THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0628

State of New Hampshire

v.

Roger Dana

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

BRIEF FOR THE DEFENDANT

Stephanie Hausman
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15337
603-224-1236
shausman@nhpd.org
(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred by twice admitting hearsay evidence offered by the State.

Issue preserved by Dana's objections and the trial court's rulings. T3* 455-58; T4 609-13.

2. Whether the court erred by giving a false exculpatory evidence instruction that only related to Dana and denied Dana's request that the instruction include all witnesses when there was some evidence that two State's witnesses had lied about their whereabouts on the day of the murder.

Issue preserved by Dana's request for jury instructions, memorandum of law, and arguments and the trial court's ruling. Add. 35-41; T4 626-30; T5 646-49.

* Citations to the record are as follows:
"Add." refers to the Addendum to this brief;
"DT, GT, and ST" refer to the transcripts of the trial depositions of Dr. Eric Drogin, Dr. Stuart Gitlow, and Criminalist Katie Swango, played for the jury;
"T1 – T7" refers to the consecutively-paginated transcripts of the six-day trial held September 17 - 26, 2019, followed by the page number given to each page;
"S" refers to the transcript of the sentencing held on September 27, 2019.

STATEMENT OF THE CASE

Roger Dana was charged in the Coos County Superior Court with one count of first-degree murder and one count of second-degree murder. T1 3-5. Both charges related to the death of M.D., aged approximately two and a half years, and her sexual assault. Id. The jury convicted Dana of both charges. T6 816-22. The court (Bornstein, J.) sentenced Dana to life in prison without the possibility of parole. S 16.

STATEMENT OF THE FACTS

On November 27, 2016, Roger Dana was at home at 109 York Street apartment 1, in Berlin, with his two-and-a-half-year-old daughter, M.D. T1 171, 180. M.D.'s mother, Ashley Bourque ("Ashley"), left the home at about 7:45 a.m. to go to work. T1 63, 171, 179. Ashley's father, Alex Bourque ("Alex"), and Alex's fiancée, Debra Johnson, who had spent the prior night at the home, left around 9:00 a.m. T1 57-59, 63, 176. Floyd Riff, the boyfriend of Ashley's sister Deborah Bourque ("Deborah"), stopped by around 10:30 a.m. T1 81, 82-83, 87, 100-01; T2 215-16. Riff went to Bob's Variety, bought some beer, and returned to the house, leaving the beer with Dana. T1 84-86, 113. Ashley, Johnson, and Riff testified that M.D. was uninjured when they last saw her. T1 64, 86-87, 178-79.

Ashley spoke to Dana during her lunch break around 12:25 and testified that M.D. and Dana seemed fine. T1 183-84, 202. Pastor Robert Haynes saw Dana pushing a young girl in a stroller between 12:30 and 1 p.m. T1 132, 137-38. The girl seemed fine to Haynes. T1 139.

At around 2:35 p.m., Shane Whitehouse, who lived at 109 York Street apartment 2, recorded sounds he heard coming from apartment 1. T4 553-54, 582. Whitehouse testified that he heard a girl screaming and yelling and banging noises coming from the apartment throughout the

day. T4 556-57, 560, 587-88. He recognized two of the voices as Dana's and Paulette Walker's. T4 557-58, 562, 580-81, 588, 598-600. Walker is Ashley's mother and she was frequently at the apartment. T1 146, 147-48, 200; T4 561. However, Walker testified that she did not go to the apartment until around 3:30 p.m. that day. T1 149.

At around 3:20 p.m., Dana called Deborah. T1 88-89; T2 219-20. Although she could not hear much of what he said before the call was disconnected[1], she heard him say something about how they had been friends for a while. T1 88-89, 126-27; T2 220, 251-52. Dana sounded intoxicated. T1 88-89, 126-27; T2 220, 251.

Walker testified that at around 3:12 p.m., she got a call from Dana, who said that M.D. had fallen off the bunk bed and was dead. T1 149-50. She testified that Dana sounded drunk. T1 150-51. Walker walked to the apartment, calling Ashley on her way. T1 150, 185-86. Ashley left work and arrived at the apartment shortly after Walker said that she had arrived. T1 152, 186. Walker testified that she found Dana in his and Ashley's bedroom, holding a motionless M.D. T1 151-52. Walker testified that she took M.D. from Dana. T1 151. Dana was crying and upset. T1 153.

[1] There was evidence that Dana's phone did not work well. T1 110, 200-01; T3 415.

Ashley testified that when she arrived, Walker was holding M.D. T1 162, 186. Ashley took M.D. from Walker and Walker called 911. T1 151, 153, 186. Ashley testified that M.D. was unresponsive. T1 186. Dana said that M.D. fell off the top bunk when he turned around to get her some clothes. T1 153, 187-88.

When emergency personnel arrived, Walker was punching a railing. T1 23-24. M.D. was rushed to the hospital where she was later pronounced dead. T1 28-29, 41-43.

Chief Medical Examiner Jennie Duval determined that M.D.'s cause of death was head and abdominal injuries. T3 461, 496, 505. She had scrapes and bruises over her entire body that had to have been inflicted by at least seven different impacts. T3 467, 470-80, 485-99. She had internal bleeding in her head and abdomen. T3 482, 493-95. She also had injuries around her vaginal opening and around and inside her anus. T3 501-03. M.D.'s injuries were inconsistent with a fall. T1 41; T3 500. There was no sperm or semen in swabs taken from M.D.'s vagina, anus, and mouth. T2 338-40. A long hair found in M.D.'s labia was not tested, even though the state lab could test hair for DNA. T1 44-45, 52; T2 351; ST 17; T3 450-53.

The police took Dana into protective custody that afternoon. T3 383. The following morning, the police

searched Dana at the Berlin Police Department. T2 262, 322. His hands were uninjured but he had dried blood on him. T2 266, 320.

Later that day, Dana spoke with New Hampshire State Police Sergeant Nathan Zipf at the Berlin Police Department. T3 390-91. Zipf did not tell him before the interview that M.D. had died. T3 392, 443. Dana said that he had been alone with M.D. from mid-morning on the twenty-seventh. T3 399. He said that she was injured when she fell off the bottom bunk. T3 396-97. When told at the end of the interview that M.D. had died, he broke down crying. T3 443.

Later that day, Dana met with Ashley. T1 189-90, 205. Dana told her that he had put M.D. on the bottom bunk for her nap and left the room. T1 190. He said he heard a thump and went in to find M.D. on the floor. Id. Dana was crying and upset. T1 204-05.

The following day, Dana agreed to meet police at his home and he showed them what had happened on the twenty-seventh. T3 406-07, 410-11. Dana said that he and M.D. had had an uneventful day. T3 408-09. He first said he had put M.D. down on the bottom bunk for a nap, went to his room, then returned when he heard M.D. screaming to find her on the floor. T3 409. He then said that he had put M.D. on the top bunk after her bath, she fell off while he was looking for clothes, he picked her up and she seemed mostly

fine so he put her on the bottom bunk for her nap and then left, returning later to find her injured on the floor. T3 409-13.

Zipf interviewed Walker in the early morning after M.D.'s death. T3 421. Her knuckles were bloody and swollen. T3 422, 445-46.

Police searched the apartment. T2 267. There were apparently bloody wipes in the trash, in M.D.'s bedroom, and the adult bedroom. T2 278-80, 287, 292-93, 308-10. There appeared to be blood in the bathroom, adult bedroom, M.D.'s bedroom, kitchen, hallway, and living room. T2 274-78, 282, 287-93, 294, 299-302, 304-06, 308-12. Police found several items of children's clothing with what appeared to be blood on them, including a pajama top that also appeared to have vomit on it, found behind the bed in Dana's and Ashley's bedroom. T2 290-91, 299, 311, 313-14, 347-48. There was apparent blood on an NFL jersey hanging in the closet in the adult bedroom, a shirt that said "with enough coffee, anything is possible," and a pair of women's underwear. T2 306-07, 311, 324-28. Although the floor of M.D.'s room was covered in toys, no toys had blood on them. T1 195; T2 291-92. There were stains of what appeared to be blood on the carpet under the toys. T2 292-93.

State lab testing confirmed that there was blood on the NFL jersey, but it did not belong to M.D. T2 343-44; ST 14,

49-52. M.D.'s blood was found on wipes from her bedroom and the trash, the hallway, the bathroom, and a child's pajama shirt. T2 344-48; ST 14-16, 18-19.

After his arrest in early December, Dana wrote Ashley letters. T3 431-32. He consistently described what had happened to M.D. as an accident. T3 432-33. He denied hurting M.D. purposely. T3 432-34.

The defense called two experts, Dr. Stuart Gitlow and Dr. Eric Drogin. GT; DT. Based on evidence that Dana had taken klonopin that morning, had drunk several beers, and did not remember all the events of the day of M.D.'s death, Dr. Gitlow testified that the use of alcohol and klonopin can cause blackouts and loss of consciousness. T1 84, 105; T3 439-42; GT 12-25. Gitlow described a blackout as an episode during which the person is able to function normally but is not "laying down any memories." GT 22. Both Gitlow and Drogin testified about how the brain uses routines or assumptions to fill in memory gaps in a way that is not apparent to the person. GT 26-31; DT 7-11.

SUMMARY OF THE ARGUMENT

1. First, the court erred by admitting the lead detective's testimony that the other people Dana suggested had access to M.D. at the time of her injuries provided alibi witnesses and that those alibi witnesses had accounted for the whereabouts of the four primary alternative suspects. The only reasonable inference from the detective's testimony is a hearsay inference that Dana was unable to challenge.

Second, the court erred by admitting, as an excited utterance, a statement Walker made twenty-four hours after the murder. In the intervening hours, Walker was interviewed by police and had contemplated the risk that she would be arrested by them. Her activities, and the careful thought with which she executed them, show that she had the capacity to contrive her statements the next day. Due to the passage of time and Walker's activities within that time, her statements were not excited utterances.

2. The court erred by denying Dana's request that the false-exculpatory-statement instruction cover such statements given by State's witnesses. By failing to apply the instruction to all involved, the court risked the jury interpreting the court's instruction as a comment on the evidence favoring the State's case. The missing instruction went to the heart of Dana's case and this Court should reverse.

I. THE COURT ERRED BY TWICE ADMITTING HEARSAY EVIDENCE OFFERED BY THE STATE.

A. The State's first offered hearsay testimony.

Dana suggested to the jury that others may have caused M.D.'s injuries. T1 11-20. In cross-examining the lead detective on the case, Zipf, defense counsel asked about his investigation into Walker, Riff, Johnson, and Alex Bourque. T3 383, 444-48, 449. Specifically, counsel asked whether Zipf had seized any of Walker's clothing other than her shirt, swabbed her injured knuckles, or searched Walker's home. T3 445-47. Counsel also asked if Zipf was involved in the searches of Riff, Alex, or Johnson. T3 449.

During redirect examination, the State asked Zipf:

> Q: Defense counsel asked you about Floyd Riff, Paulette Walker, Deb Johnson, and Alex Bourque. Remember that?
>
> A: Yes.
>
> Q: Were the people they were with on November 27th interviewed?
>
> A: Yes, they were.
>
> Q: To account for their whereabouts?
>
> A: Yes.

T3 455.

Dana objected and moved to strike, arguing that Walker, Riff, Johnson, and Alex's statements about who they were with and what those people said about Walker, Riff,

Johnson, or Alex was hearsay. T3 455-56. The State argued that it was fair rebuttal to the defense "impeach[ment]" of Zipf that he did a "sloppy job." T3 456. The State asserted that the defense had asked Zipf whether he swabbed the four people listed and whether he took their clothes. T3 457. The State also argued that the testimony was not being admitted for the truth of the matter asserted but just to show what follow-up Zipf did. T3 456.

The court found that, because no "substantive statement" was being elicited, it was not hearsay. T3 457-58. Thus, the court did not give a limiting instruction. In so ruling, the court erred.

B. The State's second offered hearsay testimony.

During the cross-examination of Johnson's testimony during the defense case, the State asked her about a telephone call she received from Walker the day after the murder. T4 608-09. Johnson testified that Walker was crying during the call. T4 609. The State then asked about what Walker said. Id.

The defense objected, arguing that it called for hearsay. Id. The State responded, arguing that it was substantively admissible as an excited utterance.[2] T4 609-12. It argued

[2] The State also argued the testimony was admissible for impeachment. T4 609-10. Because the trial court admitted it substantively, no limiting instruction

that Johnson's testimony had established that Walker was screaming, yelling, and upset. T4 611. Dana argued that, given the passage of twenty-four hours and Walker's interview with police, too much time had passed for the statement to qualify as an excited utterance. Id. The court admitted Walker's statements under the excited utterance exception to the rule against hearsay. T4 612. In so ruling, the court erred. Based on the court's ruling, Johnson testified that Walker said Dana "murdered her, beat her." T4 613.

C. The law.

The proponent of evidence bears the burden of establishing its admissibility. See, e.g., Opinion of the Justices, 141 N.H. 562, 577 (1997). This Court "review[s] a trial court's decision to admit evidence under [the Court's] unsustainable exercise of discretion standard." State v. Cavanaugh, ___ N.H. ___ (slip op. at 11) (decided December 29, 2020). "To meet this standard, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of [his] case." Id.

However, other courts use a two-step process of determining hearsay questions: first, the court will consider, under a de novo standard of review, whether the evidence is

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was given. T4 612. For this reason, Dana focuses on the hearsay issue on appeal.

hearsay; then it will determine whether the court unsustainably exercised its discretion in considering whether the evidence fits a hearsay exception. See, e.g., United States v. Price, 458 F.3d 202, 205 (3rd Cir. 2006); Wise v. State, 242 A.3d 431, 442-43 (Md. 2020); Todd J. Brown, Say What?? Confusion in the Courts Over What is the Proper Standard of Review for Hearsay Rulings, 18 Suffolk J. Trial & App. Advoc. 1, *39-41 (2013) (calling this the view of "[m]ost federal and state jurisdictions"). This Court should consider adopting this bifurcated standard of review for hearsay issues.

"Hearsay is generally defined as an out-of-court statement offered in court to prove the truth of the matter asserted." State v. Munroe, ___ N.H. ___ (slip op. at 9) (decided August 4, 2020). Hearsay is generally inadmissible, subject to certain well-delineated exceptions." Id. "In general, such extrajudicial statements, which are not made under oath or subject to cross-examination, are less trustworthy than those made in court." State v. Addison, 165 N.H. 381, 497 (2013) (quotation omitted).

D. The alibi witness hearsay.

The prohibition against hearsay does not distinguish between proving the content of a statement through direct or circumstantial evidence. See, e.g., State v. White, 159 N.H. 76, 79080 (2009) (evidence constituted statement under Rule

801, although detective "did not actually reveal [the child's] answer" about whether she had been sexually abused, where "the only reasonable inference a jury could draw was that [the detective] had asked [the child] if there had been penetration and she replied affirmatively."); United States v. Meises, 645 F.3d 5, 21-22 (1st Cir. 2011) ("We . . . reject the government's argument that [the witness's] testimony was proper because it omitted 'the actual statements' made by [the declarant].").

Here, the only reasonable inference from Zipf's testimony is that Walker, Riff, Johnson, and Alex each provided the police with alibi witnesses and that Zipf then spoke with those people to "account for [Walker's, Riff's, Johnson's, and Alex's] whereabouts." It is of no consequence that the State did not admit the "actual statements" of the four targets or their alibi witnesses.

Moreover, this testimony did not fairly rebut the defense cross-examination. The defense merely elicited that the police did not look for three types of evidence related to Walker and that Zipf had not participated in the interviews of Riff, Johnson, and Alex. Particularly as it related to Riff, Johnson, and Alex, the defense cross-examination did not imply that the police had not collected relevant evidence – only that Zipf had not personally participated in that collection. The defense cross-examination in no way opened the door to these

hearsay statements. The court erred in admitting this hearsay evidence.

E. Walker's statement that Dana "murdered" and "beat" M.D.

"A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is not excluded by the rule against hearsay. N.H. R. Evid. 803(2). "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 the event, and before he had time to contrive or misrepresent." Cavanaugh, slip op. at 11 (quotation omitted).

"The precise amount of time that may elapse before a statement loses its spontaneity as an excited utterance evoked by a startling event and becomes a mere narrative cannot be established by any absolute rule of law and accordingly, much must be left to the discretion of the trial court in admitting or rejecting such testimony." State v. Pennock, 168 N.H. 294, 302-03 (2015) (quotation omitted). This Court has often admitted statements made within hours of a startling event. See, e.g., id.; MacDonald v. B.M.D. Golf Associates, Inc., 148 N.H. 582 (2002). However, statements made a day or more later are typically not admitted. See, e.g.,

State v. Woods, 130 NH 721, 726 (1988) (because child's statements to her mother occurred on the day after the event, "there was simply too much time for reflective thought"); State v. Thompson, 161 N.H. 507, 532 (2011) ("the admissibility of statements made five days following a startling event runs directly contrary to our prior case law").

"Proof that the declarant performed tasks requiring relatively careful thought between the event and the statement provides strong evidence that the effect of the exciting event had subsided." 2 Robert S. Mosteller et al., MCCORMICK ON EVIDENCE § 272 (8th ed. 2020). For example, in State v. Fischer, the Court considered that, after the exciting event, the declarant had gone to the emergency room for treatment and spent time at work. State v. Fischer, 165 N.H. 706, 711 (2013). Those circumstances supported a finding that the declarant's subsequent statement was not an excited utterance. Id.

Here, the passage of time, and Walker's activities within that time, preclude a finding that her statements the next day were made before she had time to contrive or misrepresent. Since M.D.'s death, Walker had been interviewed by the police, had pictures taken of the injuries on her knuckles, and had her shirt collected as evidence. T1 163-64; T3 421-22. She answered all of the trooper's questions. T3 421. Walker testified that, when she met with the police, she

thought they would arrest her, because she was back with a boyfriend who was ordered not to have contact with her. T1 164, 166-67.

Walker's emotional presentation during the call was not enough to justify admission of the statement as an excited utterance. A grandmother would naturally feel grief about the death of her grandchild for days, months, and years following the event. However, the basis for admission of a statement as an excited utterance is a belief that sudden emotion stills the capacity for contrivance. Here, during the time between the event and her call to Johnson, Walker met with the police, answered all of their questions, and considered her own risk of culpability. These complex activities required relatively careful thought and gave Walker a chance to consider her own culpability. Given these circumstances, and the passage of twenty-four hours, Walker's statements did not qualify as excited utterances.

F. Prejudice.

The admission of Zipf's testimony that conveyed that Walker, Riff, Johnson, and Alex had confirmed alibis was prejudicial to Dana's case. Dana's defense was that he was not responsible for M.D.'s injuries and that others had access to her at the relevant time. Through the use of indirect hearsay, the State was able to inform the jury that non-

testifying declarants had vouched for the whereabouts of the others Dana suggested had been culpable. Dana had no way to challenge this hearsay testimony that went to the heart of his defense.

The admission of Walker's statement that Dana murdered and beat M.D. prejudiced Dana's case. This statement was not based on Walker's personal knowledge, as she testified she was not present when M.D. was injured. Thus, Walker could not have given this opinion testimony. By admitting it as an excited utterance, the court prevented Dana from questioning Walker about the basis of her knowledge. This testimony was damning, as it provided Walker's opinion of who the perpetrator was in a circumstantial case.

Because the court twice admitted hearsay evidence that prejudiced Dana's case, this Court must reverse.

II. THE COURT ERRED BY GIVING A FALSE EXCULPATORY EVIDENCE INSTRUCTION THAT ONLY RELATED TO DANA AND DENIED DANA'S REQUET THAT THE INSTRUTION COVER ALL WITNESSES WHEN THERE HAD BEEN SOME EVIDENCE THAT TWO STATE'S WITNESSES LIED ABOUT THEIR WHEREABOUTS ON THE DAY OF THE MURDER.

Dana requested an instruction on false exculpatory statements that read:

> Evidence has been introduced regarding statements various people made to explain circumstances that might appear incriminating of those people. If you find a person intentionally made statements tending to demonstrate his or her innocence, or to influence a witness, and that the statements are later discovered to be false, then you may consider whether the statements show a consciousness of guilt, and determine what significance, if any, to give such evidence.

Add. 35. Dana argued that the instruction was appropriate in light of testimony that contradicted Walker's and Riff's accounts of their activities during the time M.D. was injured. T4 627-28; Add. 38-41; see also T4 557-58, 560 (Whitehouse testimony that Walker present during the day), 615-19 (testimony from Andrew Rivard contradicting Riff's testimony about what he did that day).

The State requested a false exculpatory statements instruction that pertained only to Dana. T4 626-30. It objected to Dana's requested version. T4 628-29; Add. 42-49.

The trial court denied Dana's requested instruction, T5 648, and gave the following false exculpatory statements instruction that related only to Dana:

> But if you find that the Defendant intentionally made a statement or statements tending to demonstrate his innocence, and the statement or statements were later discovered to be false, then you may consider whether the statements show a consciousness of guilt and determine what significance, if any, to give to such evidence. It is your decision as jurors as to whether false exculpatory statements, if made, constituted or indicate consciousness of guilt or nothing at all.

T6 677-78. In so ruling, the court erred.

"The purpose of the trial court's 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. Parry, ___ N.H. ___ (slip op. at 3) (decided January 27, 2021). "When reviewing jury instructions," the Court evaluates "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. The

Court "determine[s] if the jury instructions adequately and accurately explain each element of the offense, and [it] reverse[s] only if the instructions did not fairly cover the issues of law in the case." Id. "The necessity, scope, and wording of jury instructions generally fall within the sound discretion of the trial court, and [the Court] review[s] the trial court's decisions on these matters for an unsustainable exercise of discretion." Id. "To show that the trial court's decision is unsustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of [his] case." Id.

In State v. Evans, this Court considered an instruction nearly identical to the one given here, focusing on the defendant's false exculpatory statements. State v. Evans, 150 N.H. 416, 420-22 (2003). The Court found that such an instruction was not an improper comment on the evidence but rather a reasonable inference of consciousness of guilt from evidence of false exculpatory statements. Id. at 420-21. The Court ruled that a sufficient evidentiary basis must exist before such an instruction is given. Id. at 421.

The Evans Court then considered whether it was error to not include in that instruction reference to one of the State's witnesses. Id. at 422. In affirming that ruling, the Court concluded that the witness's potential guilt was a

"theory of defense upon which [the defendant] was not entitled to an instruction." Id.

The Court then considered whether, in fairness, the false exculpatory statements instruction should have included the State's witness. Evans, 150 N.H. at 422-23. The Court "assume[d], without deciding, that it may be appropriate in some instances for the jury to be instructed on the false exculpatory statements of others." Id. at 422; see also State v. Bruneau, 131 N.H. 104, 117 (1988) (Court assumed that there was no error of law in giving an instruction that the jury may consider a State's witness's flight). The Court decided that Evans was not such a case as the evidence that the State's witness's statements were false was "scant," because the witness offered only general denials of abusing the victim. Evans, 150 N.H. at 422-23.

This Court's "theory of the case" versus "theory of defense" caselaw began in the 1980s and is summed up in Bruneau, in which it considered a defense request for an instruction regarding an inference of consciousness of guilt on the part of a State's witness and another person who was involved in the events at issue in the trial but who did not appear for trial. In that case, the Court found that a "theory of the case:"

> is simply the defendant's position on how the evidence should be evaluated and interpreted, whereas a 'theory of

> defense' has been described as 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.

Bruneau, 131 N.H. at 117 (citation and quotations omitted). The Court concluded that "a theory of defense 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." Id. at 117-18.

The Court found that because Bruneau did not raise a theory of defense, he was not entitled to his requested instruction. Id. at 118. The Court found that the jury was capable of "following and evaluating the defendant's argument in the absence of an instruction that flight in some circumstances can be taken to express consciousness of guilt." Id. The Court warned that "the more specifically a jury charge adverts to the evaluation of particular items of evidence, the greater the risk of its becoming argumentative." Id.

While the distinction between a "theory of defense" and a "theory of the case" may be important in determining when a trial court must give an instruction requested by the defense, it does little to guide trial courts in deciding whether to give a discretionary instruction requested by the defense.

Instead, a more helpful framework is to consider what a reasonable juror would understand from the instructions as a whole. Where the court gives a false exculpatory statements instruction related to the defendant's statements but not related to the State's witnesses, a reasonable juror would conclude that the inference does not apply to the State's witnesses.

Reasonable jurors would not perceive that a defendant's false exculpatory statements are relevant to the State's theory of prosecution but that State's witnesses' false exculpatory statements are merely relevant to the defense "theory of the case." To reasonable jurors the inference from false exculpatory statements either supports a finding of the defendant's guilt, if made by the defendant, or a finding consistent with the defendant's innocence, if made by someone other than the defendant. To a reasonable juror, these are two sides of the same coin and either help the State meet its burden or keep the State from doing so.

However, when the court gives an instruction applying a general logical principle – people who feel guilty will try to mask their responsibility – only to one party, it creates a risk that the jury will consider the instruction as a judicial comment on the evidence in a way that favors one party. In Evans, this risk was ameliorated by several instructions given by the trial court, including an instruction that the jury must

disregard anything it took as an expression of the judge's opinion about the facts of the case and that the judge's job is to remain entirely neutral. Evans, 150 N.H. at 421. Here, the court did not give these instructions. T6 672-89.

Moreover, there was a greater quantum of evidence supporting Dana's requested instruction than there was in Evans. In Evans, the State's witness denied harming the victim. In its opinion, the Court pointed to no evidence that showed that to be false.

Here, on the other hand, Walker and Riff denied being present during the time period that M.D. was injured and gave an alternate account of their activities during that period. However, Whitehouse testified that, contrary to Walker's testimony, she was present in the apartment during the day. In addition, Rivard gave an account of Riff's activities that day that contradicted Riff's testimony. This evidence was much more specific than the evidence in Evans and warranted expansion of the false exculpatory statements instruction to include people other than Dana.

The court's failure to give the instruction Dana requested prejudiced his case. While he was able to argue an incriminating inference from Walker's and Riff's denials of responsibility, that argument was not supported by a jury instruction given by the judge. See, e.g., Welch v. Gonic Realty Trust Co., 128 N.H. 532, 537 (1986) (matter included

in the court's instructions received "judicial imprimatur of validity"). This went to the heart of Dana's defense. In denying Dana's requested instruction, the trial court erred. This Court should reverse.

CONCLUSION

WHEREFORE, Roger Dana respectfully requests that this Court reverse and remand.

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

The appealed decisions are not in writing and therefore are not appended to the brief.

This brief complies with the applicable word limitation and contains under 5900 words.

Respectfully submitted,

By /s/ Stephanie Hausman
Stephanie Hausman, 15337
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Stephanie Hausman
Stephanie Hausman

DATED: March 1, 2021

A D D E N D U M

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THE STATE OF NEW HAMPSHIRE

COOS COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ROGER DANA

214-2016-CR-00135

DEFENDANT'S PROPOSED JURY INSTRUCTIONS (SUPPLEMENTAL) – FALSE EXCULPATORY STATEMENTS AND LACK OF FLIGHT

NOW COMES Roger Dana by and through counsel Aileen O'Connell and Eric Raymond and hereby submits the following proposed jury instructions by way of objection to the State's requested false exculpatory statements instruction. The defense requests the following instructions be included in this Court's charge to the jury at the conclusion of this case:

False exculpatory statements

Evidence has been introduced regarding statements various people made to explain circumstances that might appear incriminating of those people. If you find a person intentionally made statements tending to demonstrate his or her innocence, or to influence a witness, and that the statements are later discovered to be false, then you may consider whether the statements show a consciousness of guilt, and determine what significance, if any, to give to such evidence.[1]

Lack of flight

You have heard evidence that the defendant did not flee or attempt to flee. It is up to you to decide whether the evidence shows this. If you believe that it does, you may consider what that lack of flight indicates about the defendant's mental state. A person may choose not to flee for a variety of reasons. For example, the inclination of a guilty person to flee after committing a

[1] In State v. Evans, 150 N.H. 416, 420 (2003), the New Hampshire Supreme Court approved use of a "false exculpatory statements instruction." The entirety of the instruction given by the trial court in that case was as follows: "Evidence has been introduced regarding statements the defendant offered to explain certain bruising on Kassidy. If you find the defendant intentionally made statements tending to demonstrate his innocence, or to influence a witness, and that the statements are later discovered to be false, then you may consider whether the statements show a consciousness of guilt, and determine what significance, if any, to give to such evidence." The court noted in dicta that "it may be appropriate in some instances for the jury to be instructed on the false exculpatory statements of others." Id. at 422.

crime may be outweighed by other considerations. Nevertheless, if you think it proper to do so, you may consider lack of flight as tending to show that the defendant did not commit the crime.[2]

Respectfully submitted,

Aileen O'Connell, #17144
Eric Raymond, #17748
New Hampshire Public Defender
10 Ferry Street
Concord, NH 03301
(603) 224 1236

[2] This instruction is a modification of the September 2010 Criminal Jury Instructions Drafting Committee Version of the instruction for Flight by the Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2019, a copy of the foregoing Motion was forwarded to the Attorney General's Office.

_____

Aileen O'Connell, #17144

THE STATE OF NEW HAMPSHIRE

COOS COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ROGER DANA

214-2016-CR-00135

MEMORANDUM IN SUPPORT OF DEFENDANT'S REQUESTED JURY INSTRUCTIONS: FALSE EXCULPATORY STATEMENTS AND LACK OF FLIGHT

Roger Dana through counsel respectfully requests this Court grant the Defendant's Proposed Jury Instructions (Supplemental) – False Exculpatory Statements and Lack of Flight. In support of this request, counsel states the following:

1. On or about September 16, 2019, the defense filed "Defendant's Proposed Jury Instructions (Supplemental) False Exculpatory Statements and Lack of Flight.
2. The defense requests the court deny the State's requested "False Exculpatory" instruction and instead give the instruction requested by the defense. The defense further requests the Court instruct the jury on "Lack of Flight."
3. The instructions requested by the defense do not comment on the evidence nor are they instructions on the defendant's theory of defense. The defendant's requested instructions are proper because they will call the jury's attention to non-obvious features of the evidence that the jury may need help understanding. False exculpatory instructions and flight instructions have already been endorsed by the New Hampshire Supreme Court and

serve to call the jury's attention to a non-obvious link between an items of evidence and issues relevant to the case. The same should hold true to an instruction on false exculpatory statements of people other than the defendant and lack of flight.

4. In this case, there is also a sufficient evidentiary basis to justify an instruction on the false exculpatory statements of people other than the defendant as well as lack of flight.
5. With respect to false exculpatory statements of others, as already noted in the previously filed Defendant's Proposed (Jury Instructions Supplemental), in State v. Evans, 150 N.H. 416 (2003), the Supreme Court stated in *dicta* that it may be appropriate in some instances for the jury to be instructed on the false exculpatory statements of others.
6. In Evans, a defense request for a false exculpatory statement instruction pertaining to another witness was denied because the witness' statement consisted of "general denials." The Supreme Court noted that "general denials... do not merit a false exculpatory statement instruction." Id. at 423. The Court noted there was "scant" evidence the witness in that case lied about a child's injuries to demonstrate his innocence. Id.
7. In Mr. Dana's case, the defense requests the false exculpatory statement instruction be given as it relates to both Floyd Riff and Paulette Walker's statements. Both Floyd and Paulette made more than "general denials." Each provided alibi's that are contradicted by other evidence in the case. What is more, Paulette's alibi Chris Chasse never testified in this case. Another witness, Shane Whitehouse testified that he "definitely" heard Paulette Walker's voice coming from 109 York Street Apartment 1 on November 27, 2016.
8. Floyd Riff's testimony about where he was and what he was doing and for how long on November 27, 2016 was inconsistent with testimony provided by Debra Bourque and Andrew Rivard.

9. In addition to providing a false alibi, Paulette Walker also explained away incriminating bruises on her hands and blood on her shirt when questioned by police. For these reasons, there is a sufficient evidentiary basis for warranting a false exculpatory statement instruction as it relates to Paulette Walker and Floyd Riff.

10. There is also a sufficient evidentiary basis to warrant a "Lack of Flight" instruction. The jury heard testimony that Mr. Dana stated he was homeless and had "no where to go." There was also testimony that he had no job or family that would cause him to stay in the vicinity of the alleged crime. His decision to stay in Berlin and meet with the police at 109 York Street on November 29 and December 2, 2016 is corroborative of his consciousness of innocence. As such, a "Lack of Flight" instruction is appropriate.

WHEREFORE, Mr. Dana requests that the Court:

A. Deny the State's requested "False Exculpatory Statement" instruction;
B. Grant the Defendant's "False Exculpatory Statements" and "Lack of Flight" instruction; and
C. Grant such other and further relief in favor of Mr. Dana as may be equitable and just.

Respectfully submitted,

Aileen O'Connell, #17144
New Hampshire Public Defender
10 Ferry Street
Concord, NH 03301
(603) 224 1236

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2019, a copy of the foregoing Motion was forwarded to the Attorney General's Office.

Aileen O'Connell, #17144

THE STATE OF NEW HAMPSHIRE

COOS, SS. SUPERIOR COURT

FILED UNDER SEAL

214-2016-CR-00135

The State of New Hampshire

v.

Roger Dana

STATE'S OBJECTION TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS (SUPPLEMENTAL) FALSE EXCULPATORY STATEMENTS AND LACK OF FLIGHT

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to the defendants proposed false exculpatory statement and lack of flight instructions. In support thereof, the State says as follows:

False Exculpatory Statements (Pertaining to Witnesses)

1. At the outset, it is unclear what "false exculpatory statements" the defendant is referring to in this case. A false exculpatory statement instruction is not appropriate for just any alleged false statement. Rather, the statement must tend to "demonstrate [the witness's] innocence . . . ." State v. Fischer, 143 N.H. 311, 319 (1999); see State v. Evans, 150 N.H. 416, 422 (2003) (finding that statements by the defendant's associate, even if false, did not "merit a false exculpatory instruction" because they did not tend to demonstrate his innocence). Without more, there is no basis to even consider the proposed instruction.

2. Regardless, the Court should deny the defendant's proposed false exculpatory statement instruction pertaining to witnesses. The New Hampshire Supreme Court has upheld trial courts' rejections of similar instructions.

3. In State v. Bruneau, the defendant argued that the victim was killed by one of his associates and the defendant's other associate lied to cover for him. 131 N.H. 104, 116 (1988). In support thereof, defense "counsel urged the jury to consider that [the associates] disappeared after calling and speaking with the police . . . ." Id. Defense argued that the apparent flight of the associates merited a flight instruction, instructing the jury that "[f]rom this evidence you may conclude that they were conscious of their own guilt." Id. at 117. The Supreme Court held that the trial court's decision not to give the instruction was not in error. Id. (citing cf. Commonwealth v. Toney, 385 Mass. 575, 433 N.E.2d 425, 432 (1982) (judge need not bring to attention of jury defendant's own innocent explanation for alleged flight).

4. What the defendant is asking the Court to do is instruct the jury on his theory of the case, for which he is not entitled to an instruction. In Bruneau, the Supreme Court explained that there was a difference between a "theory of defense" and a "theory of the case." Id. A theory of the case, "is simply the defendant's position on how the evidence should be evaluated and interpreted . . . ." Id. "[A] theory of defense 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." Id. at 117-18. The Court concluded that "the defendant advanced no theory of defense, but simply made a factual argument that tended to indicate someone else was guilty. The defendant was not, therefore, entitled . . . to an instruction elucidating such a position." Id. at 118. The Court explained that "[s]ince one cannot say that the jury was incapable of following and evaluating the defendant's argument

in the absence of an instruction that flight in some circumstances can be taken to express consciousness of guilt, it was no abuse of discretion to decline to give the charge as requested." Id. The Court recognized that "the more specifically a jury charge adverts to the evaluation of particular items of evidence, the greater the risk of its becoming argumentative." Id. The trial court correctly recognized this and appropriately chose "brevity to risk and left the argument to defense counsel." Id.

5. In State v. Evans, "[t]he defendant argue[d] that instructing the jury that it could infer consciousness of guilt from [his associate's] allegedly false statements was necessary to prevent unfairness." Id. Even assuming that in some instances, such an instruction might be appropriate, the Supreme Court "conclude[d] that, like the defendant in Bruneau, the defendant . . . was not entitled to an instruction elucidating his theory that [the associate] was guilty. *This was not a theory of defense upon which he was entitled to an instruction.*" Id. (internal citations omitted) (emphasis added). In finding that the trial court's refusal to expand the false exculpatory instruction to the defendant's associate was a "sustainable exercise of discretion," the Court contrasted the amount of evidence proving the defendant's false exculpatory statements to that of his associate. The Court noted that "[i]n contrast to the evidence concerning the defendant's false exculpatory statements, there was scant evidence that [his associate] lied about [the victim's] injuries to demonstrate his innocence." Id. at 422–23.

6. As in Evans and Bruneau, the defendant's request in this case is "not a theory of defense upon which he [is] entitled to an instruction . . . ." Id. at 422. At most, the defendant has introduced contradictory statements and uses facts to argue that someone else must be guilty. Highlighting this for the jury would be improper and unfairly prejudicial to

the State. The defendant has actively pointed his finger at other witnesses throughout the trial, and is free to argue that one or more of the innocent witnesses are culpable. Thus, the defendant has had, and will continue to have "ample opportunity to present his theory and the jury [is] free to consider it." Id. at 424.

7. Moreover, as in Evans, the model "jury instructions include[] extensive information to help the jury evaluate witness credibility." Id. The instructions detail various factors for the jury to consider, including:

> Whether the witness appeared to be candid, whether the witness appeared worthy of belief, the appearance and demeanor of a witness, whether the witness had an interest in the outcome of the case, whether the witness had any reason for not telling the truth, whether what the witness said seemed reasonable or probable, *whether what the witness said seemed unreasonable or inconsistent with the other evidence in the case*, or *with prior statements by the witness*; and whether the witness had any friendship or animosity towards other people in this case.

NH Criminal Jury Instructions (1985), 1.12 (emphasis added). "Viewing the jury instructions as a whole, . . . the jury [is] []capable of evaluating the defendant's theory of the case absent a false exculpatory statement instruction that pertain[s] to [other witnesses]." Evans, 150 N.H. at 24.

Lack of Flight

8. The Court should deny the defendant's proposed jury instruction that absence of flight creates an inference of innocence. The defendant seeks an instruction that, in relevant part, provides that the jury "may consider lack of flight as tending to show that the defendant did not commit the crime." Def.'s Mot., p. 2.[1] The defendant has cited no cases in

[1] "Def.'s Mot." refers to the defendant's proposed jury instructions (supplemental) – false exculpatory statements and lack of flight, which appears to have been filed on September 16, 2019.

support of its proposed instruction and the New Hampshire Supreme Court has not yet addressed such an instruction.

> Courts from other jurisdictions that have addressed the issue, however, have . . . [held] that a defendant is not entitled to an absence of flight instruction. See e.g., United States v. McQuarry, 726 F.2d 401, 402 (8th Cir. 1984); United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972); United States v. Scott, 446 F.2d 509, 510 (9th Cir. 1971); Albarran v. State, 96 So.3d 131, 192–93 (Ala. Crim. App. 2011), cert. quashed, 96 So.3d 216 (2012), cert. denied, 568 U.S. 1032, 133 S.Ct. 657, 184 L.Ed.2d 468 (2012); State v. Walton, 159 Ariz. 571, 769 P.2d 1017, 1029–30 (Ariz. 1989), aff'd, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); People v. Cowan, 50 Cal.4th 401, 113 Cal.Rptr.3d 850, 236 P.3d 1074, 1129–30 (Cal. 2010), cert. denied, 563 U.S. 905, 131 S.Ct. 1784, 179 L.Ed.2d 657 (2011); State v. Otero, 49 Conn.App. 459, 715 A.2d 782, 788 (Conn. App. Ct. 1998), cert. denied, 247 Conn. 910, 719 A.2d 905 (1998); Adams v. State, 130 Ga.App. 323, 203 S.E.2d 318, 319 (Ga. Ct. App. 1973); State v. Peck, 14 Idaho 712, 95 P. 515, 518 (Idaho 1908); Com v. Martin, 19 Mass.App.Ct. 117, 472 N.E.2d 276, 280 (Mass. App. Ct. 1984); Starr v. State, 433 P.3d 301, 305–06 (Nev. Ct. App. 2018); State v. Burr, 341 N.C. 263, 461 S.E.2d 602, 620 (N.C. 1995), cert. denied, 517 U.S. 1123, 116 S.Ct. 1359, 134 L.Ed.2d 526 (1996); State v. Sims, 13 Ohio App.3d 287, 469 N.E.2d 554, 557 (Ohio Ct. App. 1984); Com. v. Hanford, 937 A.2d 1094, 1097–98 (Pa. Super. Ct. 2007), appeal denied, 598 Pa. 763, 956 A.2d 432 (2008); State v. Brewster, 449 P.2d 685, 687 (Wash. 1969).

Sampson v. State, No. 2337, 2019 WL 3302239, at *5 (Md. Ct. Spec. App. July 23, 2019) (unpublished opinion). Likewise, this Court should deny the defendant's proposed instruction.

9. Fundamentally, "the 'absence of flight' [or 'lack of flight'] instruction is unnecessary because, from the outset, an individual is presumed innocent until proven guilty and the jury is so instructed . . . ." Commonwealth v. Hanford, 937 A.2d 1094, 1097–98 (Pa. Sup. Ct. 2007) (citation omitted). "Because the defendant is already 'clothed with a presumption of innocence,' . . . the jury need not be additionally charged on an inference of innocence where a suspect does not flee." Id. (internal citation omitted).

10. A flight instruction and lack of flight instruction are not "logically symmetrical." Starr v. State, 433 P.3d 301, 304 (Nev. App. 2018). "The assertions are not symmetrical because criminal trials themselves are not symmetrical, nor are they supposed to be." Id. at 305. While "criminal defendant[s] [are] presumed to be innocent and bear[] no burden of proving it; the burden falls entirely upon the state to prove guilt, and it must do so unilaterally 'beyond a reasonable doubt,' the highest standard of proof that exists anywhere in the law." Id. Therefore, "a defendant has no need for any inference suggesting innocence when his innocence is presumed throughout the trial." Id.

> For this reason, except when flight is an element of the offense charged or when an absence of flight otherwise tends to seriously undermine the state's case against the defendant, the failure to flee, like voluntary surrender, is not a theory of defense from which, as a matter of law, an inference of innocence may be drawn by the jury.

Id. (quotations and brackets omitted).

11. Furthermore, the underlying principles for an instruction on flight do not conversely apply to lack of flight. While "[i]t is beyond dispute that evidence of post-offense flight is probative on the issue of the defendant's consciousness of guilt," State v. Torrence, 134 N.H. 24, 27 (1991), "the fact that a suspect did not try to avoid the police is open to multiple interpretations, many of which have little to do with consciousness of guilt, and which could actually reflect a strategic choice." Hanford, 937 A.2d at 1097; see also Starr, 433 P.3d at 305 (finding "the absence of flight is more inherently ambiguous and, consequently, its probative value on the issue of innocence is slight." (quotations omitted)). For example, "a person not in custody may . . . plausibly fear that his sudden departure from the jurisdiction will call police attention to him in the first place," and "a person still at large may refrain from fleeing because he is . . . convinced that he will never be identified as the

culprit." People v. Green, 609 P.2d 468, 490 (1980), abrogated on other grounds by People v. Martinez, 973 P.2d 512 (1999).

12. Finally, "[e]ven without his proposed instruction, [the defendant] remain[s] free to argue to the jury during closing argument that lack of flight proved his innocence. He fails to demonstrate how he [is] prejudiced by the lack of a jury instruction echoing an argument he otherwise ha[s] complete freedom to make." Starr, 433 P.3d at 306. Ultimately, the defendant's "closing argument [will] not [be] materially different or more effective with the benefit of the [requested] instruction . . . ." Id. (quotations omitted). Accordingly, the Court should deny the defendant's requested lack of flight instruction.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Deny the defendant's proposed jury instruction for false exculpatory statements and lack of flight; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

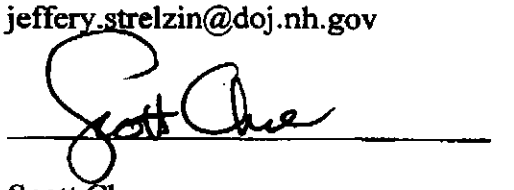
By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

September 24, 2019

Jeffery A. Strelzin
Associate Attorney General
NH Bar ID# 8841
New Hampshire Attorney General's Office
33 Capitol Street

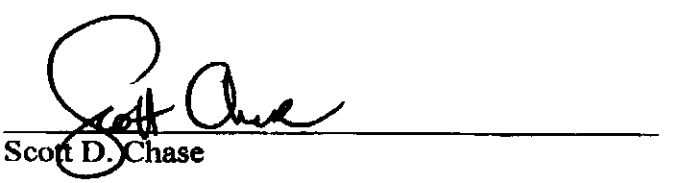
Concord, New Hampshire 03301-6397
(603) 271-3671
jeffery.strelzin@doj.nh.gov



Scott Chase
Assistant Attorney General
NH Bar ID# 268772

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was provided to Aileen O'Connell and Eric Raymond, counsel of record.



Scott D. Chase