THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0608

State of New Hampshire

v.

Brenna Cavanaugh

STATE'S SUPPLEMENTAL MEMORANDUM OF LAW
IN RESPONSE TO THIS COURT'S NOVEMBER 23, 2020 ORDER

By order dated November 23, 2020, this Court has directed the parties to file supplemental memoranda of law addressing: "(1) the defendant effectively waived the issue of her entitlement to a self-defense instruction as to the charges for which she was convicted, *see State v. Champagn*e, 119 N.H. 118, 122 (1979); 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." Order at 1.

I. PROCEDURE

In November 2018, the Rockingham County grand jury returned two indictments charging the defendant with accomplice to criminal mischief and accomplice to attempted first-degree assault. SMA 19-20.[1] In April

[1] Citations to the record are as follows:
"DB_" refers to the defendant's brief and page number.
"T_" refers to the trial transcripts and page number.
Other transcripts are identified by the date, followed by "T _" and the page number.

2019, the Rockingham County grand jury returned indictments charging the defendant with criminal solicitation to commit reckless conduct with a deadly weapon. SMA 21-22.

Both solicitation charges charged the defendant with having "requested Mark Gray to discharge a firearm in the direction of" the victim. SMA 21-22; T 101-02. In contrast, the indictment and complaint charging her as an accomplice charged her with having "caused six bullets to be discharged by means of a firearm in the direction" of the victim and having "caused bullets to be discharged by means of a firearm at a vehicle" occupied by the victim. SMA 19-20; T 102-03.

On June 12, 2019, the defendant filed a notice that she intended to rely on self-defense with respect to "two alternative theories" of the State's case: criminal solicitation to commit first-degree assault and criminal solicitation to commit reckless conduct. DB 49. The notice did not mention the two other charges – of which she was later convicted – and, therefore, the defendant placed neither the State nor the trial court on notice that she intended to rely on self-defense for either accomplice to attempted first-degree assault or for being an accomplice to criminal mischief.

On the same day, the defendant filed a motion to exclude the victim's testimony regarding the defendant's instruction to shoot. SMA 23. This motion again mentioned only the solicitation charges, since the defendant's urging was related specifically to those charges. In a third motion in limine, seeking to exclude the testimony of the State's expert witness, the defendant again relied only on the two solicitation charges. The

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"SMA_" refers to the addendum to this memorandum and page number.

motion argued that testimony on "bullet flight path and shooting reconstruction" was "not relevant to the charged crimes of criminal solicitation," but did not contend that the testimony was irrelevant to the accomplice charges. SMA 27, 29.

The court did not rule, pretrial, on the notice of self-defense. This was with the acquiescence of the defendant. *See* 7/17/19 T 2 (DEFENSE COUNSEL: "I believe that's something we need to address after the evidence has been presented to determine whether the instruction is warranted or not."). At that same hearing, the court told defense that it was not prohibited from exploring with prospective jurors their views on self-defense. 7/17/19 T 4-5.[2]

During trial, when the defense argued that a self-defense instruction was appropriate, it did not contend that the instruction applied to causing the gun to be fired. Instead, the defense told the court that the defendant "was in a lawful place at the time [when] she allegedly stated these words." T 631 (asking the trial court to "consider at this stage the concept of whether she's acting in self-defense").

The State responded that the solicitation and accomplice charges were "not alternative charges." T 631. The State told the court: "The solicitation does require the additional element, the request here being shoot him." T 631. The State pointed out that the accomplice charges were "not just the words, [they included] also the actions that bring them to that

[2] Although the lawyers and the court discussed the notice of self-defense at a hearing on July 16, 2019, the discussion was in the context of where Gray was standing, the State's expert witness's availability, and the State's motion to continue. 7/16/19 T 7. The parties did not address the specific charges to which the notice related.

situation." T 632. With respect to self-defense, the State's argument was directed at the solicitation charges. The State argued:

> So 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. So the argument of self-defense, I would state, does not negate any of the elements in the charges here.

T 633. The State contended that, "by yelling shoot," the defendant "put herself and Mark Gray in a situation" and, having done so, she was not entitled to a self-defense instruction or dismissal of the charges. T 633-34. In short, both sides focused their arguments on the defendant's words, the fact which separated the solicitation charges from the accomplice charges.

The court heard additional argument and then ruled. It stated that the victim was not the "provoking party" once he had left the house. T 644. The court denied the request for a self-defense instruction. T 646-47.

In closing, the defense challenged the credibility of the victim and questioned the thoroughness and motives of the police investigation. Turning to the accomplice charges, defense counsel told the jury:

> But in order to find Brenna was an accomplice, her purpose was to aid Mark by causing the discharge of a weapon, by causing the discharge. She's looking at a license plate, the car is smashing into a pole. She told you she didn't want to become the pole. Her purpose at that moment to cause the discharge.

T 762. In contrast, with respect to solicitation, the defense told the jury:

> [L]ook at the criminal solicitation, the same mental state. But now it's requesting that it be discharged. Requesting, asking, thinking in your mind it would be good if so and so did such and such, right? You think of the classic criminal solicitation, look, this guy's bombed; I'll give you 20 bucks go take care of

> him, right? That specific intent. I don't want to deal with that person. You, help me, go do it. That's not, oh, my God, there's a car coming at me.

T 762-63. The court then instructed the jury, reiterating the legal elements of solicitation, which included the request that Gray shoot. T 780-83.

II. ARGUMENT

A. The defendant has waived the issue of entitlement to a self-defense instruction.

1. Elements of the offenses

In order to prove criminal solicitation, the State must prove that a defendant "command[ed], solicit[ed] or request[ed]" another person to engage in "conduct constituting a crime." *State v. Carr*, 167 N.H. 264, 269 (2015). It is an inchoate crime. *Id.* "'Criminal solicitation' encompasses both the *actus reus* of 'soliciting' and the *mens rea* of having the 'purpose that another engage in conduct constituting a crime.'" *State v. Laport*e, 157 N.H. 229, 232 (2008); *see also Carr*, 167 N.H. at 270 (the requisite *mens rea* for criminal solicitation is 'purposely'). Solicitation does not require the crime to be undertaken; it is "complete when the request is made." *Carr*, 167 N.H. at 269 (internal quotation marks and citation omitted). It requires no overt act "other than the offer itself." *Id.* at 270.

"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). In order to prove an attempted first-degree assault, the State must prove that a defendant, "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, I. The requisite mental state is purposely. RSA 631:1(B); *see also* T 102.

2. Notice Requirement and Waiver

Under New Hampshire Rule of Criminal Procedure 14(b)(2)(A), a defendant has certain notice requirements. The rule reads:

> If the defendant intends to rely upon any defense specified in the Criminal Code, the defendant shall within sixty calendar days if the case originated in superior court, or thirty calendar days if the case originated in circuit court-district division, after the entry of a plea of not guilty, or within such further time as the court may order for good cause shown, file a notice of such intention setting forth the grounds therefore with the court and the prosecution. If the defendant fails to comply with this rule, the court may exclude any testimony relating to such defense or make such other order as the interest of justice requires.

N.H. R. Crim. P. 14(b)(2)(A).

Although the defense is not required to allege facts in support of a claim of self-defense, *see State v. Munroe*, __ A.3d __, 2020 WL 4461555, *4 (N.H. Aug. 4, 2020), the defendant in this case elected not only to give notice of self-defense, but to select the charges to which the notice applied. As such, the claim with respect to the charges of conviction is waived. *State v. Niquette*, 122 N.H. 870, 873 (1982) ("An issue not preserved by a timely objection and exception is deemed waived because the trial court is denied the opportunity to correct any error that it may have made.").

"This rule is particularly appropriate when alleged errors in jury instructions are involved." *Id*. (citing *Martineau v. Perrin,* 119 N.H. 529, 531–32 (1979)). "It would be unjust to allow a party to lie by and take the

chances of a verdict in his favor, and, if defeated, avail himself of an exception which might have been obviated if seasonably known." *State v. Isabelle,* 80 N.H. 191, 193, 115 A. 806 (1921) (quoting *Haines v. Insurance Co.,* 59 N.H. 199, 200 (1879)). Under this Court's case law, the defendant's notice of self-defense waived her request for the instruction as to the omitted charges. *State v, Champagne*, 119 N.H. 118, 122 (1979).

3. Discussion

The defendant's June 2019 notice of self-defense was limited the crimes involving solicitation. The defendant pointed out that, as she stood in front of the truck, trying to get its license number, the victim was "revving his engine." DB 49. The defendant's notice outlined most of the events that took place, characterizing them as alleged, but never mentioned her direction to shoot at the victim or the car. DB 49. From the date that the notice was filed until the discussion during trial on the applicability of self-defense, the defendant never sought to amend the notice to include the other charges. As a result, the claim that the trial court erred in not giving an instruction on the accomplice charges is waived. *Niquette*, 122 N.H. at 873. The court was simply never asked to do it.

To the extent that this Court wishes to consider the underpinnings of the limited notice of self-defense and the record that was developed after the notice was filed, the State offers the following:

The defendant's decision to omit any reference to the actual act of solicitation may have been an attempt to avoid conceding the fact which was the underpinning of both solicitation charges. Or the defendant may have realized that if she denied in the notice that she called to Gray to shoot, the trial court might reject the notice on the basis that it constituted a request to instruct on her theory of the case. *See State v. Noucas*, 165 N.H. 146, 155 (2013) (differentiating between a "theory of defense" and "a theory of the case"). The defendant may have felt that solicitation was a better attacked with a notice of self-defense. *See State v. Dukette*, 145 N.H. 226, 230 (2000) ("By filing a notice of self-defense, the defendant has placed her state of mind at issue."). .In any event, the fact that this act was

the only act that was omitted from the pleading supports the conclusion that the decision to ask for self-defense on only the solicitation charges was intentional.

On June 20, 2019, the State responded to the notice which limited itself to the solicitation charges. The State's response addressed the defense only in the context of "self-defense or defense of others for [sic] the use or solicitation of deadly force." DB 52. It did not address the charge that she "caused six bullets to be discharged by means of a firearm in the direction of" the victim, T 102, or "caused bullets to be discharged by means of a firearm at a vehicle occupied by" the victim, causing pecuniary damage, T 103. Instead, the State responded to solicitation, i.e., the defendant's order to "shoot, shoot" as the victim was pulling away.

Should this Court consider whether the State detrimentally relied on the limited notice, a second response shows that it did. When the defendant filed a motion to exclude the State's expert's testimony, again referring only to the solicitation charges, SMA 27, the State responded that the expert testimony was relevant to all four charges, SMA 32 ("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."). If the State had understood the notice to raise self-defense as to all four charges, it certainly would have included all of the charges in its response to that notice.

At trial, the defense did not argue that the defendant was in a lawful place when she caused the bullets to be fired in the direction of the truck or the victim, an argument that might have alerted the court that the notice of self-defense was intended to cover all four charges. *Cf. State v. Thaxton*,

122 N.H. 1148, 1152 (1982) ("Because the defendant failed to make a specific objection upon which the trial court could either correct any error it had made or rule, thereby giving the defendant an opportunity to preserve his exception, he is precluded from raising this issue on appeal.").

Nor should the trial court have concluded that the defendant intended the notice to cover all of the charges. This is because it is possible to give notice of self-defense as to one charge and not another. *Cf. Cooper v. State*, 2018 WL 1225096, *1 (Alaska Mar. 7, 2018) (defendant filed notice of self-defense as to all of the assault charges, but not for the kidnapping charge) (unpublished); *State v. Schloegel*, 2020 WL 4045397, *1 (Minn. July 20, 2020) (pretrial notice of his intent to rely on self-defense for threats of violence, not with the later, second-degree assault charges) (unpublished). It is also possible for a trial court to instruct on self-defense for one charge and not another. *State v. Elli*s, 1995 WL 276801, *1 (Ohio Ct. App. May 10, 1995) (court properly instructed on self-defense for one charge and not the other) (unpublished). *See also State v. Christen,* 976 A.2d 980 (Me.2009) (Trial court "did not err when instructing the jury that medical marijuana was an affirmative defense, or instructing the jury that the affirmative defense was applicable only to the cultivation [not the trafficking] charge.").

Admittedly, when it declined to give the self-defense instruction, the court did not identify which charges it was considering with respect to self-defense. But neither the State nor the defense asked for clarification. *Cf. Thaxton*, 122 N.H. at 1152. Since it was the defendant's request, if she intended to expand the scope of the request for a self-defense instruction as to all charges, she certainly could have asked the court to consider that

request. The court's willingness to consider the request would have been discretionary, since the request would have been untimely. *N.H. R. Crim P.* 14((b)(2)A) (setting deadlines for raising statutory defenses). But the defendant did not ask.

Nor did the defense renew its request after the defendant had started or had completed her testimony. After the first part of the defendant's testimony, the defense asked for a jury nullification instruction, in light of the trial court's ruling on the self-defense claim. T 716-17. The court declined to give the instruction, noting that the defense was "entitled to argue jury nullification to the jury." T 726. Once the defendant completed her testimony, denying that she had directed Gray to shoot, the defense did not renew its request for a self-defense jury instruction as to any of the charges. Indeed, the court, having heard her denials that she ever called to Gray to shoot, could have properly denied the request for the instruction. *See Champagne*, 119 N.H. at 122 (noting that the defendant's testimony did not give rise to a consent defense since he denied setting the fire).

Although the facts of this case could be used in considering all four charges, and both the defense and the State used some of the same facts to argue their causes, it was clear that defense counsel understood the difference between the solicitation and accomplice charges. This is borne out by defense counsel's closing argument, which addressed both solicitation and accomplice liability. As a result, it is logical to conclude that defense counsel made a strategic decision to ask for the instruction as to the solicitation, but not the accomplice, charges.

The difference in the charges in this case is important. The jury acquitted the defendant of the crimes in which she simply shouted "shoot,

shoot," but did not acquit of the crimes which were comprised of a series of acts: telling Gray to get his gun, pursuing the victim out of the house, standing near his truck to get his license plate, *and* yelling to Gray to shoot. Although the case for accomplice was certainly stronger with the defendant's exhortation to fire upon the fleeing victim, the jury could have concluded that that verbal command was not proved beyond a reasonable doubt and yet still convicted her.

In sum, the notice of self-defense was given only for the two solicitation charges. The argument raised in the defendant's brief with respect to the counts of conviction, therefore, is waived.

B. The argument regarding self-defense is moot.

Further, the claim is moot. The acquittals on the charges for which the notice of self-defense was given render the claims before this Court moot.

"The doctrine of mootness is designed to avoid deciding issues that have become academic." *Bleiler v. Chief, Dover Police Dept*., 155 N.H. 693, 695 (2007) (citation omitted). "However, the question of mootness is not subject to rigid rules; it is regarded as one of convenience and discretion." *Id.* "A decision upon the merits may be justified where there is a pressing public interest involved, or future litigation may be avoided." *Id.* This Court will consider if the case is "capable of repetition, yet evading review." *State v. Carter*, 167 N.H. 161, 164-65 (2014); *see also Leigh v. Superintendent, Augusta Mental Health Inst.*, 873 A.2d 881, 883-84 (Me. 2003) (noting that three "narrow doctrines" allow consideration of a claim that is moot: "(1) sufficient collateral consequences will flow from a

determination of the questions presented, (2) the question, although moot in the immediate context, is of great public interest and should be addressed for future guidance of the bar and public, or (3) the issue may be repeatedly presented to the trial court, yet escape review at the appellate level because of its fleeting or determinate nature.") (internal quotation marks and citation omitted)).

In this case, it is clear that the defendant's acquittal on the solicitation charges renders the self-defense argument with respect to those charges moot. *Cf. State v. Davidson*, 163 N.H. 462, 472 (2012) (reversal of assault convictions rendered the instructions on the charges moot). In *Davidson*, this Court considered the claim despite its mootness because the defendant's contention that he was entitled to a jury instruction could "arise on remand." *Id.* In this case, no similar consideration exists.

Nor is the case capable of repetition, yet evading review. The law on this point is settled as a matter of statute and this Court's case law. *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…"); *State v. Newell*, 141 N.H. 199 (1996); *State v. Lavalle*, 119 N.H. 207, 212 (1979) (noting that the "key issue of fact at trial was whether the defendant was the aggressor or acted in self-defense"); *State v. Kaw*a, 113 N.H. 30 (1973) "[T]he justification of self-defense is [generally] not available to an aggressor.").

Finally, the issue does not raise a "pressing public interest." Instead, the case raises a question of importance to both the defendant and the victim, but that is true of all cases involving charges of this nature. There is

no compelling public interest that would be addressed by deciding a claim that is otherwise moot.

In short, this Court has no reason to rule on a claim that is otherwise moot.

III. CONCLUSION

WHEREFORE, the State respectfully asks this Court: (1) to determine that self-defense was only raised as to the solicitation charges of which the defendant was acquitted and the claim is waived; and (2) to decline to further consider a claim that is, under those circumstances, moot.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

December 3, 2020

/s/Elizabeth C. Woodcock
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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.

December 3, 2020 */s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock

ADDENDUM TABLE OF CONTENTS

[redacted] [redacted]

Sheehan

DOB: 06/10/1975
F/W/?

1ST DEGREE ASSAULT W/FIREARM
RSA: 631:1,I(B)
ELC: ALL
Entries Above This Line Are Not Part of Indictment

FS

The State of New Hampshire

ROCKINGHAM, SS. **SUPERIOR COURT**

INDICTMENT

At the SUPERIOR COURT holden at Brentwood, within and for the County of Rockingham, during the November, 2018 session of the Grand Jury, the Grand Jurors for the State of New Hampshire, upon their oath, present that

BRENNA CAVANAUGH
of
140 Summer Street, Portsmouth, NH 03801
committed the crime of

JURY VERDICT: GUILTY
DATE: 8-5-19
CLERK [illegible]

ATTEMPTED FIRST DEGREE ASSAULT
[Principle/Accomplice]
on or about the 18th day of August 2018
at Portsmouth in the County of Rockingham

In that:

1. Acting with a purpose that the crime of First Degree Assault be committed,
2. Brenna Cavanaugh, acting in concert with or aided by Mark Gray,
3. caused 6 bullets to be discharged by means of a firearm in the direction of O.L., DOB: 1/15/2002,
4. which under the circumstances as she believed them to be constituted a substantial step toward the commission of the crime of First Degree Assault;

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Patricia G. Conway
Rockingham County Attorney

This is a true Bill.

Grand Jury Foreman

218-2018-CR-1583

Charge ID: 1562276C

[redacted] [redacted]

Sheehan

DOB: 06/10/1975
F/H/W/

CRIMINAL MISCHIEF
RSA: 634:2,II
ELC: A-B

FB

Entries Above This Line Are Not Part of Indictment

The State of New Hampshire

ROCKINGHAM, SS. **SUPERIOR COURT**

INDICTMENT

At the SUPERIOR COURT holden at Brentwood, within and for the County of Rockingham, during the November, 2018 session of the Grand Jury, the Grand Jurors for the State of New Hampshire, upon their oath, present that

BRENNA CAVANAUGH
of
140 Summer Street, Portsmouth, NH 03801
committed the crime of

Jury Verdict - Guilty
Date: 8-5-19
Clerk - [redacted]

CRIMINAL MISCHIEF
[Principal/Accomplice]
on or about the 18th day of August 2018
at Portsmouth in the County of Rockingham

In that:

1. Acting with a purpose that the crime of Criminal Mischief be committed,
2. Brenna Cavanaugh, acting in concert with or aided by Mark Gray,
3. caused 6 bullets to be discharged by means of a firearm at a vehicle occupied by O.L., DOB: 1/15/2002, causing a pecuniary in excess of $1500,
4. which under the circumstances as she believed them to be constituted a substantial step toward the commission of the crime of Criminal Mischief;

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Patricia G. Conway
Rockingham County Attorney

This is a true Bill.

FORMAL ARRAIGNMENT WAIVED AND PLEAS OF NOT GUILTY ENTERED.

Grand Jury Foreman

Maureen F. O'Neil
CLERK

218-2018-CR-1513

Charge ID: 1562275C

Ollis

DOB: 06/10/1975
F//W//

1ST DEGREE ASSAULT W/FIREARM
RSA: 631:1,I(B)
ELC: ALL
Entries Above This Line Are Not Part of Indictment

FS RG

The State of New Hampshire

ROCKINGHAM, SS. SUPERIOR COURT

INDICTMENT

At the SUPERIOR COURT holden at Brentwood, within and for the County of Rockingham, during the April, 2019 session of the Grand Jury, the Grand Jurors for the State of New Hampshire, upon their oath, present that

BRENNA CAVANAUGH
of
140 Summer Street, Portsmouth, NH 03801
committed the crime of

CRIMINAL SOLICITATION TO COMMIT FIRST DEGREE ASSAULT

on or about the 18th day of August 2018
at Portsmouth in the County of Rockingham

In that:

1. Brenna Cavanaugh, acting with the purpose that another engage in conduct constituting the crime of First Degree Assault,
2. requested Mark Gray to discharge a firearm in the direction of O.L. (D.O.B. 1/15/2002);

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Patricia G. Conway
Rockingham County Attorney

This is a true Bill.

Grand Jury Foreman

218-2018-CR-1583

Charge ID: 16103550

DOB: 06/10/1975
F//W//

RECKLESS CONDUCT
RSA: 629:2; 631:3, II
ELC: A-B
Entries Above This Line Are Not Part of Indictment

Ollis
FB

The State of New Hampshire

ROCKINGHAM, SS.

SUPERIOR COURT

INDICTMENT

At the SUPERIOR COURT holden at Brentwood, within and for the County of Rockingham, during the April, 2019 session of the Grand Jury, the Grand Jurors for the State of New Hampshire, upon their oath, present that

BRENNA CAVANAUGH
of
140 Summer Street, Portsmouth, NH 03801
committed the crime of

CRIMINAL SOLICITATION TO COMMIT RECKLESS CONDUCT WITH A DEADLY WEAPON

on or about the 18th day of August 2018
at Portsmouth in the County of Rockingham

In that:

1. Brenna Cavanaugh, acting with the purpose that another engage in conduct constituting the crime of Reckless Conduct with a Deadly Weapon,
2. requested Mark Gray to discharge a firearm in the direction of O.L. (D.O.B. 1/15/2002),
3. the firearm being a deadly weapon as defined in RSA 625:11;

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Patricia G. Conway
Rockingham County Attorney

This is a true Bill.

Grand Jury Foreman

218-2018-CR-1583

Charge ID: 1610356C

KO

COPY

ROCKINGHAM, SS. THE STATE OF NEW HAMPSHIRE

218-2018-CR-01583

State of New Hampshire
v.
BRENNA CAVANAUGH

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE STATEMENTS

NOW COMES, the defendant, Brenna Cavanaugh, by and through counsel, Michael J. Zaino, and moves this court to exclude from trial testimony from O.L. regarding whether Ms. Cavanaugh said "shoot him" or words to that effect. In support of this motion, the defendant states as follows:

1. Ms. Cavanaugh stands charged with two alternative theories of Criminal Solicitation that stem from an incident on August 18, 2018. The first charge (1610355C), Criminal Solicitation to Commit First Degree Assault alleges that Brenna Cavanaugh, "acting with the purpose that another engage in conduct constituting the crime of First Degree Assault, requested Mark Gray to discharge a firearm in the direction of O.L." The second charge (1610356C) alleges that Brenna Cavanaugh, "acting with the purpose that another engage in conduct constituting the crime of Reckless Conduct with a Deadly Weapon, requested Mark Gray to discharge a firearm in the direction of O.L."

2. According to discovery provided by the State, the complainant 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 complainant 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 complainant 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. The complainant fled the area and his vehicle was struck by some of the fired bullets.

5. The Portsmouth Police Department investigated the shooting and identified the complainant. The complainant was transported to the police station by Officer Keegan Pearl, who notes that he brought the complainant into the lunchroom and provided the complainant with food and drink. Officer Pearl then notes that the complainant started talking freely and recounted the events of the evening. During this purported unrecorded statement, Officer Pearl alleges that the complainant said he heard Ms. Cavanaugh say "shoot him, shoot him" as Mr. Gray approached his vehicle with a handgun. Following this narrative of what the complainant allegedly said, Officer Pearl notes that Sergeant Peracchi brought the complainant back to his house. Officer Pearl does not note whether his casual conversation with the complainant was prior to or after the formal 20-minute recorded interview of the complainant conducted by Detective Sergeant Rebecca Hester.

6. During the recorded interview with Detective Sergeant Hester, the complainant gives specific details about the events that morning. After about 14 minutes of a back and forth discussion of the events that covered before, during, and after the shooting where the complainant never mentions hearing Ms. Cavanaugh say "shoot him," Detective Sergeant Hester asked the complainant specifically if his windows were down. The complainant stated that his passenger window was half-way down. Then Detective Sergeant Hester asked if he could "hear" anything and the complainant says he could not. The interviewer then immediately asked the complainant if he "heard anybody say anything." The complainant stated that he was "not positive, but could have heard Brenna say shoot, but not positive."

7. The defense now moves to exclude testimony from O.L. regarding whether Ms. Cavanaugh said "shoot him" or words to that effect. This request is made pursuant to Rules 601(b) and 602 of the N.H. Rules of Evidence. *See also State v. Cochran*, 132 N.H. 670 (1990).

8. Under Rule 601 (b), "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." Rule 602 holds that "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."

9. Here, the complainant lacks the sufficient capacity to remember whether Ms. Cavanaugh asked Mr. Gray to shoot. The complainant provided a 20-minute recorded interview with the police. During the first 14 minutes, the complainant detailed the specifics of what happened before, during, and after the shooting. The interview consisted of a back and forth dialogue between the complainant and Detective Sergeant Hester. The complainant never mentioned that he heard Ms. Cavanaugh say "shoot him" or words to that effect.

10. Then Detective Sergeant Hester asked the complainant specifically if his windows were down. The complainant stated that his passenger window was half-way down. Detective Sergeant Hester then specifically asked the complainant if he heard "anything." The complainant denied hearing anything. After denying hearing "anything," the complainant was specifically asked if he heard anyone "say anything." The complainant responded that he was "not positive." The complainant went on to say that he "could have heard Brenna say shoot." Then the complainant repeated that he "[was] not positive."

11. Based on the recorded conversation between the complainant and Detective Sergeant Hester, the complainant does not remember whether Ms. Cavanaugh said "shoot" or words to that effect. He specifically said twice that he was not positive if he

heard Ms. Cavanaugh say "shoot." As such, there is a question of whether the complainant has personal knowledge of whether Ms. Cavanaugh said "shoot." This means either it was said or it was not. If it was not said, the complainant cannot have personal knowledge of it. If it was said, then he still remains unsure of whether he heard it or not. If he did not hear it, then he lacks personal knowledge. If he did hear it, then the witness lacks the sufficient capacity to remember. In either case, the witness' testimony regarding same should be excluded under Rules 601 and 602 of the N.H. Rules of Evidence.

WHEREFORE, Ms. Cavanaugh respectfully requests that the Court:

A. GRANT this motion and exclude the complainant from testifying that he heard Ms. Cavanaugh say "shot" or words to that effect; OR

B. Schedule a hearing on this matter; AND

C. Grant any other relief justice may require.

Respectfully submitted,

July 9, 2019

Michael J. Zaino (#17177)
Law Office of Michael J. Zaino, PLLC
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.

July 9, 2019

Michael J. Zaino

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

218-2018-CR-01583

State of New Hampshire
v.
BRENNA CAVANAUGH

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EXPERT

NOW COMES, the defendant, Brenna Cavanaugh, by and through counsel, Michael J. Zaino, and moves this court to exclude from trial testimony from Trooper Tara Elsemiller regarding bullet flight path and shooting reconstruction. In support of this motion, the defendant states as follows:

1. Ms. Cavanaugh stands charged with two alternative theories of Criminal Solicitation that stem from an incident on August 18, 2018. The first charge (1610355C), Criminal Solicitation to Commit First Degree Assault alleges that Brenna Cavanaugh, "acting with the purpose that another engage in conduct constituting the crime of First Degree Assault, requested Mark Gray to discharge a firearm in the direction of O.L." The second charge (1610356C) alleges that Brenna Cavanaugh, "acting with the purpose that another engage in conduct constituting the crime of Reckless Conduct with a Deadly Weapon, requested Mark Gray to discharge a firearm in the direction of O.L."

2. The defense now moves to exclude expert testimony from Trooper Tara Elsemiller regarding bullet flight path and shooting reconstruction on the basis that it is not relevant to the charged crimes of criminal solicitation. "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." RSA 629:2.

3. 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

4. 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.

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

6. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Evid. 401. "Evidence which is not relevant is not admissible." N.H. R. Evid. 402; *see State v. Walsh*, 139 N.H. 435 (1995).

7. Based on the plain language of RSA 629:2, the nature of the crime demands that the State prove beyond a reasonable doubt that when one person solicits another to commit a crime, it was their purpose for that person to engage in criminal activity. Thus, at the time the solicitation takes place, the crime has yet to be committed. One cannot solicit another to do something in the past. To solicit means to request or to ask. Whether the person asked actually engaged in criminal conduct is not relevant to whether one solicited or asked another to do so. Assuming the State can meet its burden of proof with sufficient evidence, the crime is completed upon the solicitation or request by one person of another.

8. Here, the State intends to introduce expert testimony that purports to show where Mr. Gray may have been standing relative to where O.L.'s vehicle was located at the time Mr. Gray fired the shots based on the bullet trajectory. This evidence may be relevant to show whether Mr. Gray may have committed a crime when he fired shots at O.L.'s vehicle and whether his actions constitute a crime. However, such evidence has no bearing on whether Ms. Cavanaugh was acting with the purpose that Mr. Gray

engage in criminal activity when she allegedly solicited him to commit the crime of either First Degree Assault or Reckless Conduct.

9. Since the crime of solicitation is committed when the request is made or the words are uttered, whether one chooses to act on the request or whether one actually engages in criminal activity is not relevant to a prosecution for solicitation. Here, Trooper Elsemiller's testimony is only relevant to whether Mr. Gray engaged in criminal activity and has no tendency to make the existence of a solicitation more probable or less probable.

10. Therefore, Trooper Elsemiller's testimony regarding bullet flight path and shooting reconstruction should be excluded as it is not relevant to the crime of solicitation.

11. Alternatively, if this Court deems the evidence relevant, it should nevertheless be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by misleading the jury under Rule 403. N.H. R. Evid. 403.

12. Here, the question is whether Ms. Cavanaugh solicited another to commit a crime. There is a substantial danger of unfair prejudice to Ms. Cavanaugh if the jury hears about whether an actual crime was committed. The jury should make its decision on the defendant's intent or purposeful mental state without any knowledge of whether the crime allegedly solicited was committed.

13. Not only is such evidence potentially unfairly prejudicial, but it may also confuse the jury that will determine whether she asked someone to commit a crime and not whether that person committed the crime. Here, the jury could be confused regarding what exactly they are deciding, i.e., whether Ms. Cavanaugh asked another or whether another actually committed the crime.

14. Thus, even if the Court finds the evidence relevant, which the defendant disputes, the Court should still exclude Trooper Elsemiller's testimony under Rule 403

as unfairly prejudicial or on the basis that it will confuse the jury.

WHEREFORE, Ms. Cavanaugh respectfully requests that the Court:

A. GRANT this motion and exclude Trooper Elsemiller's testimony regarding bullet flight path and shooting reconstruction; OR

B. Schedule a hearing on this matter; AND

C. Grant any other relief justice may require.

Respectfully submitted,

June 21, 2019

Michael J. Zaino (#17177)
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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 21, 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 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