THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0608

State of New Hampshire

v.

Brenna Cavanaugh

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(10-minute 3JX argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ISSUES PRESENTED

I. Whether the trial court acted within its discretion when it declined to give a self-defense jury instruction, where the defendant followed the victim out of the defendant's house and told her boyfriend to shoot him as the victim attempted to drive away.

II. Whether the State presented sufficient evidence to prove the charges of accomplice to first degree assault and accomplice to criminal mischief.

III. Whether the trial court erred in allowing statements of the victim under the excited utterance exception to the hearsay rule, whether any error was harmless and whether the trial court properly declined to allow the defendant to recall a witness who had already been subject to cross-examination.

IV. Whether the claim that the trial court erred in ruling on impeaching through extrinsic evidence is preserved where the defendant did not object to the court's ultimate ruling and where the ruling was otherwise within the court's discretion.

STATEMENT OF THE CASE

The defendant was charged with accomplice to attempted first degree assault, RSA 629:1, RSA 631:1(b), accomplice to criminal mischief, RSA 634:2, I, criminal solicitation to commit first degree assault, RSA 629:2, RSA 631:1(b), and criminal solicitation to commit reckless conduct, RSA 629:2, RSA 631:3. T 19-20, 101-03.[1] After a jury trial in Rockingham County Superior Court (*Wageling*, J.), she was found guilty of accomplice to attempted first degree assault and accomplice to criminal mischief. T 804. She was acquitted of criminal solicitation to commit first degree assault and criminal solicitation to commit reckless conduct. T 803.

The court sentenced the defendant to twelve months incarceration on the attempted first-degree assault charge with all but four months suspended. NOA 2.

This appeal followed.

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[1] "DB_" refers to the defendant's brief and page number.
"DBA_" refers to the appendix to the defendant's brief and page number.
"Ex. _: _" refers to the exhibits transferred to this Court from the trial court, identified by the exhibit number, and time on the recording.
"NOA __" refers to the defendant's notice of appeal and page number.
"T _" refers to the trial transcript and page number.

STATEMENT OF FACTS

A. The State's Case

1. The Victim's Testimony

The juvenile victim was 17 at the time of trial. T 151. He was a student at Portsmouth High School. T 151. He was friends with the defendant's daughter whom he had met in school. T 154. He had been to the defendant's house on Summer Street to visit her daughter and had met the defendant. T 154. In early August 2018, he visited the Summer Street house and talked to the defendant for about 30 minutes. T 154. The victim was 16 years old at the time. T 152.

On August 18, 2018, in the early morning, the victim was communicating with the defendant's daughter via Snapchat. T 152-54, 156. The daughter invited him to a party. T 153-54. It was about 3:00 a.m., but the victim decided to go and left his house without telling his parents. T 156. Although he did not have a driver's license, he also took his father's truck without permission and drove to the defendant's house on Summer Street and parked. T 156-57.

The victim's tablet was not receiving Wi-Fi, so he could not receive any text messages or send any messages using Snapchat. T 159. But in one of her Snapchat messages, the defendant's daughter had told him to go to the front door, so he did. T 159-60. The defendant's daughter had told him that it was "an open house, which mean[t] that parents [were not] normally particularly home then," and he thought that he could "just walk in." T 160. The door was unlocked, so he did. T 160.

The victim walked up a flight of stairs to the main part of the house. T 160. There was no one there and the victim thought that his friends had "played [him], that [he] was being screwed over by them." T 161. He whispered the defendant's daughter's name and, hearing no response, started to leave. T 161. Then he heard a voice say, "[S]omebody's here." T 161. The victim stepped on a floorboard near the main staircase and it "made a pretty big noise." T 162.

The victim turned and saw the defendant chasing after him and he ran down the stairs, "probably record time," and out the door to his father's truck. T 162-63. The victim had had trouble getting the truck because he had forgotten that he had locked it. T 164. By that point, the defendant was trying to take the victim's license plate number. T 164. The victim tried to get the defendant to recognize him, but "no words came out of [his] mouth." T 164. He started the truck and, after he did, he heard the defendant shout "Shoot." T 165, 183. He then heard a gunshot. T 165.

The victim "stepped on it" and backed into a telephone pole. T 171. The defendant was on the sidewalk, coming closer to the truck. The defendant's boyfriend was standing in the road. T 173. The victim put the truck in drive and drove down the street. The defendant and her boyfriend, Mark Gray, sprinted toward the middle of the road as the victim drove away. T 174-75. The victim stopped at a gas station and vomited and then drove straight home. T 176.

When he got home, the victim sent the defendant's daughter a text message and said that he was "just shot at by her mother and Mr. Gray." T 177. About ten minutes later ST and another friend, who were at the party that night, arrived to pick him up. T 179. The victim had asked them to

drive him back to the scene because he wanted to tell the police what had happened so that they would not be looking for his father's truck. T 180. They drove to Summer Street and the victim told an officer what had happened. T 180.

Officer Keegan Pearl put the victim in the back of a police cruiser and the victim was taken to the police station where he was interviewed. T 180-81, 409. Later that morning, an officer drove the victim home. T 182.

2. The Party

ST was a student at Portsmouth high school and was at the party with the defendant's daughter. T 335. They were at their friend Mya's house and the daughter was Snapchatting with the victim. T 335. There were a lot of people there as Mya's parents were not home. T 336. The defendant's daughter had been drinking and was "tipsy." T 336. The daughter and a boy at the party were "[s]hot-gunning beer." T 337. ST said that the daughter "told us that she had invited [the victim] over, and he went to the wrong address, because [she] told him to go to her mom's house instead of Mya's." T 337. ST said that the victim had not been drinking that night. T 340. When she and a friend went to pick him up, the victim was "very shaken up, very shaky." T 341.

3. Law Enforcement Testimony

Portsmouth Police Officer Jack Maloney was working in the early morning of August 18, 2018. T 348. At approximately 3:20 a.m., he went to assist some other officers on an unrelated investigation and he heard six

gunshots fired. T 349. He drove in the direction of the gunshots and then the dispatcher told him that the gunshots had come from Summer Street. T 349. He drove to Summer Street and saw the defendant and Mark Gray waving their arms to flag him down. T 349-50. After talking to Gray, the officer sent out a "be on the lookout" for the victim's father's truck. T 351. After talking to Gray, Officer Maloney also took Gray's black Ruger as evidence. T 352-53.

Officer Keegan Pearl recalled driving past Summer Street at 3:30 a.m. on August 18. T 402-03. He noticed a silver compact truck parked across from the church with its dome light and parking lights on. T 403. There was a male seated in the truck. T 403. Officer Pearl continued to respond to an unrelated traffic stop to assist Officer Maloney and, as he was standing outside his cruiser, he heard "five to six loud, audible pops that was in very close proximity to where [he and Officer Maloney] were for the traffic stop." T 404. The sounds were gunshots. T 404. He drove to Summer Street and "secured the crime scene." T 405. He saw "bullet casings on the ground near where that truck had been parked and that there was damage to the light pole that was there." T 405. Officer Pearl left the scene and returned to the station, but was called back when the victim returned. He described the victim as "very disheveled, very upset, [and] nervous." T 406. The officers "had to calm him down multiple times, because he was very shaken by whatever had happened." T 406.

Officer Pearl said that the victim was still shaken when they reached the station. T 407. He told the officer about the misunderstanding about the party and described how he had entered the house. T 410. He told the officer that he heard a woman say "get a gun," and he fled. T 410. He tried

to start his truck and saw the defendant and Mark Gray standing in front of the truck and Gray was armed. T 410. He heard the defendant say, "[S]hoot him, shoot him." T 410-11. As he started the truck, he "started to get fired upon with the pistol, which made him put it in reverse and hit the telephone pole. And he stated he sped away after that, while his truck was getting fired upon." T 410. The victim repeated, "I almost died tonight. I almost died tonight." T 411.

Sergeant Perrachi drove the victim home that morning. T 422. The victim was in "shock at times, kind of disbelief. At times, there was a couple times he was crying." T 422. The victim was not intoxicated. T 422. When they arrived at the victim's house, the sergeant saw the father's truck and noticed three bullet holes in it. T 423.

Sergeant Richard Webb was the shift commander on August 18, 2019, and, when he learned of the shots fired on Summer Street, he drove to the scene. T 435. He blocked the street with his cruiser and then walked through the scene. T 436. As he did so, he noticed six shell casings on the ground and some debris near the telephone pole. T 436.

Detective Peter Sheldon saw the father's truck being placed in one of the department bays. T 270. He saw three bullet holes in the left front portion of the truck, "to include the left front quarter panel, and the left front quarter panel in the inner wheel well as well as the driver's door." T 271. There was damage to the taillight "and some scraping of the vehicle, all the way up to the passenger side rearview mirror." T 271.

4. The Defendant's Interview

Detective Kristyn Bernier interviewed the defendant and recorded the interview, which was played for the jury. T 535. During the interview, the defendant said that she that the intruder was a white male with blond hair, between 16 and 30 years old. Ex. 18: 1:16. When she heard him, she told Gray to get his gun "so the guy would know." Ex. 18: 12;51. She heard the intruder leave and followed him outside to get his license plate number. Ex. 18: 1:36-49. She gave chase before she even knew that Gray was behind her and armed. Ex. 18: 12:44.

The truck was running when she came outside. Ex. 18: 14:26. The truck accelerated as she was still walking toward the car. Ex. 18: 2:07. She could see Gray in her peripheral vision. Ex. 18: 17:40. Both she and Gray told the driver to stop. Ex. 18: 2:27; 18:20.

As the truck accelerated, the defendant heard four rounds fired by Gray. Ex. 18: 2:35. She recalled that Gray fired towards the truck's tires. Ex. 18: 2:39. Asked how she knew that Gray was firing at the truck's tires, she responded that she could see the direction of his gun. Ex. 18: 2:47. She heard the "ping" of the bullets. Ex. 18: 23:48. She said that she saw the flares from the barrel. Ex. 18: 2:53. She did not see where the bullets hit the truck because the truck was moving. Ex. 18: 22:54. As the truck drove away, she thought, "Good. He's going to crash," and she could call the police. Ex. 18: 25:27.

The defendant acknowledged that the intruder had not taken anything from the house. Ex. 18: 28:30. She said that her purse was "right

there" and her laptop was "right there." Ex. 18: 28:50. She mused that perhaps the intruder had gone into the wrong house. Ex. 18: 28:57.

Lieutenant Darrin Sargent recalled talking to the defendant when she was interviewed at the station on the morning of August 18. T 521. She wanted to know if the police had identified the person who had entered her house. T 521. He told her that the police knew who the person was and that no one had been hurt. T 522. She then asked if the person was the victim, identifying him by name. T 522.

B. The Defendant's Case

The defendant testified. T 648. She served as a Portsmouth Police Commissioner for about four years. T 657.

On the night of August 17, 2020, the defendant's daughter was staying with the defendant's ex-husband. T 649. The defendant recalled awakening on the morning of August 18, 2020 to a "creaky noise" and when she awoke, there was a "guy in [her] room." T 659. She woke Gray and threw on some clothes. T 659. She recalled:

> I'm thinking worst case scenario. I'm think this is a serial killer. This is a rapist. There's more than one person in here. I don't know what I'm dealing with. And I just want to get out of that house.

T 659-60. She made eye contact with the victim and recalled that he had blond hair. T 661. The victim was standing at the top of the stairs. T 661.

The defendant went outside and saw a truck with the engine running. T 664. She thought, "[T]hat's probably the guy." T 664. She went over to

the truck to record the license number to give to the police. T 665. The person in the truck was "a shadowy figure." T 666.

The defendant then claimed:

> I remember the engine revving, like, vroom, vroom, and I'm taking that as a threat, like, get out of my way, or I'm going to run you over. And I think I went over to the sidewalk at that point after the vroom, vroom and it's revving and the lights are in my face, so I think I jumped on the sidewalk. And then the car flew into reverse at a high rate of speed. Smashes into this telephone pole, which was not at the scene -- the site the other day, but it smashes. Debris is flying everywhere. There's tires screeching. And now there - this - this car is coming at me, like, straight on with the headlights on. And - I mean, to his own testimony, he gunned it. And the car's coming at me, and I'm, like, I'm going to - this is the scariest thing that's ever happened in my life besides the other scariest thing that just happened a few minutes ago upstairs.

T 667.

The defendant realized that Gray had also come outside. T 668. She said that she remembered "rounds being fired as the car was coming at" the two of them. T 671. She denied telling Gray to shoot. T 671. She watched the automobile "blow through both stop signs on State and Summer and Islington and Summer and take a left down Islington." T 671. She then called the police. T 671.

Her testimony about asking about the victim differed from that of the lieutenant's. She said that the lieutenant told her that the intruder was a friend of her daughter's. T 681. She then asked if it was the victim because she remembered that he "had dropped [her daughter] off before in a silver truck." T 681.

On cross-examination, the defendant admitted that she told Gray to get a gun. T 704. She claimed that she did not remember seeing Gray shoot the firearm. T 736. The State played her 911 call on cross-examination. T 739. During the call, she told the dispatcher shots had been fired. When the dispatcher asked her who had fired the shots, she replied, "My boyfriend did." Ex. 21: 2:57.

C. Request for Self-Defense Instruction

On June 12, 2019, the defendant filed a notice of self-defense. DBA 49. She alleged that, as she was standing in front of the victim's truck, trying to get the truck's license number, the victim was "revving the engine." DBA 49. The State responded, in part, that the defendant had "provoked the use of force" against herself and could not claim self-defense. DBA 51.

At trial, defense counsel asked if the court had decided on whether to give a self-defense instruction. T 560. The court responded, "Based upon the information currently available to me, I doubt it," but invited argument on the point. T 560.

After the State had rested, the court gave the parties the opportunity to argue the point. T 626. The defense argued that a self-defense instruction was merited because the defense had presented "some evidence" that the victim "had backed up, [was] revving [the] engine, and was accelerating towards her, as well as another person." T 630.

The State responded that the defendant "indicated in her interview that the first shot had not been fired until after the vehicle had passed her.

That is specifically what she said to Ofc. Bernier." T 633. The State argued that this account supported the victim's account that "he heard 'shoot,' and then the shots immediately followed." T 633 (internal quotation marks added). The State pointed out that "if she said 'shoot,' and the shots immediately follow and those shots don't happen until after that car is driving away, she is no longer in a position to get struck by the car." T 633 (internal quotation marks added).

The court responded:

> [I]n my consideration of that, I include the fact that the Defendant walked outside following the individual that had just left her house, ran after that person, in fact, and then walked in front of that person's car. And by her own statement, stood a yard away from it for a period of time.
>
> And - so the claim that she was acting in self-defense, it's just I'm a bit hard-pressed to find that she was concerned with regard to her safety, at least at that point. So - and then the testimony from Ms. Cavanaugh to Det. Bernier is that she heard the first shot after [the victim's] car had passed her so.

T 635.

Defense counsel responded that the threshold was "very low" and that the defense only had to produce "some evidence" to merit the jury instruction. T 637. Defense counsel contended the "provoking party is [the victim]. [The victim] is the one who commits the home invasion into [the defendant's] home." T 637.

The State countered by stating that the defendant had "followed [the victim], a 16-year-old boy, out of the house, at a point in which she could -- in her statements before the Court at this time, she had claimed that she got a clear sight of him." T 640. The State said that the defendant could

"identify him if she saw him again. That he was white. That she identified his build. And that he had blonde hair." T 640. The defendant "said that she heard the door close and therefore assumed" that "he had left the house." T 640. The State contended that, once outside, she "had the means to retreat." T 641. The defendant was in "no danger." T 641.

The court stated that the victim had run from the house. T 643. It noted that the victim's "provocation of them ended when he ran from the house." T 644. The defendant and Gray "chose, for whatever reason, to run after the person who they believed had just left the house, out into the outside area." T 644. The defendant and Gray "stood in front - or in the path of the car that the person was in." T 644. It concluded: "And so when we try to analyze who the, quote, provoking party is, for purposes of the self-defense claim, I don't find that [the victim] under these conditions was the provoking party." T 644. The court found that the defendant's response to the situation was not reasonable. T 645.

D. The Ruling on Prior Statements

When Officer Maloney was testifying on cross-examination, defense counsel asked him: "And you would agree with me that [the victim] told you that [the defendant's daughter] must have given him the wrong address?" T 362. The State objected on the basis of hearsay and a sidebar conference ensued. T 362. At the bench, defense counsel told the court that he wanted to use the victim's statements to the officer to impeach the victim. T 362. He asserted that, while testifying, the victim had denied making the statements. T 362.

The State responded that when the victim "was asked if he remembered saying that to police, [but] he didn't say he didn't say it. He said, I don't remember." T 362. The State pointed out that the victim was not confronted with the statements to Officer Maloney and that no one had attempted to refresh his recollection. T 362. The court excused the jury and began to review its trial notes. T 365. The court then stated:

> My notes then reflect that on multiple occasions he 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."

T 367. The court observed that the victim repeatedly stated that he could not remember what he had said to the police. T 367.

Defense counsel insisted that he could impeach the victim through the officer because his statements were inconsistent, but the trial court responded, "[T]here's nothing to impeach." T 371. After hearing from the State, the court told defense counsel that lack of memory was not a repudiation of the statement. T 373; *see also* T 377.

Defense counsel countered, stating that, under Rule 613, extrinsic evidence of a prior inconsistent statement was admissible if the witness was afforded the opportunity to admit or deny it. T 377. He continued: "And I am making a note for the record that he was afforded that opportunity. He claimed to not remember. And therefore, the Defendant's position is that this is proper extrinsic evidence." T 377.

The court took a recess to review some case law and, when the discussion reconvened, noted that the case law was not clear. T 382-83. The court then told the parties: "[W]hat I suggest to [the defense] is that if you choose to do that [*i.e.*, impeach the victim and ST] through the extrinsic evidence, I will allow the State to rehabilitate [the victim or ST] through the same means. So if you want to introduce this extrinsic evidence to impeach, I am inclined to allow the State to allow it to rehabilitate the same witness." T 384. Defense counsel replied, "I understand the Court's ruling." T 385.

After breaking for lunch, the State asked to clarify the court's ruling. T 386, 388-92. Defense counsel then asked a question to be sure he understood that impeachment could be followed by rehabilitation. T 395. The court responded, "Yes." T 395. Defense counsel replied, "Okay." T 395.

E. The Motion for a Judgment Notwithstanding the Verdict

On August 15, 2019, the defendant filed a motion for a judgment notwithstanding the verdict. DBA 54. She stated that she was not "a principle in attempting to discharge a firearm." DBA 55. She contended that "there was insufficient evidence presented to establish beyond a reasonable doubt that Cavanaugh had the specific intent to aid anyone." DBA A56. She said that she intended only to look at the truck's license plate and that "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." DBA 56.

The defendant argued that:

> [N]o direct evidence was presented that [the defendant'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.

DBA 56. Relying on the different rules for evaluating circumstantial as opposed to direct evidence, the defendant contended that "there are multiple conclusions that could be reached consistent with innocence based on the lack of direct evidence presented on whether [her] actions aided Gray and/or caused the discharge of six bullets." DBA 56.

The defendant also contended that there was no evidence introduced concerning the damage to the car. DBA 57. And she argued that the jury's verdicts were inconsistent. DBA 57. The State objected. DBA 59.

On October 9, 2019, the trial court denied the defendant's motion. DBA 65. The court first noted that the jury received instructions on the question of sufficiency of the evidence. DBA 70. The court found that "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." DBA 71.

According to the court, the defendant "opted to follow [the victim] out of her home and onto the street." DBA 71. "She then stood approximately three feet in front of [the victim's] vehicle, attempting to get his license plate number." DBA 71. "Once Gray had followed Defendant outside, Defendant twice instructed Gray to shoot the gun she had told him

to retrieve from the bedroom." DBA 71. "Immediately thereafter, Gray opened fire, shooting six bullets in [the victim's] direction." DBA 71. This evidence, the court concluded, was sufficient "to support the jury's finding that Defendant had the specific intent to aid Gray in committing the crime of Attempted First Degree Assault." DBA 72.

The court also rejected the defendant's contention that her actions did not aid Gray. DBA 72. The court first turned to the jury instructions on reasonable doubt. DBA 72-73. It then noted that the victim "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." DBA 73. The court continued that "it would not be rational to conclude that Gray did not hear Defendant yell shoot/shoot him." DBA 73.

The court added: "[G]iven that Gray got his gun at Defendant's behest, followed Defendant out of their home, and shot at [the victim] immediately after Defendant instructed him to do so, it is not rational to conclude that Gray shot at [the victim] solely because he wanted to protect himself or Defendant." DBA 73. "Nor is it rational to conclude that as Gray was trailing behind Defendant, who had run out of the home after [the victim], he had time to decide he was going to shoot at whoever had been inside of their home regardless of Defendant's conduct." DBA 73. The court concluded that "the only rational conclusion supported by the evidence is Defendant's actions that evening aided Gray in shooting his gun at [the victim]." DBA 73.

The court rejected the defendant's contention that the State failed to prove damage to the truck in excess of $100.00. DB 73-74. And it rejected

the defendant's contention that the verdicts were inconsistent and that the defendant's convictions should be vacated on that basis. DBA 74-75.

SUMMARY OF THE ARGUMENT

I. The trial court acted within its discretion when it declined to give a self-defense jury instruction. The defendant followed the victim out of her house and told Gray to shoot him as the victim attempted to flee. Although she denied telling Gray to shoot, her testimony conflicted with that of the victim and, consequently, the disagreement raised a credibility issue, not a legal defense.

II. The State presented sufficient evidence to prove the charges of accomplice to first degree assault and accomplice to criminal mischief. The defendant pursued the fleeing victim and called to Gray to shoot, satisfying the charge of accomplice to first degree assault. The cost of the damage to the truck was within the average juror's knowledge to assess.

III. The trial court did not err in allowing statements of the victim under the excited utterance exception to the hearsay rule. If it did err, any error was harmless because the testimony was duplicative of the victim's testimony. Further, the trial court properly declined to allow the defendant to recall a witness who had already been subject to cross-examination.

IV. The defendant did not preserve her claim that the trial court erred in ruling on impeaching through extrinsic evidence. Defense counsel acquiesced in the court's ruling and the claim raised here is not properly before this Court. But even if the claim is preserved, the trial court acted within its discretion.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DECLINED TO GIVE A SELF-DEFENSE JURY INSTRUCTION.

The defendant was not entitled to a self-defense instruction. She did not act in her own defense; instead, she pursued the victim out of her house. She did not admit her culpability and, therefore, a jury instruction would have been tantamount to an instruction on her theory of the case.

The purpose of jury instructions "is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." *State v. Hernandez,* 159 N.H. 394, 400 (2009). "When reviewing jury instructions, [this Court will] evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *Id.* This Court will determine "whether the jury instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case." *Id.*

"Whether a particular jury instruction is necessary, and the scope and wording of jury instructions, are within the sound discretion of the trial court, and [this Court will] review the trial court's decisions on these matters for an unsustainable exercise of discretion." *Id.* "To show that the trial court's decision is not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Lambert,* 147 N.H. 295, 296 (2001) (quotation omitted).

RSA 624:4, II(a) provides: "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." "The plain language of the statute allows a person to use deadly force if he reasonably believes that another person is about to use deadly force against him." *State v. Furgal*, 164 N.H. 430, 435 (2012).

Self-defense is a complete defense to a charge of assault. *State v. Richard*, 160 N.H. 780, 788 (2010). "Once the trial court admits some evidence of self-defense, it must instruct the jury on self-defense because conduct negating the defense becomes an element of the charged offense that the State must prove beyond a reasonable doubt." *Id.* However, the trial court "is not required to submit the issue of self-defense to a jury when there is no evidence that would support a claim of self-defense." *State v. Kawa*, 113 N.H. 310, 311 (1973); *see also Aldrich v. Wright*, 53 N.H. 398, 407 (1873) ("The immense value at which the law appraises human life makes it legally reasonable, that the destruction of it, as a means of averting danger, should be resorted to only when the danger is immense in respect of consequences, and exceedingly imminent in point of time.").

This Court "distinguishes between what [it has] called a 'theory of defense' and a 'theory of the case.'" *State v. Noucas*, 165 N.H. 146, 155 (2013). A trial court must instruct a jury on a defendant's "theory of defense," but not on a "theory of the case." *See State v. Bruneau,* 131 N.H. 104, 117-18 (1988). "A 'theory of defense' is akin to a 'civil plea of confession and avoidance, by which the defendant admits the substance of the allegation but points to facts that excuse, exonerate or justify his actions such that he thereby escapes liability.'" *Nouca*s, 165 N.H. at 155 (citation omitted). It "is a proposition about the legal significance of claimed facts,

and it thus falls within the scope of a judge's responsibility to instruct the jury on the law." *Bruneau,* 131 N.H. at 117–18.

By contrast, a "theory of the case" is "simply the defendant's position on how the evidence should be evaluated and interpreted." *Id.*; *State v. Shannon,* 125 N.H. 653, 662, 484 A.2d 1164 (1984) (defendant was not entitled to requested jury instruction because he was "not admitting liability and pointing to facts that exonerate, excuse or justify his conduct, but [was] denying criminal behavior"); *State v. Ramos,* 149 N.H. 272, 274–76, 821 A.2d 979 (2003) (no consent instruction because victim's and defendant's accounts on that point conflicted). "In other words, a defendant is not entitled to a jury instruction on a proffered 'defense' when he simply presents 'evidence of a different factual scenario than that presented by the State, and then argue[s] how the facts and evidence should be evaluated or interpreted by the jury.'" *Noucas*, 165 N.H. at 155-56. "Such a defense creates a 'credibility contest,' which [this Court has] recognized 'is not a legal defense to any charge.'" *Id.* (citation omitted).

In this case, the victim testified that he had fled the house and was trying to leave the scene when the defendant directed Gray to shoot at him. The defendant did not disagree that the victim was leaving. She acknowledged as much in her 911 call, her interview with the police on the morning of the shooting, and in her testimony at trial. But she did not admit basis for the charges, *i.e.*, that she directed Gray to shoot at the terrified and fleeing victim. This was in direct conflict with the victim's testimony that she called to Gray to shoot. As a result, the trial was a credibility contest and did not involve a legal defense. *Noucas*, 165 N.H. at 155-56.

To the extent that she felt threatened, the threat was gone when the victim left her house. *See* RSA 627:4, III ("A person is not justified in using deadly force on another to defend himself or a third person from deadly force by the other if he knows that he and the third person can, with complete safety: (a) Retreat from the encounter, except that he is not required to retreat if he is within his dwelling or its curtilage, or anywhere he or she has a right to be, and was not the initial aggressor."). When she was standing in the street or on the sidewalk, trying to get the truck's license plate, the defendant was no longer in her home or within its curtilage and she certainly could have retreated without danger.

The defendant even told the officer in her interview that she "felt safer" once Gray had his weapon. Ex. 18: 25:11. She did not describe herself as being afraid when she was outside the house, although by following the victim outside, she could have exposed herself to greater danger. Perhaps this was because she knew, as she said in the 911 call, that the intruder was just a "blond haired kid." Ex. 21: 2:21.

The defendant contends that the court erred in concluding that the defendant was the aggressor. DB 27. She states: "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." DB 27. This might be true if that was all she had done. But it is not. She followed the victim to the truck and when it was clear he posed no threat and was simply trying to escape, she called to Gray to fire at the truck and its driver.

The defendant tries to bootstrap her argument by pointing out that, when Gray went to trial, the court gave a self-defense argument and Gray was acquitted. DB 25 n.1. She does not direct this Court to the part of the

record in this case where the trial court was made aware of this outcome or the fact that the instruction was given, nor does she cite any case law to support the contention that a court must treat two defendants, tried in separate trials and presenting different evidence, the same way. *Cf. Petition of the State of New Hampshire*, 2019 WL 3385190, *2 (July 26, 2019) ("The previous determination was made in a different case involving a different defendant, a different time period, and a different set of memories.") (unpublished) (discussing right to a *Hungerford*[2] hearing)).[3]

But even if Gray's acquittal were relevant, the defendant testified in a manner that was inconsistent with her 911 call and her interview with the police. She told the jury that she did not know that Gray had fired the shots but, in her 911 call, she calmly acknowledged that he shot at the truck as it was leaving. In her interview, she recalled the "ping ping" of the bullets hitting the car. It was clear that the victim was trying to retreat and that the defendant was pursuing him. Her statements were inconsistent with acting in self-defense.

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[2] *State v. Hungerford*, 142 N.H. 110 (1997).

[3] Although the record is silent on this point, it is possible that defendant Gray received the instruction on the theory that he was acting in defense of another, i.e., the defendant. This legal theory was not available in this trial because the defendant did not act in defense of Gray.

II. THE EVIDENCE WAS SUFFICIENT FOR CONVICTIONS ON THE CHARGES OF ACCOMPLICE TO FIRST DEGREE ASSAULT AND ACCOMPLICE TO CRIMINAL MISCHIEF.

"With respect to sufficiency of the evidence, 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or 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) (internal quotation marks and citations 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,' it fails when it cannot be said reasonably that the intended inference may logically be drawn therefrom." *Spinale*, 156 N.H. at 463, (quoting 32A C.J.S. *Evidence* § 1303(b) (1996) (internal quotation marks omitted)). Where evidence is insufficient, it is "so lacking" that the case should not "even be[ ] *submitted* to the jury." *Spinal*e, 156 N.H. at 463 (quoting *Tibbs v. Florida*, 457 U.S. 31, 41-42 (1982)).

In order to prove first degree assault the State must prove that a defendant "[p]urposely or knowingly cause[d] bodily injury to another by means of a deadly weapon." RSA 631:1(b). "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." RSA 629:1; *see also State v. Meany*, 129 N.H. 448, 451 (1987). "In order to prove accomplice liability, the State had to prove 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. Winward*, 161 N.H. 533, 543 (2011).

"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." RSA 634:2, I. Proof of misdemeanor criminal mischief requires that the damage exceed $100, but not exceed $1500. RSA 634:2, II-a.

The charge of accomplice to first degree assault read: "in that acting with a purpose that the crime of first degree assault be committed, Brenna Cavanaugh, acting in concert with or aided by Mark Gray, caused six bullets to be discharged by means of a firearm in the direction of [the victim], which under the circumstances as she believed them to be, constituted a substantial step towards the commission of the crime of first degree assault." T 102. The charge of accomplice to criminal mischief read: the defendant, "acting in concert or aided by Mark Gray caused bullets to be discharged by means of a firearm at a vehicle occupied by [the victim], causing [pecuniary] loss in excess of one hundred dollars." T 103.

The defendant contends that the State failed to disprove "that Gray fired the gun of his own accord, completely and independently of [the defendant's] actions." DB 17. She also argues that "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." DB 17. She contends that the State did not introduce direct evidence showing that the defendant acted to aid Gray. DB 29. This is incorrect.

"Direct evidence is evidence which, if accepted as true, directly proves the fact for which it is offered, without the need for the factfinder to draw any inferences." *State v. Kelley*, 159 N.H. 449, 454 (2009). Direct evidence includes "the testimony of a person who claims to have personal knowledge of facts about the crime charged such as an eyewitness." *Id*. The fact that the defendant told Gray to get his gun is direct evidence. Gray's possession of the gun is direct evidence. The victim testified that he saw the defendant outside, near his truck. This testimony is direct evidence. The victim heard the defendant tell Gray to shoot, which is also direct evidence. The defendant heard the "ping ping" of the bullets hitting the truck; the victim also testified that, after hearing the defendant's order to shoot, bullets hit the truck. Both of these statements are direct evidence. The bullet holes in the side of the truck door are direct evidence. After having credited the victim's testimony, the only inference that the jury had to draw from the testimony was whether, when the defendant told Gray to shoot, she meant it.

With respect to the damage to the truck, the jury saw damage to the taillight and the bullet holes in the truck and concluded that the resulting repairs would cost at least $100. Further, on cross-examination, defense counsel asked the victim's father if he had hired a lawyer and the father responded, "I did it to get compensation for my truck that is gone that I had no way to work." T 514. The jury also learned that, after the Portsmouth Police Department returned the truck to the father, the department re-impounded it from the auto body shop to which the father had taken it and that he had not had it since. T 507-08. The jury was free to conclude that the father would not consult a lawyer unless the damage to the truck

exceeded the lawyer's fees. It was also free to use its common sense that bullet holes in the door of a truck would cost at least $100 in repairs. *See Commonwealth v. Gerhardt*, 81 N.E.2d 751, 787 (Mass. 2017) ("Jurors may use their common sense in evaluating whether the Commonwealth introduced sufficient evidence to satisfy its burden of proof.").

III. THE TRIAL COURT DID NOT ERR IN ADMITTING THE VICTIM'S STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE AND IN DECLINING TO ALLOW THE DEFENDANT TO RECALL A DISMISSED WITNESS TO BRING IN OTHER STATEMENTS BASED ON THE EXCITED UTTERANCE RULING.

The defendant contends that the trial court committed error when it admitted statements by the victim as excited utterances and when it declined to allow the defendant to recall a witness. DB 33.

A. Excited Utterances

"The excited utterance exception to the hearsay rule permits the admission of hearsay statements 'relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *N.H. R. Ev.* 803(2); *see also State v. Pennock*, 168 N.H. 294, 302 (2015). "To qualify as an excited utterance, the 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 [s]he had time to contrive or misrepresent." *State v. Pepin,* 156 N.H. 269, 274 (2008) (quotation omitted).

"The basis of the excited utterance exception rests with the spontaneity and impulsiveness of the statement...." *Id.* (quotation omitted). "Whether testimony is admissible as an exception to the hearsay rule is for the trial court to determine." *Pennock*, 168 N.H. at 302. The ruling is reviewed by this Court for an unsustainable exercise of discretion. *Id*.

Defense counsel argued that, by the victim made the statements to Officer Pearl, he had "been fed, he [had] been watered." The trial court rejoined drily, "He's not a plant," and ruled that the foundation had been laid. T 408. In doing so, the trial court was correct. The State introduced the victim's statement that, upon escaping from the shooting bullets, he was distraught. ST testified to as much when she and a friend went to pick him up. T 340-41 (The victim was "just kind of freaking out about it."). When the victim returned to the scene, Officer Maloney described him as "very scared" and "very nervous." T 358. Officer Pearl said that the victim repeated, "I almost died tonight," T 411, and described the victim as distraught and shaken, T 406.

But even if the trial court erred, any error was harmless. *State v. Hebert*, 158 N.H. 306, 316 (2009). The jury had already heard the victim's testimony that the defendant called to Gray to shoot as he tried to put the truck in drive and leave. If error, Officer Pearl's testimony to essentially the same testimony and was "merely cumulative [and] inconsequential to the strength of the State's evidence of guilt." *Id.*

B. Recall Witness

Once a witness has left the stand, the witness may be recalled with the permission of the Court. *Super. Ct. R.* 24(b)(6). This Court's case law "supports the discretion of the trial court in this matter." *State v. Duff,* 129 N.H. 731, 736 (1987). To constitute error, the court's discretion must have been exercised for reasons "clearly untenable or unreasonable to the

prejudice of [the defendant's] case." *State v. Gooden*, 133 N.H. 674, 677 (1990).

After Officer Pearl testified, the defense asked the Court to recall Officer Maloney in order to ask him about statements made by the victim. T 501. The defense argued that, because the ruling on the excited utterances came after Officer Maloney testified, recall was appropriate. T 501-02. The State objected, arguing that the defendant could have asked the questions when the officer was on the witness stand and that the officer was not on the defendant's witness list. T 501.

The court responded:

> [B]est I can tell from the evidence that's come in thus far, everybody was certainly on notice as to the facts underlying Ofc. Maloney, as well Ofc. Pearl's interaction with [the victim]. And I'm not going to allow the Defense to now recall Ofc. Maloney simply because of a ruling that occurred subsequent.

T 502.

According to the defendant, Officer Maloney should have been recalled to say that the victim told the officer that he saw the defendant get out of bed. DB 38. She contends that, if the officer had testified to this, the statement "would have directly contradicted [the victim's] testimony that he did not go up the stairs into [the defendant's] bedroom." DB 38.

Defense counsel did cross-examine the victim about his inconsistent statements to the police. *See* T 184 (statement to police that he was not sure that the defendant called "Shoot"), T 210-11 (statement to police about going up a flight of stairs), T 216 (statement to police that he did not hear anyone say "shoot"). But when he was asked about the stairs that led up to

the defendant's bedroom, the victim responded, "Actually I've never been up there, so I did not know what was up there." T 193. Since the defense knew the substance of the victim's statements to Officer Maloney, defense counsel could have confronted the victim with the inconsistency as he had on the other occasions and as required by Rule 613(b). But defense counsel did not do it.

The defendant asserts that the trial court was biased against her. DB 40. As proof, she directs this Court to an objection that defense counsel made. T 613. At sidebar, as he was arguing, defense counsel noticed that the court was looking at the exceptions to the hearsay rule. DB 40; *see also* T 614 (Defense Counsel: "I just want to put on the record that the Court is flipping through possible exceptions to hearsay, and I just further note that no such issues have been raised by the State."). Because the trial court looked at the Rules of Evidence, the defendant now makes an unfounded accusation of bias to this Court. DB 40. In doing so, the defendant has neglected to mention that defense counsel's objection was sustained. T 614. And she offers no authority for the unusual proposition that trial judges must not consult the Rules of Evidence before ruling on an objection. The allegation of bias, on this record, is simply scurrilous.

IV. THE CLAIM THAT THE TRIAL COURT ERRED IN ITS RULING ON INCONSISTENT STATEMENTS IS NOT PRESERVED, BUT EVEN IF IT IS, THE TRIAL COURT COMMITTED NO ERROR.

The defendant did not object to the trial court's ruling that impeachment evidence could be balanced by prior consistent statements. As a result, the claim is waived. *See State v. Hoag*, 145 N.H. 47, 52 (2000) ("In general, a defendant must make a specific and contemporaneous objection during trial to preserve an issue for appellate review.").

The record bears this out. The trial court made its ultimate ruling on page 384 of the trial transcript. Defense counsel responded that he understood the trial court's ruling. T 385. When court reconvened, defense counsel told the court "I'm generally inclined to accept Your Honor's offer, but I was trying to discuss some logistics." T 388.

After the State asked for more clarification, defense counsel asked the court, "Is it rehabilitating [ST] by proving the truth of the matter asserted; is that what's happening, as opposed to - or rehabilitating her by saying she mentioned at another point that it actually was?" T 392. After more discussion, defense counsel asked the court:

> I just wanted to state it, so I understand. My choices, in terms of attempting to impeach, are limited to statements the witness had the opportunity to explain or deny. Their opportunity to rehabilitate [is] not limited in that way. They can use any prior consistent statement?

T 395. When the court said "Yes," defense counsel replied "Okay." T 395. In short, he raised no objection to the court's ruling and he cannot do so now. *Hoag*, 145 N.H. at 52.

But even if she had objected, the defendant would be entitled to no relief on this claim. This is because the trial court committed no error.

This Court will "review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case." *State v. Fisk*e, 170 N.H. 279, 286 (2017) (quotation omitted). A defendant bears the burden of demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id*. "The admissibility of prior consistent statements for rehabilitative purposes is a matter wholly within the discretion of the trial court, and will not be overturned absent an unsustainable exercise of discretion." *State v. White*, 159 N.H. 76, 79 (2009). Under Rule 613(b), a witness must be "given an opportunity to explain or deny the statement." *N.H. R. Ev*. 613(b). The "common law rule allows the admission of prior consistent statements for the limited purpose of rehabilitation when a witness's credibility has been impeached by the use of prior inconsistent statements." *White*, 159 N.H. at 79 (citations omitted).

In this case, the defense wanted to ask witnesses about inconsistent statements made by the victim and ST, but he did not confront either with those statements. If the court committed error, it was in allowing defense counsel to avoid the consequences of his decisions not to confront these two witnesses as required by Rule 613(b). The court, to its credit, researched the issue and did not come up with a definitive answer and then tried to do what was "right and fair in this case and applying the Rules of Evidence appropriately." T 383. Defense counsel, having accepted the court's offer, then asked Officer Maloney a series of questions about

statements the victim had made which appeared in the officer's report and which the victim had never denied making. T 396-98.

On this record, the trial court did not exercise its discretion to the detriment of the defendant's case. *Fiske*, 170 N.H. at 286. To the contrary, the court allowed defense counsel to escape the consequences of a strategic decision made when the victim was on the stand.

CONCLUSION

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

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

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its attorneys,

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June 26, 2020

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CERTIFICATE OF COMPLIANCE

I, Elizabeth E. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,186 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 26, 2020 *<u>/s/Elizabeth C. Woodcock</u>*
Elizabeth Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Michael J. Zaino, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

June 26, 2020 *<u>/s/Elizabeth C. Woodcock</u>*
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