THE STATE OF NEW HAMPSHIRE
SUPREME COURT

STATE OF NEW HAMPSHIRE

v.

BRENNA CAVANAUGH
No. 2019-0608

DEFENDANT'S MEMORANDUM OF LAW REGARDING SELF-DEFENSE INSTRUCTION

NOW COMES Attorney Michael J. Zaino on behalf of the defendant, Brenna Cavanaugh, who files this Memorandum of Law pursuant to this Court's Order issued on November 23, 2020.

This Court directed each party to file a supplemental memorandum of law addressing whether: (1) the defendant effectively waived the issue of her entitlement to a self-defense instruction as to the charges for which she was convicted; and (2) any argument she has with regard to her entitlement to a self-defense instruction is moot because the jury found her not guilty of the charges for which she requested that instruction.

In order to answer the Court's questions, it is important to understand the procedural history of the case. The defendant was originally indicted on two charges in November 2018. See Indictments 1562275C & 1562276C. Indictment 1562276C alleged the crime of "attempted first degree assault principle/accomplice (sic)" where it was alleged that the defendant "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." Indictment, 1562275C, charged "criminal mischief principal/accomplice" where it was alleged the defendant "acting in concert with or aided by Mark Gray caused 6 bullets to be discharged by means of a firearm at a vehicle occupied by O.L."

In April 2019, the defendant was indicted on two new charges alleging the crimes of criminal solicitation to commit first degree assault and reckless conduct. See Indictments 1610355C & 1610356C. In each of these charges, the state alleges that the defendant, "acting with the purpose that another engage in conduct constituting a

crime…requested Mark Gray to discharge a firearm in the direction of O.L." Following the new indictments, the state told the Seacoast Online newspaper that "the new indictments do not contain new allegations and will replace prior charges brought against the couple." See Exhibit A attached hereto – New Indictments in Portsmouth gunfire incident dated April 10, 2019. The defendant then filed her notice of defense on June 12, 2019 and in an introductory paragraph noted that the defendant stands charged with two alternative theories, Criminal Solicitation to commit first degree assault and criminal solicitation to commit reckless conduct. See Defendant's Notice of Self Defense appended to Defendant's Brief at 49-50.

The notice further states that each of these charges stems from an incident on August 18, 2018. Id. at 49. In successive paragraphs 2 through 4, the defendant's notice presents facts from the discovery that includes O.L.'s entry into her third-floor bedroom in the middle of the night, her being awoken to find a man in her bedroom, and following O.L. out of her home. Id. The notice also mentioned the incident outside her home where the defendant was attempting to get information about the suspect's vehicle while the suspect was revving the engine with the defendant standing in front of the vehicle. Id. The notice then notes that it was during this time that shots were fired by Mark Gray. Id.

After noting the relevant facts, the notice then expressly puts the state and court on notice that "the actions of the alleged victim 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." Id. The notice then concludes by notifying "the court and the government that she may rely on the defense of Physical Force in Defense of a Person under RSA 624:4 (II)." Id. Therefore, the notice was not expressly limited to the criminal solicitation charges.

The state filed an objection to the notice of self defense on June 20, 2019. See State's Objection to Defendant's Notice of Self Defense appended to Defendant's Brief at 51-53. Noticeably, the state does not make any mention of the pending charges or whether the notice applies to some or all of the charges. The essence of the state's objection surrounds the factual allegation and whether a person in the defendant's position is entitled

to a self-defense jury instruction. For example, in paragraph 3, the state seeks clarification of whether the defendant "believed the victim was about to use unlawful force against her, another, or both?" Id. at 51. In paragraph 4, the state again notes its concern regarding whether the notice provides sufficient factual basis for the self-defense instruction claiming the notice "failed to allege any conduct to show that she reasonably believed O.L. was about to use unlawful deadly force against anyone." Id. In paragraphs 5 through 7, the state argues that the defense is not available because 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" and she "could easily have moved to safety." Id. at 51-52.

The Court now seeks argument on whether the defendant waived the issue of her entitlement to a self-defense instruction on the charges of attempted first degree assault and criminal mischief for failing to expressly state those charges in the notice under State v. Champagne, 119 N.H. 118, 122 (1979). The defendant disagrees.

In Champagne, the Court held that "consent of the owner was [not] available [in a prosecution for arson] as a defense…because that issue was effectively waived below." Id. In reaching this conclusion, the Court noted that the defendant did not give the notice required by superior court Rule 102 that he intended to rely on the consent defense. Id. Importantly, the Court further noted that such a defense was inconsistent with the evidence relied on at trial, as the defendant's testimony at trial corroborated the testimony of two alibi witnesses that he did not participate in the burning incident at all. Id. The court noted that is completely the opposite of a defense that relies on the consent of the owner and permission to burn the item. Id. As such, the Court found that failure to notice that issue constituted a waiver by the defendant. Id. That was not the case here.

The defendant in this case made clear by formal notice that she intended to rely on the defense of Physical Force in Defense of a Person under RSA 624:4 (II). This defense applied to all the charges, whether expressly referenced or not, based on the grounds proffered in the notice and specifically responded to in the state's objection. Here the facts that were intended to support the criminal solicitation charges were the same facts relied upon to support the attempted first degree assault and criminal mischief charges, that is

whether the defendant either "caused 6 bullets to be discharged by means of a firearm at a vehicle occupied by O.L." or whether she "requested Mark Gray to discharge a firearm in the direction of O.L." As noted in Exhibit A, the state even agreed that the indictments for criminal solicitation do not contain new allegations and will replace prior charges brought against the defendant. This makes clear that the factual allegations supporting all of the charges were the same. If all of the charges are supported by the same facts and if the defendant put the state on notice of the factual grounds supporting the self-defense instruction, then the failure to specify which charges it specifically applies to should have no legal significance in this case, especially since paragraph 6 of the defendant's notice makes a general blanket statement, not limited to particular charges, that she may rely on the defense of physical force in defense of a person.

On these facts, the holding in Champagne is distinguishable and does not support the conclusion that the defendant effectively waived her right to the self-defense instruction on all charges not expressly referenced in the notice. Here, each charge relied upon the same set of facts properly noticed as grounds for the defense in the defendant's notice of self-defense. Further, the defendant's argument at trial for the self-defense instruction again referred to the same facts plead in the notice and the state's objection at trial did the same. As such, there is no inconsistency in the notice and the evidence and/or strategy at trial, as there was in Champagne. For these reasons, the defendant should not be deemed to have waived her right to a self-defense instruction based on the notice given in this case, as it clearly and directly related to the facts supporting all of the charges, whether expressly referenced or not.

The next issue is whether the defendant's entitlement to the self-defense instruction is moot because the jury found her not guilty of the charges for which she requested that instruction. Pursuant to the New Hampshire Rules of Criminal Procedure, "[i]f the defendant intends to rely upon any defense specified in the Criminal Code, the defendant shall…file notice of such intention setting forth the grounds therefore with the court and the prosecution." N.H. R. Crim. Pro. 14(b)(2)(A). In a recent decision, this Court has held that "Rule 14(b)(2)(A)'s requirement that the defendant 'set[] forth the grounds' is not

tantamount to a requirement that the defendant proffer evidence in support of the noticed defense. State v. Munroe, No. 2018-0433, decided August 4, 2020 at page 5. The Court went further in rejecting the state's argument and noted that the rule only requires the defendant to 'set[] forth the grounds' when raising any defense specified in the Criminal Code…[and that they] will not add words to the clear language of the rule." Id.

This is important in this case, as the Court is asking whether the Rule requires the defendant to expressly indicate what charges the defense applies too, a requirement above and beyond the Rule's clear direction to 'set forth the grounds' relied upon. Here, the defendant clearly and plainly 'set forth the grounds' relied upon and went above and beyond to specify the relevant factual basis of the claimed defense of Physical Force in Defense of a Person under RSA 624:4 (II).

In her notice, the defendant made clear the grounds she relied upon for the defense. The notice specifies the alleged victim's entry into her home, her actions of following him out, her actions of standing near the car, the alleged victim's actions of revving the engine of his car and her location relative to it, and it further notes that shots were fired. Each of these facts is used as grounds to justify the self-defense instruction for all charges, as they are all based on the defendant's actions relative to the discharge of a weapon by another in defense of her or another under RSA 624:4 (II).

Another important consideration when determining whether a defendant has waived her right to a self-defense instruction is whether the state was prejudiced by the notice provided. See State v. Chen, 148 N.H. 565 (2002) (affirming trial court's refusal to give self-defense instruction following an oral motion in the middle of trial due to the prejudice to the state). In this case, the defendant filed a notice of self-defense prior to trial and since the charges represent alternative legal theories covering the same facts, the state was not prejudiced by a failure to list each specific charge pending. Unlike Chen, the state did not argue in this case that it was prejudiced by the defendant's notice. The state filed a written objection and made no mention of its application to any particular charges. After all, even the state went back and forth regarding the true nature of the charges. As noted above in Exhibit A, in April 2019, the state is quoted as saying the solicitation charges are

replacements for the first degree assault and criminal mischief charges. Then in the state's objection to the defendant's motion in limine to exclude expert filed on July 1, 2019, the state notes that the "[d]efendant is charged with alternative counts of Criminal Solicitation to Commit First Degree Assault (1610355C), Criminal Solicitation to Commit Reckless Conduct with a Deadly Weapon (1610356C), Criminal Mischief [Principal/Accomplice] (1562275C), and Attempted First Degree Assault [Principle/Accomplice] (sic) (1562276C)." See Exhibit B attached hereto – State's Objection to Defendant's Motion in Limine to Exclude Expert. And then in the state's objection to defendant's motion in limine to exclude statements, the state only notes that the "[d]efendant is charged with alternative counts of Criminal Solicitation to Commit First Degree Assault (1610355C) and Criminal Solicitation to Commit Reckless Conduct with Deadly Weapon (1610356C)." See Exhibit C attached hereto – State's Objection to Defendant's Motion in Limine to Exclude Statements. Thus, in just these three examples, the state discusses the charges (i.e., the principal/accomplice and the criminal solicitation charges) in three different ways: (1) as alternative theories (Exhibit B), (2) as the criminal solicitation charges are replacement charges for the principal/accomplice charges (Exhibit A), and (3) as only the solicitation charges are pending (Exhibit C).

Finally, if this Court finds that a self-defense notice must articulate the specific charges it applies to and not just the grounds, then the defendant asks this Court to still find that her request is not moot based on the fact that this Court has "long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." Sate v. Cromlish, 146 N.H. 277, 280 (2001). The Cromlish Court made clear that the discovery of truth in criminal proceedings should not suffer by an overly technical application of a scheduling order or the rules of court. Id. As is stated in the Rules of Criminal Procedure, "these rules shall be construed to provide for the just determination of every criminal proceeding." N.H. R. Crim. Pro. 1(b). Here, failing to give the self-defense instruction did not allow for the just determination at trial.

Thus, when the facts of this case are viewed in the context of the purpose of the notification requirements, that is, to reduce surprise at trial, the defendant clearly

articulated the grounds upon which her stated defense rested and the state was put on notice that it was a pure defense and they were sufficiently apprised of the grounds for the defense and what it would have to disprove at trial. See Cromlish, 146 N.H. 277 (2001); Chen, 148 N.H. 565 (2002); State v. Champagne, 152 N.H. 423 (2005); State v. Fichera, 153 N.H. 588 (2006); and State v. Etienne, 163 N.H. 57 (2011). Since the state never claimed any prejudice or confusion about what charges the notice of defense was related to in the trial court, as clearly it was factually related to all of them, there is no just basis for this Court to find that the defendant's requested instruction is moot.

Here the defendant was charged with two sets of alternative theories of criminal liability for the same conduct. Her notice of defense made clear that her self-defense was grounded on the facts that supported all of the pending charges. Her notice expressly stated that she intended to rely on the defense of physical force in defense of a person under RSA 624:4 (II). And the state was neither prejudiced nor surprised at trial by the defendant's notice, evidenced by the fact it never argued such to the trial court. As such, the defendant's argument is not moot, as she was entitled to the self-defense instruction on all charges, as all charges were supported by the same grounds noticed in the defendant's notice of self-defense.

Respectfully submitted,
BRENNA CAVANAUGH

By her attorney,

December 3, 2020

/s/ Michael J. Zaino

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Defendant's Memorandum of Law was forwarded to all parties of record.

December 3, 2020

/s/ Michael J. Zaino
Michael J. Zaino, Bar #17177

DEFENDANT'S EXHIBITS TABLE OF CONTENTS

State v. Cavanaugh, No. 2019-0608 Defendant's Exhibit A

Seacoastonline.com

New indictments in Portsmouth gunfire incident

By Elizabeth Dinan
edinan@seacoastonline.com
Posted Apr 10, 2019 at 3:58 PM
Updated Apr 10, 2019 at 4:44 PM

PORTSMOUTH -- A Rockingham County grand jury this month indicted former police commissioner Brenna Cavanaugh and her partner Mark Gray for a combined five charges related to an Aug. 18 shooting by Gray outside their shared home.

Deputy County Attorney Jennifer Haggar told the Portsmouth Herald the new indictments do not contain new allegations and will replace prior charges brought against the couple.

Cavanaugh, 43, of 140 Summer St., was initially charged by indictment in November when it was alleged she acted in concert with Gray, who was indicted for five charges related to the shooting incident. Police alleged Gray, 44, fired shots at a pickup truck driven by a teen who entered Gray's home at 3:30 a.m. Aug. 18, mistakenly thinking there was a party there.

The shots were fired in Summer Street while the teen was fleeing, police alleged. Cavanaugh previously said the teen was driving toward her and Gray when the shots were fired.

One new indictment against Cavanaugh, announced Wednesday, is for a felony count of "criminal solicitation to commit first degree assault." That alleges Cavanaugh "requested Mark Gray to discharge a firearm in the direction of" the juvenile, who is identified in the indictment by initials and a birth date. A second indictment for a charge of "criminal solicitation to commit reckless conduct with a deadly weapon" alleges Cavanaugh "requested Mark Gray to discharge a firearm in the direction" of the juvenile.

Cavanaugh is represented by attorney Michael Zaino, who said Cavanaugh was in her home when it was intruded and the new indictments "(don't) change

anything about the case."

"I do think it shows desperation on their end," he said. "I think this is the state's attempt to try and find some charge against my client."

The April grand jury indicted Gray for three felonies, two for counts of "reckless conduct with a deadly weapon." One alleges Gray engaged in conduct, which placed or may have placed the public in danger by discharging rounds from a semi-automatic pistol at a moving vehicle as it traveled down Summer Street. The second alleges Gray placed the juvenile in danger of serious bodily injury by discharging rounds from a pistol at a vehicle occupied by the juvenile. A third new indictment alleges he committed the crime of "criminal threatening with a deadly weapon" by placing or attempting to place the juvenile in fear of bodily injury by discharging a pistol in the direction of the minor.

Gray is represented by attorney Alan Cronheim who said, "We received the new indictments and it changes nothing about the defenses we have. The allegations are about the same events when a truck was heading toward Mark and he defended himself."

The indictments mean the grand jury found enough evidence to take the cases to trial and are not findings of guilt.

During a November court hearing, Cronheim said Gray feared the unknown intruder when he fired at his truck as it drove toward him. Cronheim said Gray and Cavanaugh both gave interviews to police, during which they expressed their fear of the home intruder early that morning. When they later learned the person was a friend of a relative, they were "even more shaken," he said.

According to a Portsmouth police affidavit, the teen told police he received a text from another teen who lived at Gray's home, inviting him to a party. Unaware the party was at another location, he mistakenly went to Gray's home at 3:30 a.m. and went in through an unlocked door, police allege. There were no lights on and the teen climbed stairs to the third floor when he heard someone say, "Someone's here" and to get a gun, according to the affidavit.

Police say the teen ran from the home and was followed by Cavanaugh, then Gray who shot at the front of the truck before it backed up, hit a phone pole,

then left the scene.

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 IN LIMINE TO EXCLUDE EXPERT

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, and objects to the Defendant's Motion In Limine and in support thereof states as follows:

1. The Defendant is charged with alternative counts of Criminal Solicitation to Commit First Degree Assault (1610355C), Criminal Solicitation to Commit Reckless Conduct with a Deadly Weapon (1610356C), Criminal Mischief [Principal/Accomplice] (1562275C)., and Attempted First Degree Assault [Principle/Accomplice] (1562276C).

2. The State has indicated its intention to call New Hampshire State Trooper Tara Elsemiller as an expert to discuss bullet flight path and a shooting reconstruction. The Defendant now objects to the expert's testimony on relevancy grounds. Alternatively, the Defendant also objects that the evidence violates Rule 403 of the New Hampshire Rules of Evidence.

3. "Evidence is relevant if it tends to make the existence of any fact consequential to the determination of the action more or less probable than it would be without admission of the evidence." In re Haines, 148 N.H. 380, 381 (2002); see N.H. R. Ev. 401. "Irrelevant evidence is not admissible." N.H. R. Ev. 402. It is important to note that "there are so many qualifiers in the language of the Rule that nearly anything can be considered 'relevant.'" N.H. R. Ev. 401 Reporter's Notes.

4. "A person is guilty of criminal solicitation if, with a purpose that another engage in conduct constituting a crime, he commands, solicits or requests such other person to engage in such conduct." N.H. RSA 629:2, I. The plain language of the solicitation statute makes it clear that the State must prove beyond a reasonable doubt that the Defendant commanded, solicited, or requested another person to engage in criminal conduct. It is, therefore, consequential to this action to determine whether the conduct solicited was criminal.

5. By statute, an individual can be held criminally liable for the conduct of another if the offense is committed by the individual's conduct or by another person for whom the individual is legally accountable. N.H. RSA 626:8, I. A person can be found "legally accountable" when she solicits another person to commit a crime, with the purpose of promoting or facilitating the offense. N.H. RSA 626:8, II-III.

6. "[A]ccomplice liability is not a separate and distinct crime, but rather holds an individual criminally liable for actions done by another." State v. Donohue, 150 N.H. 180, 185 (2003). An accomplice's liability should not extend past the criminal purpose the accomplice shares. State v. Etzweiler, 125 N.H. 57, 64 (1984); overturned on other grounds, State v. Cheney 165 N.H. 677 (2013). However, in order to avoid accomplice liability through withdrawal, an individual who solicits another to engage in criminal conduct must make some act designating to the principal that she has withdrawn. State v. Formella, 158 N.H. 114. 117-18 (2008).

7. To satisfy the Rule 401 relevancy requirements, Trooper Elsemiller's testimony must (1) make any fact more or less probable than it would be without admission of the evidence, and (2) the fact made more or less probable must be consequential to the determination of the action. See N.H. R. Ev. 401. In the instant matter, Trooper Elsemiller's testimony meets both prongs of the relevancy requirement under Rule 401.

8. The State has charged the Defendant with soliciting her co-defendant, Mark Gray, to engage in criminal conduct by discharging a firearm at the victim's vehicle as the vehicle attempted to flee the scene. By soliciting the co-defendant to engage in criminal conduct, the Defendant is legally accountable for her co-defendant's criminal conduct. The Defendant is also charged as a principle/accomplice for First Degree Assault and Criminal Mischief. Under the same accomplice liability, she is responsible for Mark Gray's conduct for these charges too.

9. The State anticipates that if allowed to testify, Trooper Elsemiller will testify about the trajectory of the bullets and provide an analysis of the shooting that occurred on the night of the charged offenses. Her testimony will make a fact more probable than it would be without her testimony, specifically the location of the co-defendant, Mark Gray, in relation to the victim's vehicle. There are conflicting statements regarding Mark Gray's position in relation to the vehicle when the shots were fired. There are also conflicting statements regarding the Defendant's location in relation to the vehicle and to Mark Gray. The trajectory of the bullets would aid the jury in determining the positions of parties involved in this case when the shots were fired.

10. As outlined above, the State must prove that the conduct solicited by the Defendant was criminal. See N.H. RSA 629:2, I. The location of the involved parties, including the co-defendant, is a consequential fact in the determination of this case. The information is also relevant because it establishes the potential criminal liability the Defendant may be held accountable for based on the statute.

11. The Defendant has also indicated that she may invoke the defense of self-defense in this case. See Defendant's Notice of Self-Defense, filed on June 12, 2019. Trooper Elsemiller's testimony would also aid the fact-finder in determining whether the Defendant's and co-defendant's belief that the victim was about to use unlawful force against the Defendant and co-defendant was reasonable. See N.H. RSA 627:4, II The location of the Defendant and Mark Gray would be a consequential fact for the jury to determine when considering the reasonableness of the Defendant's fear and the Defendant and co-defendant's use of force.

12. For the reasons outlined above, Trooper Elsemiller's expert testimony must survive the Defendant's relevancy challenge because it meets the standards outlined in Rule 401.

13. The Defendant furtger asserts that if this Court determines that Trooper Elsemiller's testimony is relevant, the testimony should be excluded by New Hampshire Rule of Evidence 403.

14. New Hampshire Rule of Evidence 402 states that relevant evidence is admissible unless it is prohibited by the State or Federal Constitutions, statute, the Rules of Evidence, or other Supreme Court rules. Rule 403 grants the Court discretion to exclude relevant evidence when the Court determines that the "probative value [of the relevant evidence] is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." N.H. R. Ev. 403.

15. The Defendant challenges Trooper Elsemiller's testimony under Rule 403 by asserting that the testimony is unfairly prejudicial, confuses the issue, and misleads the jury.

16. Evidence is "unfairly" prejudicial when its primary purpose is to "appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions of the case." State v. Kuchman, 168 N.H. 779, 790 (2016). Unfair prejudice refers to evidence that has "an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged." Id.

17. The danger of unfair prejudice must "substantially outweigh" the evidence's probative value for Rule 403 to apply. N.H. R. Ev. 403. As outlined above, Trooper Elsemiller's testimony has substantial probative value because it is relevant in determining whether the conduct solicited by the Defendant was criminal, the extent of the Defendant's criminal liability, and whether the Defendant's and co-defendant's belief that the victim was about to use unlawful force was reasonable.

18. The probative value of the expert's testimony outweighs any unfairly prejudicial effect her testimony may have on the Defendant's case. The Defendant has failed to articulate any potential prejudice that may arise is "unfair" prejudice or that the danger of such unfair prejudice substantially outweighs the evidence's probative value. The Defendant makes no claims that hearing about the bullet trajectory will appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that would cause the jury to base its verdict on some improper basis. Because the probative value of the evidence is not outweighed by the risk of unfair prejudice, the Defendant's Motion on these grounds should fail. See N.H. R. Ev. 403.

19. The Defendant also argues that Rule 403 applies because of the likelihood that Trooper Elsemiller's testimony will confuse the jury. Again, the language of Rule 403 favors a presumption that relevant, probative evidence will be admitted unless the risk of confusing the jury substantially outweighs the probative value. N.H. R. Ev. 403.

20. Trooper Elsemiller's testimony is probative and will aid the jury in making vital factual determinations, meaning that the Defendant has a high bar to show that the probative value is substantially outweighed by risk of confusing the jury. See N.H. R. Ev. 403. Second, the State contends that any potential confusion of the jury may be dealt with in the Court's instructions to the jury.

WHEREFORE, the State requests that this Honorable Court:

A. Deny the Defendant's Motion without a hearing; or
B. Hold a hearing on the matter; or
C. Grant any other relief deemed proper and just.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

July 1, 2019

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

CERTIFICATE 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.

July 1, 2019

Ryan C. Ollis
Assistant County Attorney

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 MOTION IN LIMINE TO EXCLUDE STATEMENTS

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, to object to the Defendant's Motion In Limine and in support thereof states as follows:

1. The Defendant is charged with alternative counts of Criminal Solicitation to Commit First Degree Assault (1610355C) and Criminal Solicitation to Commit Reckless Conduct with a Deadly Weapon (1610356C).

2. During the night of August 18, 2018, the minor victim, O.L., entered the Defendant's home under the mistaken belief that he had been invited. The Defendant and co-defendant woke and the Defendant chased the victim out of the house. The victim entered his vehicle. The co-defendant came out of the house with a handgun. The Defendant told the co-defendant to shoot the victim, and the co-defendant fired several shots at the victim's vehicle as he tried driving away.[1]

3. Portsmouth police officers investigated the incident and conducted interviews with several parties, including the victim. During a recorded interview with Detective Sergeant Rebecca Hester, O.L. was asked whether he heard anything, and O.L. stated he could not.

4. The victim also spoke with Officer Keegan Pearl, and stated that he heard the Defendant tell the co-defendant to "shoot him, shoot him."

5. The Defendant now challenges the admissibility of O.L.'s statements and contends that they are impermissible pursuant to Rules 601 and 602 of the New Hampshire Rules of Evidence.

6. Rule 601(a) states that every person is competent to testify unless another provision of the rules or applicable statute applies. See N.H. R. Ev. 601(a). Rule 601(b) clarifies the first

[1] All facts referenced in this objection are derived from discovery that the State has provided to the Defendant.

provision of the rule by stating that "[a] person is not competent to testify as a witness if the court finds that the witness lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth." N.H. R. Ev. 601(b).

7. "An inconsistency in testimony or the failure to remember aspects of some observed event typically does not disqualify a witness on competence grounds; such gaps in testimony 'present questions of credibility for resolution by the trier of fact.'" State v. Hungerford, 142 N.H. 110, 118 (1997).

8. In the instant matter, the Defendant argues that the victim lacks the sufficient capacity to remember whether the Defendant told the co-defendant to shoot based on an inconsistency in the victim's statements to police. See Def.'s Mot. ¶ 9.

9. The victim has personal knowledge of what he saw and heard on August 18, 2018. See N.H. R. Ev. 602. The fact that he has given inconsistent statements to the police does not make his testimony inadmissible; indeed, it has long been the case that a witness may be impeached by his prior inconsistent statements. See Villineuve v. Manchester St. Ry., 73 N.H. 250 (1905). Furthermore, the Rules of Evidence account for the fact that a witness's memory is not without flaw and that he may forget details. See N.H. R. Ev. 612; State v. Chickering, 97 N.H. 368 (1952).

10. The Defendant's argument goes to the weight of the victim's testimony, not its admissibility. Indeed, the Defendant does not seek to prevent the witness from testifying entirely, nor has she argued that the victim lacks the capacity to observe, remember, and narrate any of his experiences on the night in question. Instead, the Defendant seeks to preclude only a small portion of the witness's testimony, despite seemingly accepting the victim's general competency to testify about the remainder of his observations that night.

11. The victim's testimony must be deemed admissible by this Court, and the weight assigned to that testimony is a question of fact that must be left to the jury. See United States v. Gaudin, 515 U.S. 506, 514 (1995) (discussing jury's role as a fact finder in criminal trials).

WHEREFORE, the State requests that this Honorable Court:

A. Deny the Defendant's Motion without a hearing; or
B. Hold a hearing on the matter; or
C. Grant any other relief deemed proper and just.

Respectfully Submitted,
STATE OF NEW HAMPSHIRE

July 15, 2019

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

CERTIFICATE 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 787Hampton, NH 03843.

July 15, 2019

Ryan C. Ollis
Assistant County Attorney