the defendant, evidence of the amount the insurance company paid to repair the damage, as well as evidence of the damage to the property. Id.

The defendant challenges the sufficiency of the evidence as it relates to whether her actions caused bullets to be discharged for the same reasons articulated above in Section II(a). Those arguments are incorporated herein by this reference. Further, the defendant submits that the State failed to present sufficient evidence to prove any pecuniary loss beyond a reasonable doubt. To prevail on a sufficiency argument, the defendant must prove that no rational trier of fact, viewing the evidence most favorably to the State, could have found a pecuniary loss exceeding $100. Id. (citing State v. Amell, 131 N.H. 309, 311 (1988). The defendant submits that showing damage alone is insufficient. Under Paris, the State must prove pecuniary loss above and beyond damage. To illustrate the defendant refers to this Court's distinction between pecuniary loss or actual loss and value. See State v. Gruber, 132 N.H. 82 (1989) (interpreting RSA 637:4). The Court makes the distinction between the value of the property taken as separate and distinct from the actual loss suffered. Id. The defendant argues that similarly the value of the damage caused is separate and distinct from the actual pecuniary loss.

The State did not provide any evidence as to what it would cost to repair the damage to the truck. The State did not present an estimate of repair for the truck at trial nor did it provide any evidence of whether money was paid to repair the damage. As such, the State failed to prove any real or expected pecuniary loss. Although the State did produce evidence that the vehicle was damaged, such evidence does not prove pecuniary loss. Therefore, unlike in Paris, the State failed to present any evidence of the pecuniary loss related to the damage. At trial, the State conceded this fact to the trial court. TR 563. In the absence of such evidence, there was insufficient evidence to prove beyond a reasonable doubt that the defendant was guilty of accomplice to criminal mischief.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED STATEMENTS OF A WITNESS UNDER THE EXCITED UTTERANCE EXCEPTION AND WHEN IT REFUSED TO ALLOW THE DEFENDANT TO RECALL A DISMISSED WITNESS TO INTRODUCE OTHER STATEMENTS OF THE SAME WITNESS BASED ON THE SAME RULING.

a. The trial court erred when it admitted statements of a witness under the excited utterance exception to the hearsay rule.

During trial, Pearl testified about the demeanor of O.L. at the scene. TR 406. Specifically, Pearl noted that O.L. was "very disheveled, very upset, nervous. Id. He said they "had to calm him down multiple times, because he was very shaken by whatever had happened." Id. Pearl then described O.L.'s demeanor at the police station after Pearl transported him there. TR 407. Specifically, Pearl noted that after he gave O.L. food and a drink, O.L. started talking about what happened. Id. Pearl noted that O.L. "was very upset, intermittently crying, and his hands would be shaking. At some point, his voice was trembling. He was – appeared to be very upset from what he was just involved with." Id. Following this testimony, the State questioned Pearl about O.L.'s statements at the police station. TR 407 – 408. The defendant objected arguing the statements were hearsay. TR 408. The court found O.L.'s statements to Pearl admissible as excited utterances. TR 409. The trial court ruled that "based upon Ofc. Pearl's testimony and the prior descriptions of [O.L.] when he was conversing with the police laid a foundation that all of the statements he's made thus far to

the police would be excited utterances…." Id. The State then elicited O.L.'s description to Pearl of the incident. TR 408 – 411.

This Court reviews a trial court's evidentiary rulings for an unsustainable exercise of discretion. State v. McDonald, 163 N.H. 115, 121 (2011). "In determining whether a ruling is a proper exercise of judicial discretion, [the Court] consider[s] whether the record establishes an objective basis sufficient to sustain the discretionary decision made." Id. (citation omitted). "To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of [his] case. State v. Ruggiero, 163 N.H. 129, 135 (2011) (citation omitted).

Rule 803(2) defines the excited utterance exception to the hearsay bar as encompassing a "statement related to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." N.H. R. Evid. 803(2). Underlying that exception is "the theory that a condition of excitement temporarily stills the capacity of reflection, thereby producing utterances free of conscious fabrication." State v. Cole, 139 N.H. 246, 249 (1994). A court therefore should admit "only those extrajudicial excited utterances made before the declarant had time to contrive or misrepresent." Id. (citing Semprini v. Railroad, 87 N.H. 279, 280 (1935)); see also State v. Pepin, 156 N.H. 269, 274 (2007) (to qualify as excited utterance, statement "must be a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by that event and before she had time to contrive or misrepresent").

This Court has identified factors bearing on the analysis of whether a given statement constitutes an excited utterance. One factor, "contemporaneity," measures the passage of time between the startling event and the statement. Wilder v. City of Keene, 131 N.H. 599, 604 (1989) ("requirement of contemporaneity in the context of the excited utterance exception to the hearsay rule is aimed at assuring the trustworthiness of the statements at issue."). Other important considerations include such things as the nature of the event, the witness' state of mind, and all other circumstances of the statement. MacDonald v. B.M.D. Golf Assocs., 148 N.H. 582 (2002) (citations omitted).

Here, the State failed to establish that O.L.'s description of the events was an excited utterance. It is unclear from the record how much time had passed from the incident to when the statements were made. Nevertheless, it is clear what transpired between the incident and the statements. O.L. testified that he left the scene and stopped at a gas station and threw up. TR 176. O.L. was thinking that he "might get in trouble for this." Id. He also thought that his dad's truck was damaged, and he was going to get grounded for that. TR 177. After reflecting on the situation, O.L. then drove home, went to his basement and started texting his friends. Id.

O.L. testified that about 10 minutes later, he was picked up from his home by two friends and driven to the scene of the incident. TR 179 – 180. O.L. noted that he went back to tell the cops it was him hoping "it wouldn't be a big investigation, and they wouldn't come looking for [his] dad's truck and get him in trouble." TR 180. O.L. then states he spoke to an officer on scene, he was put in a police cruiser and brought to the police station by

Pearl, who he described as a family friend. TR 180 – 181. O.L. then notes he sat in "their lunchroom for probably four hours." TR 181. During this time, O.L. allegedly tells Pearl about the incident. Id.

In order to assess the amount of time passed, it is helpful to consider Pearl's actions during this time. Pearl testified that he heard the gun shots when he was assisting other officers on a traffic stop. TR 404. He called in the shots to dispatch and then headed to the scene. TR 405. On his way, he got a description of the vehicle involved and searched for it in the surrounding area. Id. Pearl was unsuccessful in finding it and then went to the scene. Id. He then spoke with Gray and Cavanaugh about what had happened and secured the crime scene. Id. After that, Pearl returned to the police station for an unspecified period and was then called back to the scene because O.L. had arrived on the scene. TR 405 – 06. Pearl notes that he spoke with O.L. briefly on scene and then transported him back to the station. TR 406 – 07. At the station, Pearl provided O.L. with a drink and some food "and then he started to talk to me about what had happened…." TR 407.

On these facts, not only did O.L. have time to contrive or misrepresent, but there were also significant intervening events that transpired between the incident and the statements. O.L. stopped at a gas station, he went home, he texted with friends, he waited for two friends to come and pick him up, and then they drive him back to the scene. TR 176 – 81. He spoke to at least two officers on scene. TR 405 – 06. He had to wait for Pearl to pick him up and transport him back to the police department. Id. He waited in the lunchroom and was given food and water before making the alleged statements. TR 407.

For these reasons, the trial court erred in concluding that O.L.'s statements to Pearl were made before the declarant had time to contrive or misrepresent. This error prejudiced Cavanaugh.

The State relied upon O.L.'s statements to Pearl, specifically that "he heard [Cavanaugh] say, shoot him. Shoot him" (TR 410 – 11) to bolster O.L.'s credibility because O.L. was impeached at trial regarding a recorded statement where he said he was not positive but thought Cavanaugh may have said shoot. TR 216 – 17. Whether Cavanaugh said the words "shoot" or "shoot him" was a critical piece of evidence the State relied on to prove she aided Gray on that day. O.L.'s trial testimony that he was certain she said it was impermissibly bolstered by allowing Pearl to corroborate that O.L. said that on the night of the incident, when O.L.'s recorded statements the next morning did not. Therefore, the trial court impermissibly bolstered O.L.'s testimony by allowing the out of court statement as an excited utterance.

b. <u>The trial court erred in refusing to allow the defendant to recall a dismissed witness to bring in other statements based on the excited utterance ruling</u>.

Following the trial court's ruling regarding the admissibility of O.L.'s statements to Pearl as excited utterances, the defendant requested to recall a prior witness, Officer Maloney. TR 500 – 03. Maloney spoke to O.L. at the scene of the incident. TR 347 – 399. In denying the defendant's request, the court noted that it "was waiting for someone to

suggest that his testimony would be allowed under the excited utterance. No one asked." TR 502 – 03.

The control of the order of interrogation of witnesses and the admissibility of evidence is committed to the sound discretion of the trial judge. State v. Hopkins, 136 N.H. 272, 275 (1992). N.H. R. Crim. Pro. 24(b)(6) allows for a witness that has been dismissed to be recalled with the court's permission. N.H. R. Evid. 611(a) requires the trial court to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoiding wasting time; and (3) protect witnesses from harassment or undue embarrassment." The defendant argues that the trial court abused its discretion.

Here, the defendant sought to recall Maloney to illicit statements made by O.L., including that he saw Cavanaugh get out of bed. TR 368. This statement would have directly contradicted O.L.'s testimony that he did not go up the stairs into Cavanaugh's bedroom. TR 190 – 91, 211. Impeaching O.L. was critical to Cavanaugh's defense, as the jury had to weigh the credibility of O.L. and Cavanaugh to determine which sequence of events to believe regarding the incident.

Originally, the defense attempted to introduce the statement as impeachment of O.L. through Maloney. TR 362 – 96. During the lengthy debate over whether or not to allow extrinsic evidence to impeach O.L., the trial court indicated that it was "trying to do what…is right and fair in this case and applying the Rules of Evidence appropriately." TR 383. The trial court then went further to say that "the Defense is choosing, under 613, to introduce extrinsic evidence of what they claim to be a prior inconsistent

statement." Id. "Their argument…is that [O.L.'s] testimony to this jury is inconsistent with what they propose to elicit through Ofc. Maloney." Id. The trial court allowed the defense to illicit extrinsic evidence of only those statements presented to O.L., but imposed no such limit for the State to use extrinsic evidence of prior consistent statements of O.L. TR 395.

Nevertheless, when discussing the possibility of recalling Maloney TR 500 – 03, the trial court noted at the time it was considering allowing extrinsic evidence to impeach O.L. that it "was waiting for someone to suggest that his testimony would be allowed under the excited utterance. No one asked." TR 502 – 03. Counsel explained that he did not think the excited utterance exception applied to O.L.'s statements for the reasons he articulated in his objection when the State sought to introduce them through Pearl. TR 501. The trial court viewed this as a trial tactic and refused to allow the defense to recall an excused witness. TR 503.

When viewed as an abuse of discretion, it is concerning that the trial court thought the statements of O.L. to Maloney were admissible substantively and was waiting for someone to articulate the precise rule despite a very lengthy argument by the defense attempting to use the statements. The trial court prevented the defense from introducing statements to impeach when it thought they were admissible substantively, despite noting that it was trying to be fair in this case. This is directly contrary to Rule 611(a), which requires the trial court to exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth.

Later, the trial court made clear that it was, in fact, not trying to be fair in its evidentiary rulings. Specifically, during a later witness, the defense raised an objection to the admissibility of hearsay evidence. While considering the arguments, the trial court was *sua sponte* searching through the rules of evidence for an exception to obvious hearsay evidence, assisting the State to introduce otherwise inadmissible evidence over the defendant's objection. TR 613 – 14. Counsel for the State did not raise any exceptions to the hearsay rule, but rather argued that it was not hearsay. Id. Counsel for the defendant had to put on the record that the trial court was "flipping through possible exceptions to hearsay" and noted that no such issue had been raised by the State. TR 614. The trial court's actions demonstrates clear bias toward the State. When it would benefit the defense, the trial court waited to see if the specific rule or exception was raised by counsel even though the court thought the statements were admissible, contrary to Rule 611 (a)(1), but when it benefits the State, the trial court was actively flipping through the rules to find an exception that applied to let the evidence in, at least until it was pointed out on the record. Id.

Despite the trial court's ruling that "all of the statements [O.L. has] made thus far to the police would be excited utterances," (TR 409) the court refused the defendant's request to recall Maloney to introduce those statements, again violating the principle of Rule 611(a)(1). The recall of Maloney would not have been an undue burden. Maloney is not a civilian, he was not a victim, he is a law enforcement officer and could have easily been recalled to briefly testify. It would not have caused much, if any, delay in the proceedings, as his testimony would have lasted just a few

minutes, but would have been critical in assisting jurors in determining the truth.

The trial court abused its discretion by not allowing the defendant to recall Maloney to testify to statements made by O.L. These statements were contradictory to the statements of O.L. at trial and impeaching O.L.'s credibility was central to Cavanaugh's defense, as O.L.'s account of the sequence of events was different than that Cavanaugh's.

IV. THE TRIAL COURT ERRED IN REFUSING TO ALLOW EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENTS OF A WITNESS UNLESS THE STATE COULD ILLICIT PRIOR CONSISTENT STATEMENTS OF THE WITNESS.

At trial, the defendant sought to impeach O.L. with prior statements made to Maloney under Rule 613. TR 362 – 98. The court indicated that there was nothing to impeach because O.L. did not deny saying it. TR 371 – 76. The trial court explained that O.L. "didn't deny saying anything to Ofc. Maloney. He, in fact, testified repeatedly that he doesn't remember what he told the police." TR 383. Specifically, the court indicated that "[m]y notes then reflect that on multiple occasions [O.L.] testified, 'I don't remember saying it to the police.' My notes are replete with that. 'My memory of the different points are hard. My memory has changed on points. Yes, prior statement, I listened to it within the last week. The written reports were not reviewed. I recall talking to the police. I don't remember when. I know it was in the morning.' And then you were asking him questions about the stairs. And my notes continue to say, 'I don't remember saying.' 'I don't remember saying.' 'I don't know what I said to the police.' You asked him about the pistol being in the hand. 'I don't recall saying it.' Tell police where Mark Gray was standing. 'I don't recall.' So my notes are replete with him telling you over and over again that he doesn't remember what he told the police." TR 367.

The trial court further noted that Rule "613 requires a finding, by me, that he – that it's inconsistent. And I don't make that finding based upon the record before me." TR 376. Counsel sought to clarify that the inconsistency is what was said prior to trial to the police, that it was

inconsistent with what the witness said at trial. TR 377 – 78. The trial court indicated that impeachment was not allowed because O.L. did not deny making the statement to Maloney. TR 383. Ultimately the trial court ruled that if the defense chose to impeach O.L. with prior inconsistent statements, then it would allow the State to rehabilitate O.L. through the same means. TR 384. The trial court went further and limited the defense to statements asked about but did not so limit the state. TR 395.

This Court reviews a trial court's evidentiary rulings for an unsustainable exercise of discretion. State v. McDonald, 163 N.H. 115, 121 (2011). "In determining whether a ruling is a proper exercise of judicial discretion, [the Court] consider[s] whether the record establishes an objective basis sufficient to sustain the discretionary decision made." Id. (citation omitted). "To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of [his] case. State v. Ruggiero, 163 N.H. 129, 135 (2011) (citation omitted).

Rule 613 holds that [e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." N.H. R. Evid 613(b). State v. Wamala, 158 N.H. 583, 596 (2009) (holding that such impeachment can be accomplished by use of a prior inconsistent statement). This Court has never ruled on whether a witness, who claims to not remember making the statement, has been given the opportunity to explain or deny the statement. This Court, however, in an unpublished opinion did not find error when a defendant challenged on appeal whether a

statement that was inadmissible due to relevance under Rule 401 could have been admissible under Rule 613. State v. Parent, No. 2004-0210 (2005). The Court noted without analysis or citation that "the victim did not deny making the alleged statement, but rather testified that she had no recollection of it." Id.

Other courts have held that "prior statements forgotten by witnesses are inconsistent enough to impeach their lack of memory when they disbelieve the witnesses' assertions of memory lapse." Greenwald, The Forgetful Witness, 60 Univ. Chi. L. Rev. 167, 188 (1993) (citing United States v. Rogers, 549 F2d 490, 496 (8th Cir 1976). The general rule seems to be that present lack of recollection is not inconsistent with past knowledge. Id. at 192. However, an exception exists in the impeachment context when the witness's disavowal of memory seems incredible. Id. (citing Rogers, 549 F2d at 496 ("claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent"); United States v. Insana, 423 F2d 1165, 1168 (2d Cir 1970). See also United States v. Shoupe, 548 F2d 636, 643 (6th Cir 1977) (impeachment of witness with memory "so selective as to be incredible" proper, but extensive use of prior statement violated defendant's right to fair trial).

Here, O.L. repeatedly denied any memory of contradictory statements he made previously to police. O.L. did not remember telling the police that he went up the second flight of steps despite testifying that he did not. TR 191, 211. He did not remember telling the police he did not see Cavanaugh come out of the house until he was in his car and the car would not start. TR 212. O.L. did not remember telling Pearl he saw Gray come out with a pistol in his hand despite telling other officers he could not

see what was in his hand and testifying that he did not even know Gray was there. TR 219 – 20. O.L. could not remember telling the police where Cavanaugh and Gray were when he drove away, despite testifying that he did. TR 222 – 225.

Each of these topics were crucial to assess the credibility of O.L. on important matters in the trial. Conveniently, and selective as to be incredible, O.L. did not remember his prior inconsistent statements. Based on these pervasive and categorical claims feigning memory, the trial court should have allowed introduction of the prior out of court statements at a minimum to impeach O.L. without allowing the State to rehabilitate O.L. with prior consistent statements.

Based on the categorical and convenient problems with memory, the defendant should have been able to impeach O.L. with his prior inconsistent statements. The claim of lack of memory was simply unbelievable under the circumstances. Moreover, whether the witness remembers making the statement should have no bearing on whether the prior statement is inconsistent with his trial testimony. The witness was given the opportunity to explain or deny the statement, if the witness claims not to remember making the statement, that has no bearing on whether the witness made a prior inconsistent statement and counsel should be able to introduce extrinsic evidence of the out of court statement to impeach the witness' trial testimony.

CONCLUSION

WHEREFORE, Ms. Cavanaugh respectfully requests that this Court vacate her convictions of accomplice to first degree assault and accomplice to criminal mischief.

Undersigned counsel requests 15 minutes of oral argument before a full panel of this Court.

CERTIFICATIONS

I, Michael J. Zaino, hereby certify that on April 27, 2020, copies of the foregoing was forwarded to the NH Attorney General's Office, as counsel for the State by electronic service.

I, Michael J. Zaino, hereby certify that the appealed decision is in writing and is appended to this brief.

Respectfully submitted,
Brenna Cavanaugh

By her Attorney,

Dated: April 27, 2020

/s/ Michael J. Zaino
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DEFENDANT'S BRIEF ADDENDUM

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 218-2018-CR-01583

State of New Hampshire
v.
BRENNA CAVANAUGH

DEFENDANT'S NOTICE OF SELF DEFENSE

NOW COMES, the defendant, Brenna Cavanaugh, by and through counsel, Michael J. Zaino, and notifies this Court and the State that the defendant may rely upon the defense of self-defense, pursuant to NH RSA 627:4 (II) at trial in this matter. In support of this notice, the defendant states as follows:

1. Ms Cavanaugh stands charged with two alternative theories, Criminal Solicitation to Commit First Degree Assault and Criminal Solicitation to commit Reckless Conduct. Each of these charges stems from an incident on August 18, 2018.

2. According to discovery provided by the State, the alleged victim entered Ms. Cavanaugh's home in the middle of the night while she was in bed asleep with the co-defendant. Ms. Cavanaugh was awoken to find the alleged victim standing inside her bedroom on the third floor. It is important to note that the entrance to her bedroom is on the second floor followed by a 12-step flight of stairs with a landing in the middle

3. Ms. Cavanaugh followed the alleged victim out of her home and watched as he got into a vehicle. As Ms. Cavanaugh was trying to get as much information as she could on the unknown intruder, including his vehicle and license plate information, the alleged victim was revving the engine of his vehicle as Ms. Cavanaugh was standing right in front of it.

4. It was during this time that shots were fired by the co-defendant.

5. The defendant submits that the actions of the alleged victim in this matter placed the defendant in a position where she reasonably believed that the alleged victim was about to use unlawful deadly force against her or another, or was about to use unlawful deadly force while committing or attempting to commit a burglary.

6. Therefore, Ms. Cavanaugh notifies the court and government that she may rely on the defense of Physical Force in Defense of a Person under RSA 624:4 (II). *See State v. Champagne*, 152 N.H. 423, 429 (2005); *State v. Gorham*, 120 N.H. 162, 163-164 (1980).

Respectfully submitted,

June 12, 2019

Michael J. Zaino (#17177)
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P.O. Box 787
Hampton, NH 03843
603-910-5146

CERTIFICATE OF SERVICE

I hereby certify that a copy of this within Notice has been forwarded to the Rockingham County Attorney's Office on this day.

June 12, 2019

Michael J. Zaino

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT
218-2018-CR-01583

STATE OF NEW HAMPSHIRE

v.

BRENNA CAVANAUGH

STATE'S OBJECTION TO DEFENDANT'S NOTICE OF SELF DEFENSE

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, and states as follows:

1. On June 12, 2019 the State received the Defendant's Notice of Self Defense.

2. Pursuant to rule 14 of the NH Rules of Criminal Procedure, this notice is late. However, on June 11, 2019 the State agreed not to object to this motion on the ground of timeliness.

3. In the Defendant's Motion the Defense alleges that the defendant "reasonably believed that the alleged victim was about to use unlawful force against her or another." The State seeks clarification on whether the Defendant is asserting that she believed the victim was about to use unlawful force against her, another, or both?

4. Pursuant to RSA 624:4 II(a), "a person is justified in using deadly force upon another person when he reasonably believes that such other person. . . is about to use unlawful, deadly force against the actor or a third person." First, there is conflicting testimony about whether or not the Defendant was in any danger prior to her charged conduct and this defense would depend on the evidence presented at trial; therefore, the State requests a further opportunity to argue this issue after evidence is presented at trial. Next, the Defendant's own notice fails to allege any conduct to show that she reasonably believed O.L. was about to use unlawful deadly force against anyone. The Defendant's notice alleges that she "was standing right in front of [the victim's vehicle]" while the defendant was "revving the engine" this is not sufficient to reasonably believe that deadly force is imminent. The Defendant is not entitled to this defense because the use of force used is not proportionate to any possible threat perceived.

5. The Defendant placed herself in a position that provoked a situation that she then relied on to claim self-defense or defense of others at trial. Considering the language of the New Hampshire statute, the Court can likely determine as a matter of law that an individual is not entitled to a claim of self-defense after provoking the force against him. N.H. RSA 627:4, III(c). An individual is generally precluded from claiming self-defense or defense of another when "with the purpose of causing death or serious bodily harm, the person has provoked the use of force against himself." N.H. RSA 627:4, III(c). The New Hampshire Supreme Court concluded that "to the extent that [an individual] provoke[s] the encounter, whether alone or in concert with

a third person, the use of deadly force is not justifiable." State v. Etienne, 163 N.H. 57, 79 (2011).

6. Additionally, the Defendant could easily have moved to safety, if she felt it necessary. There is no evidence to suggest the Defendant was unable to retreat from the encounter rather than claiming self-defense or defense of others for the use or solicitation of use of deadly force. The Defendant instead created the encounter by pursuing the victim in this case, a 17 year old boy. N.H. RSA 627:4, III(c).

7. In the Defendant's Motion the Defense further alleges that the defendant "reasonably believed . . . the alleged victim . . . was about to use unlawful deadly force while committing or attempting to commit a burglary." The State objects to this defense.

8. Pursuant to RSA 624:4 II(d), the Defendant must reasonably believe that O.L. was likely "likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage." (emphasis added). First, evidence in this case shows that the Defendant's daughter had invited the victim to her location and that the victim mistakenly went to the wrong residence, this conduct does not constitute a burglary or have the requisite *mens rea* for any other crime. Second, O.L. was fleeing the area and therefore could not be in commission of an offense against the actor. Third, the Defendant's conduct occurred on a public street and not within her dwelling or its curtilage. The Defendant is therefore not entitled to this Defense as a matter of law.

9. Regarding both notices, the State argues that even if the Court were to find that the Defendant was in a position where she was in fear of deadly force, the Defendant placed herself in that position and therefore is barred from this defense.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the Defendant's ability to assert this defense at trial; and

B. Grant such further and other relief as justice may demand.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

06/20/2019

Ryan C. Ollis
Assistant County Attorney
New Hampshire Bar # 20808

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to defense counsel Michael J. Zaino, attorney for defendant, at P.O. Box 787 Hampton, NH 03843.

Ryan C. Ollis
Assistant County Attorney

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 218-2018-CR-01583

STATE OF NEW HAMPSHIRE
v.
BRENNA CAVANAUGH

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

NOW COMES, Brenna Cavanaugh, through her attorney, Michael J. Zaino, who moves this court to vacate the convictions in this matter notwithstanding the jury's verdict. In support thereof, Ms. Cavanaugh offers the following:

1. Following a jury trial, Cavanaugh was found guilty of one felony count of Principal/Accomplice Attempted First Degree Assault, contrary to RSA 631:1 and one misdemeanor count of Principle/Accomplice Criminal Mischief, contrary to RSA 634:2. Cavanaugh was also found not guilty of two felony counts of Criminal Solicitation, contrary to RSA 629:2. The Defendant now moves this court to vacate the convictions notwithstanding the verdict, as the evidence presented was legally insufficient to support the jury verdict as a matter of law.

2. Sufficiency of the evidence is a legal standard applied to determine whether the evidence is legally sufficient to support the jury verdict as a matter of law. State v. Spinale, 156 N.H. 456, 463 (2007). Sufficiency is a test of adequacy and requires both quantitative and qualitative analysis. Evidence may fail quantitatively only if it is absent, that is, where there is none at all. Whereas, evidence may fail qualitatively if it cannot be said reasonably that the intended inference may logically be drawn therefrom. Id.

3. The court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied. Id. The trial court should uphold the jury's verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State. Id. Thus, the search for sufficient evidence

involves an evaluation of the evidence to determine whether a reasonable jury could have found guilt beyond a reasonable doubt. Id. at 464.

4. In terms of the Attempted First Degree Assault charge, the State had to prove beyond a reasonable doubt that:

a. The Defendant acted with the purpose that the crime of First Degree Assault be committed; and

b. The Defendant acted in concert with or aided by another, and

c. These actions "caused six bullets to be discharged by means of a firearm, in the direction of O.L.," which under the circumstances as the Defendant believed them to be, constituted a substantial step toward the commission of the crime of First Degree Assault.

In terms of the Criminal Mischief, the State had to prove beyond a reasonable doubt that:

a. The Defendant acted with the purpose that the crime of Criminal Mischief be committed; and

b. The Defendant acted in concert with or aided by another; and

c. Having no right to do so nor any reasonable basis for belief of having such a right, purposely caused pecuniary loss in excess of $100.00 by "causing six bullets to be discharged by means of a firearm at a vehicle occupied by O.L."

5. Here, there is no quantitative evidence, direct or circumstantial, that Cavanaugh acted as a principle in attempting to discharge a firearm. Therefore, the jury could have only found beyond a reasonable doubt that her actions *aided* another in causing six bullets to be discharged. As such, the defendant argues there was insufficient qualitative evidence to support a finding beyond a reasonable doubt that Cavanaugh purposely aided another in causing six bullets to be discharged.

6. Even in a light most favorable to the State, there was insufficient evidence presented to establish beyond a reasonable doubt that Cavanaugh had the specific intent to aid anyone. The evidence was clear that she went outside and toward O.L.'s car. The evidence was clear that she was looking at the license plate. However, the evidence was not clear as to whether she said "shoot," but for purposes of this motion it will be assumed since the evidence is viewed in a light most favorable to the State. This accounts for all of the actions upon which the jury could have decided her guilt. Even in a light most favorable to the State, no reasonable jury could have found beyond a reasonable doubt that she specifically intended for her actions to aid another in causing the discharge of six bullets.

7. Further, no direct evidence was presented that Cavanaugh's actions in any way aided Mark Gray, as he was not called as a witness in this matter. No testimony was introduced regarding whether her actions contributed in any way to his decision to fire the gun. There was no evidence of a plan between them, no evidence presented that Gray heard Cavanaugh say shoot, especially since he was across the street, or that her actions caused him to do anything.

8. Based on the lack of direct evidence presented on how Cavanaugh's actions aided in the discharge of a weapon, the jury was left to assume such based on circumstantial evidence. As such, the jury instructions require that the jury must find that the totality of the evidence excludes all reasonable conclusions other than guilt. The instructions also noted that if it is reasonable to arrive at two conclusions, one consistent with guilt and one consistent with innocence, the jury must choose the reasonable conclusion consistent with innocence. Here, there are multiple conclusions that could be reached consistent with innocence based on the lack of direct evidence presented on whether Cavanaugh's actions aided Gray and/or caused the discharge of six bullets. For example, Gray could have fired solely because he wanted to protect himself or Cavanaugh, or Gray may not have heard Cavanaugh say shoot, or Gray may have decided under what circumstances he was going to shoot before going outside regardless of what actions Cavanaugh took. As such, no reasonable jury could have found Cavanaugh guilty beyond a reasonable doubt based on the reasonable conclusions consistent with innocence that remained.

9. As well, no evidence was provided regarding the value of the damage to the vehicle. Pursuant to RSA 637:2, V, value means the highest amount determined by any reasonable standard of property or services. There was no testimony regarding any standards of property or services. In the absence of any quantitative evidence regarding the value of repairing the vehicle based on the gun shots, there was insufficient evidence presented on this element. The lack of evidence was conceded by the State to the Court. Since the burden in on the State to prove guilt beyond a reasonable doubt, neither the court nor the jury should be able to assume guilt. The State chose not to present any evidence on this element. As such, no reasonable jury could find beyond a reasonable doubt that the State met its burden of proof on the elements of Criminal Mischief.

10. Finally, the jury's verdict was inconsistent. On the one hand they found that Cavanaugh did not act purposely in "requesting" Gray to discharge the gun by saying shoot and on the other hand, they found that her actions of saying shoot caused the discharge of the gun. These two conclusions are inconsistent based on the nature of the actions proven at trial. As such, Ms. Cavanaugh's verdicts should be vacated because no reasonable jury could have found beyond a reasonable doubt that Cavanaugh acted purposely to solicit or aid another.

WHEREFORE, Ms. Cavanaugh requests that this Court:

a. GRANT this motion and vacate the convictions; OR
b. Schedule a hearing on this matter; AND
c. Grant such further relief as justice requires.

Respectfully submitted,

August 15, 2019

/s/ Michael J. Zaino

Michael J. Zaino (#17177)
Law Office of Michael J. Zaino, PLLC
P.O. Box 787
Hampton, NH 0843
603-910-5146

CERTIFICATION

I hereby certify that a copy of the foregoing motion was this day forwarded to the Rockingham County Attorney's Office via the electronic filing system.

August 15, 2019

/s/ Michael J. Zaino
Michael J. Zaino

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
218-2018-CR-01583

STATE OF NEW HAMPSHIRE

v.

BRENNA CAVANAUGH

STATE'S OBJECTION TO THE DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, and states as follows:

I. PROCEDURAL POSTURE

1. The Rockingham County Grand Jury indicted the Defendant on charges of Criminal Mischief [Principal/Accomplice] (1562275C) and Attempted First Degree Assault [Principle/Accomplice] (1562276C) in November of 2018. Prior to trial, the State reduced Criminal Mischief [Principal/Accomplice] (1562275C) to a Class A Misdemeanor. On August 5, 2019 after a jury trial, the Defendant was found guilty of both of these charges.

2. The Rockingham County Grand Jury indicted the Defendant on charges of Criminal Solicitation to Commit Reckless Conduct with a Deadly Weapon (1610356C) and Solicitation to Commit First Degree Assault (1610355C) in April of 2019. The defendant was subsequently found not guilty of these charges on August 5, 2019 after the jury trial.

3. On August 15, 2019 the Defendant moved to vacate the conviction notwithstanding the verdict, alleging the evidence presented was legally insufficient to support the jury verdict as a matter of law. The State objects to the Defendant's motion.

II. VOIR DIRE

1. During panel Voir Dire, the State questioned the jurors about what level of planning they believed would be required for solicitation. The majority of the jurors indicated that believed solicitation required some level of prior planning. At that point, the jurors did not have the benefit of the Court's instructions in regards to the relevant law and all of the jurors indicated they would be able to follow any instructions given by the Court. While this cannot and does not definitively explain the jury's logic, it is worth noting given the defendant's attempt to ascertain the jury's thoughts.

III. EVIDENCE AT TRIAL

1. The State incorporates by reference herein all testimony and exhibits admitted during the trial in this case. The State would like to highlight evidence that admitted during trial for the purposes of this objection.

2. O.L. testified he was invited to a party by L.T., the defendant's daughter, and believed it to be at the defendant's home. O.L. arrived at the Defendant's home, parked his car behind a red car, and entered the home. While inside he stepped on a loose board and the floor creaked. The defendant awoke and indicated to Mark Gray, her partner, to get his firearm. O.L. fled the resident and the defendant followed. As O.L was getting in his car the Defendant passed him, wearing a robe, and stood at the front of the car. After a period of sitting in his car and hoping the defendant recognized him, he heard her yell shoot. While O.L. could not say he heard her voice specifically, he heard a female's voice and she was the only female he knew to be out there at the time. Immediately following the defendant yelling "shoot" O.L. heard a gunshot. He attempted to flea backed his truck into a telephone pole, the then put his car in drive and drove away. While driving he heard more gun fire and the gun fire continued as he drove away.

3. Trooper Tara Elsemiller, the States expert, testified that based on her analysis of the pickup truck she identified three defects. Defect A entered at a 90º angle. Defect B entered between a 24º to 45º angle. Defect C struck the vehicle at a 3º angle.

4. Detective Peter Sheldon testified regarding his part of the investigation including the photographs he took of the scene that were admitted into evidence. While testifying, Detective Sheldon described pictures of the inside of the Defendant's home that night and photos of the crime scene including the shell casings. Notably some of these images admitted into evidence show a robe on the Defendant's bed.

5. Officer Pearl testified that he spoke to O.L. when he was at the police station. O.L was upset, shaken and emotional. O.L. told Officer Pearl that the Defendant said "shoot him, shoot him" before the shots were fired.

6. During Detective Bernier's testimony, the Defendant's audio and visually recorded interview was admitted as an exhibit and played to the jury. During said interview the Defendant states that she woke up to an unknown individual in her room. Later in the interview when asked what she thought the person was doing there, she noted that he did not take anything and thought maybe he got the wrong house. The Defendant acknowledged that the light was on, that the individual was a white male with blond hair between the ages of 16 and 30 years old. She told detective Bernier that she could identify this person if she saw him again. The Defendant stated that she called for Mark Gray to get his gun, put on a shirt, and went down the stairs after the individual. The Defendant stated that she heard him go down the stairs and outside. She followed this individual outside and approached the vehicle he was sitting in with the truck running. She looked at the license plate. She stated the vehicle reversed at a high rate of speed and she walked towards the car to again look at the license plate. At that time, Mark was between the sidewalk and the center line to her right and both Mark Gray and

the Defendant yelled stop. The Defendant said the vehicle accelerated towards them and she heard shots.

7. At trial the Defendant testified that she put on a shirt. She stated that she was afraid that other people might be in the home so ran out to the street. She stated that she thought the person in her home could be a murderer or rapist. She also testified she could not remember many details. She indicated that after the truck reverse reversed she was afraid she would be hit. She further testified that she heard gunfire and could not remember where Mark Gray was or what he was doing. She stated that she went back in to get her phone and did not stay because she was too afraid to go back into the house until the police cleared the home. After the incident, she went to the police station and was offered a drink, she did not want to wait for a detective so she left and walked around Portsmouth as she was not allowed in her residence. She walked around outside for a few hours, went to a friend's house, and then went back to the police department where she was interviewed. Immediately following the interview, Lt. Sargent explained they identified the person in the house and driving the vehicle. The defendant said she asked who it was and was told it was one of her daughter's friends. The Defendant then asked if it was O.L.

8. During cross examination the State admitted the recorded emergency dispatch call as an exhibit and played it for the jury. In the dispatch call, the defendant states "I went outside, to approach the person and say who you are." She also tells dispatch that she is re-entering the house and that her boyfriend was the only one to fire a gun.

III. LEGAL ANALYSIS

A. Standard

1. In a Motion for Judgment Notwithstanding the Verdict where the sufficiency of the evidence at trial is contested, the defendant bears the burden of proving that no rational trier of fact, "considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State," could have found guilt beyond a reasonable doubt. *State v. Spinale*, 156 N.H. 456, 463 (2007) (internal quotations and citations omitted). Determining whether the defendant has met this burden "requires both quantitative and qualitative analysis [of the evidence]; 'quantitatively,' evidence may fail only if it is absent, that is, only where there is none at all, while 'qualitatively,' it fails when it cannot be said reasonably that the intended inference may logically be drawn therefrom." *Id.*

2. In reviewing the evidence admitted at trial, the trial court should "examine each evidentiary item in the context of all the evidence, not in isolation. . . ." *State v. Crie*, 154 N.H. 403, 406 (2007) (citations omitted). The jury is the finder of fact, and full deference must be given to its findings. *State vs. O'Neill*, 134 N.H. 182 at 185 (1991). The role of the trial court is not to "weigh the evidence or inquire into the credibility of the witnesses . . . ." *Spinale*, 156 N.H. at 463 (quoting *Slattery v. Norwood Realty*, 145 N.H. 447, 448-449 (2000)). Rather, the trial court should "objectively review the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 464. The trial court, therefore, "has little discretion when deciding whether to grant a motion for JNOV" and "should exercise its discretion with caution and invoke its power to grant a

new trial only in exceptional cases . . . where a miscarriage of justice may have resulted." *Id.* at 464-66 (quotations and citations omitted).

3. "Although a verdict may be supported by sufficient evidence, a trial court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Spinale*, 156 N.H. 456, 465 (2007) (citations and internal quotations omitted). "The weight of the evidence is its weight in probative value, not the quantity or amount of evidence. It is not determined by mathematics, but depends on its effect in inducing belief." *Id.* Essentially, whether the verdict is supported by the weight of the evidence is "a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* (quoting 29A Am. Jur. 2d Evidence § 1430 (1994)). "Thus, in contrast to sufficiency where we determine whether a rational *juror* could have found guilt, a verdict conclusively against the weight of the evidence is one no reasonable *jury* could return." *Id.* (internal quotations and citations omitted).

4. The jury verdict must be an unreasonable before the court may set it aside. As such, "the court should exercise its discretion with caution and invoke its power to grant a new trial only in exceptional cases in which the evidence preponderates heavily against the verdict and where a miscarriage of justice may have resulted." *Id.* at 466 (internal quotations omitted). "The trial court should not disturb the jury's findings unless the jury clearly failed to give the evidence its proper weight." *Id.*

B. Legal Argument

5. Any rational trier of fact, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State, could have found guilt beyond a reasonable doubt. The weight of the evidence was clearly sufficient to support the Jury's guilty finding and does not support the extraordinary remedy of the Court granting a new trial.

6. The evidence here does not weigh against the jury's verdict requiring the Court to grant a new trial. The Court clearly already determined this when it denied the Defendant's Motion to Dismiss after the State rested its case.

7. The Defendant requested Mark Gray get his firearm. The Defendant chased O.L. out of her home and Mark Gray followed. The Defendant yelled "shoot him, shoot him" while standing in front of O.L.'s vehicle. Mark Gray then fired his pistol. O.L. was stationary at this time. O.L. drove in reverse into a pole and then drove forward. The Defendant testified that she moved into the street and the jury could have perceived this as an attempt to corner O.L. as Mark Gray fired at the vehicle. In viewing this evidence in the light most favorable to the State, a reasonable jury could and did conclude that these actions aided Mark Gray in the commission of Attempted First Degree Assault and Criminal Mischief.

8. The Defendant argues several hypothetical explanations for how Mark Gray did not act as a result of or aided by the Defendant. The Defendant did not argue these hypotheticals in her closing argument and therefore these hypotheticals were not specifically posed to the jury. "Because determination of the defendant's awareness is a subjective inquiry, it may be

proven by any surrounding facts and circumstances from which such awareness may be inferred." State vs. Hull, 149 N.H. 706, at 713 (2003). A reasonable jury could exclude all reasonable conclusions consistent with innocence and find the defendant guilty beyond a reasonable doubt, as they did here.

9. The State presented evidence of the damage to the vehicle. Specifically four defects in the motor vehicle, the shattered rear tail light and other damage to the truck. A reasonable jury could conclude that the value of the damage presented was in excess of $100.

10. To prove that the defendant acted purposely, the State had to show that his conscious object was to cause a certain result. This is a subjective theory. Deciding whether the defendant acted with the required intent was a question of fact for the jury to decide. There is often no direct evidence of intent because there is no way of examining the operation of a person's mind. Here, the Defendant testified that she told Mark Gray to get his gun, that she chose to chase O.L. out of the home, that she ran over to O.L.'s vehicle, that she yelled to "shoot him, shoot him", and that after knowing O.L. was in the car she stated she thought Mark Gray should do it again. The evidence presented to the jury was enough for the jury to conclude that the defendant acted with the requisite intent to be found guilty of the charges.

11. In her motion, the Defendant alleges that the jury's verdict was inconsistent and thus should be vacated. The State disagrees. The defendant was convicted of Criminal Mischief [Principal/Accomplice] and First Degree Assault [Principal/Accomplice]. She was found not guilty of Solicitation to Commit Reckless Conduct with a Deadly Weapon and Solicitation to Commit First Degree Assault. These charges contain separate elements allowing for diverse verdicts on the charges absent a conclusion that the verdict was unsupported by the weight of the evidence. Given the varying elements required for each charge, is it reasonable that the jury found the Defendant guilty of some charges but not all. A not guilty verdict in relation to the solicitation charges does not necessitate a not guilty verdict on the other charges.

12. Finally, in her motion, the Defendant attempts to ascertain the thinking of the jury. Defense argues that the Court should not attempt to place itself in the jury deliberation room or assume that based the decision of one charge, evidence was not considered in the deliberation of a different charge.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the Defendant's Motion without a hearing; or

B. Hold a hearing on the matter; and

C. Grant such further and other relief as justice may demand.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

08/15/2019

/s/ Ryan C. Ollis
Ryan C. Ollis
Assistant County Attorney
New Hampshire Bar # 20808

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to defense counsel Michael J. Zaino, attorney for defendant.

/s/ Ryan C. Ollis
Ryan C. Ollis
Assistant County Attorney

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

STATE OF NEW HAMPSHIRE

v.

BRENNA CAVANAUGH

218-2018-CR-1583

ORDER ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

On August 5, 2019, a jury found Defendant Brenna Cavanaugh guilty of one felony-level count of Principal/Accomplice Attempted First Degree Assault, see RSA 631:1, and one class A misdemeanor-level count of Principal/Accomplice Criminal Mischief, see RSA 634:2. However, the jury found Defendant not guilty of two felony-level counts of Criminal Solicitation. See RSA 629:2. Presently before the Court is Defendant's August 15, 2019 motion for judgment notwithstanding the verdict ("JNOV"). See Doc. 55. The State objects. See Doc. 60 (objection filed September 6, 2019). Although the parties each requested a hearing on this issue, the Court's review of the pleadings revealed that both sides had clearly articulated the factual and legal bases for their respective positions. Accordingly, the Court concluded that a hearing was unnecessary. Prior to the sentencing on September 20, 2019, the Court informed counsel that it would be issuing an order in due course and without the need for a hearing. For the reasons that follow, Defendant's motion for JNOV is DENIED.

Facts

Viewed in the light most favorable to the State, the evidence presented at trial

established the following. See State v. Fedor, 168 N.H. 346, 348 (2015). In the early morning hours of August 18, 2018, Defendant's teenaged daughter invited a sixteen-year-old boy with the initials O.L. to a party. O.L. was friends with Defendant's daughter, and he believed that the party was being held at Defendant's residence. O.L. also believed that there were no adults present at Defendant's residence. O.L. had been to Defendant's residence at least two prior times, and he had engaged in a fairly lengthy conversation with Defendant approximately two weeks prior to August 18, 2018.

Although O.L. did not have a driver's license, he took his father's truck (without permission) and drove to Defendant's residence in order to attend the party. O.L. parked the truck across the street from Defendant's residence, with the driver's-side door facing the street. It was dark outside, but there was a lit telephone pole approximately five feet behind the truck. O.L. crossed the road and entered Defendant's unlocked residence. He went up a staircase to the living room area. The residence was poorly lit, and neither Defendant's daughter nor any of O.L.'s other friends seemed to be present in the residence. O.L. whispered the name of Defendant's daughter in an effort to confirm whether she was in the residence. When no one responded, O.L. decided to leave Defendant's residence.

As he was preparing to leave Defendant's residence, O.L. stepped on a creaky floorboard. He then heard a voice state "someone's here" or "somebody's here." In response, O.L. quickly ran from Defendant's residence and to his father's truck. O.L. explained at trial that he fled Defendant's residence because he was afraid he was going to get in trouble.

Defendant testified at trial that she had been sleeping when O.L. first entered the

home but was awakened by the sound of O.L. stepping on the creaky floorboard. She informed her partner, Mark Gray, that someone was inside the house. She also instructed Gray to get his gun. Gray complied. Because she was naked from the waist up, Defendant put on a robe. At some point before she left the bedroom, Defendant heard her front door swing closed. Although her bedroom door had a lock, Defendant opted to leave her bedroom, run down two flights of stairs, exit her home, and chase after O.L. Gray followed moments later.

Defendant managed to get outside before O.L. left the area. O.L. explained at trial that he had forgotten he had locked the truck, and thus it took him a few seconds to get inside of the vehicle. Defendant ran across the street and stood approximately one yard away from the front of the truck so that she could see the number on the truck's license plate. She did not explain at trial why she opted to stand near the front of the truck rather than getting this information from the back of the truck. During this time, O.L. did not speak, but kept staring at Defendant hoping she would recognize him from their prior interactions.

O.L. struggled to start the truck, momentarily forgetting that he needed to put his foot on the brake in order to do so. As he was about to drive away, O.L. heard a female voice yell "shoot, shoot" or "shoot him, shoot him." O.L. explained at trial that Defendant was the only female in the area at that time. Immediately after O.L. heard the female say "shoot/shoot him," he heard a very loud noise and saw a puff of dust. Realizing that he was being shot at, O.L. put the truck into reverse. He explained at trial that he drove in reverse because he did not think he had enough room to drive out of his parking space without hitting another vehicle. However, O.L. ended up striking the telephone

pole behind him. He then put the truck into drive and maneuvered out of the parking space. As he drove out of the parking space, O.L. heard more gunshots. Once safely away from Defendant's residence, O.L. stopped briefly to vomit, then drove home.

Members of the Portsmouth Police Department happened to be in the vicinity when the above-described events occurred. Several such officers testified that they heard approximately six gunshots go off.[1] After Defendant called 911 to report that there had been an intruder in her home, the officers responded to Defendant's residence. While the officers processed the scene, O.L. returned with some friends. He explained at trial that he returned because he knew that Defendant had looked at his father's license plate, and he did not want his father to get in trouble. O.L. was eventually taken to the Portsmouth Police Station. It was later determined that O.L.'s father's truck sustained three "defects" as a result of being hit by three separate bullets.

Standard of Review

To prevail upon a challenge to the sufficiency of the evidence—i.e., a motion for JNOV—a 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 been found guilt beyond a reasonable doubt. State v. Shepard, 158 N.H. 743, 746 (2009) (citation omitted). "Determining whether evidence is sufficient requires both quantitative and qualitative analysis; 'quantitatively,' evidence may fail only if it is absent, that is, only where there is none at all, while 'qualitatively,' fails when it cannot be said reasonably that the intended inference may logically be drawn therefrom." State v. Spinale, 156 N.H. 456, 463 (2007) (citation omitted). In considering a motion for JNOV, the Court "may not weigh the evidence or inquire into the credibility of the

[1] The Portsmouth Police Department eventually recovered six bullet casings in connection with this case.

witnesses, and, if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied." Fedor, 168 N.H. at 349. However, when the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. Shepard, 158 N.H. at 746. Yet, even under this standard, the Court must "consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation." Id. "Further, the trier [of fact] may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom." State v. Young, 159 N.H. 332, 338 (2009) (citation omitted).

Analysis

Here, Defendant's motion for JNOV raises three arguments. First, Defendant challenges her conviction for Principal/Accomplice Attempted First Degree Assault on the ground that there was insufficient evidence concerning Defendant's intent, and whether her actions actually "aided" Gray or otherwise "contributed in any way to his decision to fire the gun." See Doc. 55, p. 3. Second, Defendant challenges her conviction for Principal/Accomplice Criminal Mischief on the ground that there was insufficient evidence concerning the value of the damage to O.L.'s father's vehicle. See id. at 4. Lastly, Defendant contends that the jury's verdict was inconsistent because the jury did not find her guilty of solicitation but did find her guilty under a Principal/Accomplice theory. See id. The Court will address each argument, in turn.

I. Sufficiency of the Evidence Concerning Principal/Accomplice Attempted First Degree Assault

As set forth above, Defendant was found guilty of Principal/Accomplice Attempted First Degree Assault. As Defendant aptly notes, there is no evidence in the

record that Defendant "acted as a princip[al] in attempting to discharge a firearm." Doc. 55, p. 2. Defendant also challenges the sufficiency of the evidence vis-à-vis accomplice liability, claiming "there was insufficient qualitative evidence to support a finding beyond a reasonable doubt that [Defendant] purposely aided another in causing six bullets to be discharged." Id. Specifically, Defendant avers: (a) there was insufficient evidence concerning her intent; and (b) there was further insufficient evidence as to whether Defendant's actions "in any way aided" Gray. Id. at 3.

The Court is unpersuaded. "To prove accomplice liability, the State was required to submit sufficient evidence that: (1) the accomplice had the purpose to make the crime succeed; (2) the accomplice's acts solicited, aided or attempted to aid another in committing the offense; and (3) . . . the accomplice shared the requisite mental state for the offense." State v. Young, 159 N.H. 332, 338 (2009) (citation and quotations omitted); accord RSA 626:8, III–IV. Here, the relevant crime is Attempted First Degree Assault. See RSA 631:1. Pursuant to RSA 629:1, I, "A person is guilty of an attempt to commit a crime if, with a purpose that a crime be committed, he does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step toward the commission of the crime." Consistent with the foregoing, the Court instructed the jury in this matter as follows:

> Before you can find the Defendant guilty as an accomplice, you must find the State has proven the following beyond a reasonable doubt:
> 1. [] Defendant aided or attempted to aid another person in committing the crime of Attempted First Degree Assault; and
> 2. [] Defendant had the purpose to promote or facilitate the other person's unlawful conduct. This means that the State must prove [] Defendant had the conscious object to do certain acts or to achieve a certain result . . . To prove [] Defendant acted purposefully . . . requires proof [] Defendant specifically intended or desired to bring about a particular result or to do the particular acts; and

3. It was a reasonably foreseeable consequence of [] Defendant's conduct that the actions of . . . Gray and [] Defendant . . . would result in the commission of the crime of Attempted First Degree Assault [said actions being causing 6 bullets to be discharged by means of a firearm in the direction of O.L., which under the circumstances as [] Defendant believed them to be constituted a substantial step toward the commission of the crime of First Degree Assault]; and
4. [] Defendant acted purposely with respect to her intent to have the crime of Attempted First Degree Assault committed.

Court's Ex. 1, pp. 17–18; see also id. at p. 21 ("A person acts '**purposely**' when her conscious object is to engage in certain conduct . . . It requires proof that . . . Defendant specifically intended or desired to do a particular act." (emphasis in original)).

As set forth above, based upon the evidence presented at trial the jury could have reasonably found that after Defendant was awakened by a creaking floorboard inside of her residence, she woke Gray and instructed him to get his gun. Although Defendant could have locked her bedroom and stayed inside with Gray and his gun, she opted to follow O.L. out of her home and onto the street. She then stood approximately three feet in front of O.L.'s vehicle, attempting to get his license plate number. Once Gray had followed Defendant outside, Defendant twice instructed Gray to shoot the gun she had told him to retrieve from the bedroom. Immediately thereafter, Gray opened fire, shooting six bullets in O.L.'s direction. The Court disagrees with Defendant's claim that, based upon these facts, "no reasonable jury could have found beyond a reasonable doubt that she specifically intended for her actions to aid" Gray in firing his gun in O.L.'s direction.[2] See Doc. 55, p. 3. Rather, in the Court's view, there

[2] There is (at least) a suggestion in Defendant's motion that the jury had to find a specific intent to aid Gray in discharging all six bullets. See Doc. 55, p. 3. To the extent Defendant intended to assert that argument, it is unavailing. In State v. Therrien—a case in which the defendant was charged with Principal/Accomplice First Degree Murder—the New Hampshire Supreme Court held that even though the indictment alleged one overt act (stabbing), the defendant could be convicted as "an accomplice . . . on the basis of overt acts not specifically alleged" in the indictment. Therrien, 129 N.H. 765, 768–69 (1987).

was sufficient evidence to support the jury's finding that Defendant had the specific intent to aid Gray in committing the crime of Attempted First Degree Assault.

Based upon the foregoing, the Court is likewise unpersuaded by Defendant's challenge to the sufficiency of the evidence with regard to whether her actions "in any way aided" Gray. See Doc. 55, p. 3. Noting that there was no direct evidence concerning this issue, Defendant avers that the evidence presented at trial supported "multiple conclusions . . . consistent with innocence." See id. ("For example, Gray could have fired solely because he wanted to protect himself or [Defendant], or Gray may not have heard [Defendant] say shoot, or Gray may have decided under what circumstances he was going to shoot before going outside regardless of what actions [Defendant] took."); cf. Shepard, 158 N.H. at 746. The Court disagrees with Defendant's view of the evidence.

The Court's view of this issue is once again informed by the jury instructions provided in this case: specifically, the instruction concerning reasonable doubt. See Court's Ex. 1. As the Court instructed the jury,

> A reasonable doubt is just what the words would ordinarily imply. The use of the word "reasonable" means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can easily be explained away.

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After explaining the general law surrounding sufficiency of indictments, the Therrien court clarified that "once a specific offense is identified" in an indictment, "there is no further and independent requirement to identify the acts by which a defendant may have committed that offense, or to limit proof of guilt to acts specifically pleaded." Id. at 770–71 (emphasis added) (clarifying that the holding in State v. Bean, 117 N.H. 185, 187 (1977) was "no authority for a general requirement to plead specific acts beyond what may be necessary to identify the particular offense"); accord State v. Abbis, 125 N.H. 646, 647 (1984) ("The indictment sufficiently alleges accomplice liability to attempted felony theft if it alleges an attempted felony on the part of the principal and the acts and intent of the accomplice to aid the principal in that activity."). In the Court's view, the wording of the indictment in this case did not require the jury to find, beyond a reasonable doubt, that Defendant intended to aid Gray in discharging a specific number of bullets; rather, the jury could properly convict Defendant if it found, beyond a reasonable doubt, that Defendant specifically intended for her actions to aid Gray in causing the discharge of one or more of the six bullets Gray fired at O.L. that evening.

Id. at p. 7. In this context, the terms "reasonable" and "rational" are synonyms. See Webster's Third New International Dictionary 1885 (unabridged ed. 2002).

Viewed against the above-described standard, the Court cannot agree that the "innocent" conclusions suggested by Defendant constitute "rational conclusions" which the jury could have drawn from the evidence presented at trial. See Shepard, 158 N.H. at 746. O.L. heard Defendant yell "shoot/shoot him" multiple times while he was inside of his father's vehicle, and immediately thereafter Gray fired the first shot.[3] On these facts, it would not be rational to conclude that Gray did not hear Defendant yell shoot/shoot him. Likewise, given that Gray got his gun at Defendant's behest, followed Defendant out of their home, and shot at O.L. immediately after Defendant instructed him to do so, it is not rational to conclude that Gray shot at O.L. solely because he wanted to protect himself or Defendant. Nor is it rational to conclude that as Gray was trailing behind Defendant, who had run out of the home after O.L., he had time to decide he was going to shoot at whoever had been inside of their home regardless of Defendant's conduct. In short, the only rational conclusion supported by the evidence is Defendant's actions that evening aided Gray in shooting his gun at O.L. In light of the foregoing, the Court is unpersuaded by Defendant's arguments concerning the sufficiency of the evidence with regard to the conviction for Principal/Accomplice Attempted First Degree Assault. Accordingly, Defendant's request for JNOV on this basis is DENIED.

II. Sufficiency of the Evidence Concerning Value of Damage to Truck

Defendant next challenges her class A misdemeanor-level conviction for

[3] The fact that one or more of the truck's windows may have been partially open does not undermine the Court's view of the evidence in this regard.

Principal/Accomplice Criminal Mischief on the ground that there was insufficient evidence presented at trial concerning the amount of damage caused to O.L.'s father's truck. Under RSA 634:2, II-a, criminal mischief is a class A misdemeanor "if the actor purposely causes or attempts to cause pecuniary loss in excess of $100 and not more than $1,500." By contrast, the State does not need to prove a specific pecuniary loss in order to secure a conviction for "the least serious variant of criminal mischief." State v. Hudson, 151 N.H. 688, 690 (2005) (citing RSA 634:2, III). Here, Defendant was charged with and convicted of the class A misdemeanor variant, and thus the Court must determine the sufficiency of the evidence as it relates to the $100 threshold amount of damage specified in RSA 634:2, II-a.

As set forth supra, O.L.'s father's truck sustained damage from three different bullets. While one of those bullets essentially ricocheted off of the vehicle, two of the bullets left visible bullet holes. The jury observed the bullet holes during the view, and the State submitted photographs of that damage into evidence. Although the State did not introduce direct evidence of the amount of damage caused to the truck, the circumstantial evidence submitted at trial leads to only one rational conclusion: that the truck sustained at least $100 worth of damage as a result of the gunshots. Cf. See Shepard, 158 N.H. at 746. Accordingly, Defendant's challenge to the sufficiency of the evidence vis-à-vis this issue is unavailing, and her request for JNOV on this basis is therefore DENIED.

III. Import of the Jury's Allegedly-Inconsistent Verdict

Defendant's final argument in support of her motion for JNOV is that the jury's verdict was inconsistent and should be vacated on this basis. See Doc. 55, p. 4.

Specifically, Defendant questions how the jury could find her not guilty with respect to the solicitation charges but guilty under a principal/accomplice theory with respect to the underlying crime of First Degree Assault. See id. In response, the State notes that during voir dire in this case, "[t]he majority of the jurors indicated [they] believed solicitation required some level of prior planning." See Doc. 60, p. 1. In the State's view, this may shed light on the jury's thoughts in this case. See id. The Court is in general agreement with the State's view of this issue, particularly given defense counsel's emphasis at trial on the limited amount of time Defendant had to react to what was happening around her.

In the Court's view, several portions of the jury instructions may also shed light on this issue. First, although the Court denied defense counsel's request for a formal jury nullification instruction, the Court did provide the following instruction:

> If you have a reasonable doubt as to whether the State has proven any one or more of the elements of the offense charged, you must find [] Defendant not guilty. However, if you find that the State has proven all of the elements of the offense charged beyond a reasonable doubt, then you should find [] Defendant guilty.

Court's Ex. 1, pp. 23–24 (emphasis added). In addition, the Court instructed the jury to "consider each charge separately when reaching" a verdict, and clarified the jury's "verdict on one charge should not influence [the jury's] verdict on the other." Id. at p. 24.

It may be that the jury's so-called inconsistent verdicts were the product of the above-described notion that solicitation required more advanced planning than that required to convict Defendant of the other charges. Or, it may be that the jury found the State had proven all of the elements of the solicitation offenses as well, but opted not to find Defendant guilty of those charges. Or, there may be some other rational

explanation for the overall verdict in this case. Cf. State v. Chapin, 128 N.H. 355, 357 (1986). Under the circumstances of this case, the Court will not attempt to divine the jury's reasoning from the tea leaves.

The Court's ruling on this issue is consistent with "established jurisprudence regarding inconsistent verdicts." State v. Littlefield, 152 N.H. 331, 354–55 (2005) (discussing the relevant "jurisprudence"). The court observed:

> In State v. Brown, [132 N.H. 321, 323 (1989)] . . . we stated:
>
> > [U]nder federal and State law, the inconsistency of simultaneous jury verdicts against a single defendant on a multiple-count criminal indictment need not be rationally reconciled, and does not entitle the defendant to relief. . . .
> >
> > The United States Supreme Court held in 1932 that consistency among multiple-count verdicts is not necessary. Instead, the Court stated that although inconsistent verdicts may show that the jury did not voice its true conclusions in either the acquittal or the conviction, this does not mean that the jury was not convinced of the defendant's guilt. The rationale supporting the Court's decision . . . has been expanded and continues to be relied upon today.
> >
> > As [United States v. Powell, 469 U.S. 57. . . (1984)] explains, even if inconsistent verdicts reflect jury error, it should not be assumed that they necessarily aid the government. It is just as likely that the jury correctly reached the guilty verdict on one count, and through leniency or mistake arrived at the not guilty verdict on a different count of the same offense. Under these circumstances, the government is prevented by the United States Constitution's double jeopardy clause from appealing an acquittal based upon jury error. The defendant, however, is in a superior position to determine whether the jury irrationally or erroneously arrived at its guilty finding, because he or she can appeal the verdict based on insufficient evidence. If the appellate court concludes that sufficient evidence was introduced at trial to support a determination of guilt beyond a reasonable doubt, the conviction will stand. Before a court could determine which of two or more inconsistent verdicts, if any, was based on error, mistake, or leniency, it would be necessary to inquire into the jury's deliberations. According to Powell, the better rule is to insulate jury verdicts from review under these circumstances.

> This court has recently noted, similar to the United States Supreme Court . . ., that although it may be assumed that one of the two inconsistent verdicts is wrong, their inconsistency does not, standing alone, indicate where the error lies. If we were to vacate each verdict, one of our decisions would presumably be wrong on the merits. If we were to vacate only one, we would never know which one to choose.
>
> Id. at 328–30 . . . (citations, quotations and brackets omitted).
>
> In this case, the jury's verdict of not guilty of negligent homicide by operating a boat while under the influence of intoxicating liquor, meant that the jury unanimously agreed that the defendant was not guilty of that charge. Even assuming that the two verdicts are inconsistent, we cannot infer that the acquittal stemmed either from jury error, leniency, nullification, insufficiency of the evidence, or any other particular reason. We thus conclude that the acquittal on indictment # 03–S–007 does not require us to reverse the defendant's conviction. See id.

Littlefield, 152 N.H. at 354–55.

Here, as in Littlefield, the Court cannot infer from the present record that the jury's finding of not guilty on the solicitation charges in any way undermines the validity of the jury's finding of guilty on the Principal/Accomplice charges. Accordingly, Defendant's arguments concerning this issue are unavailing, and her request for JNOV on this basis is therefore DENIED.

Conclusion

For all of the foregoing reasons, Defendant's motion for JNOV is DENIED.

So Ordered.

October 9, 2019
Date

Marguerite L. Wageling
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/16/2019