THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0350

State of New Hampshire

v.

Ian Boudreau

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

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15149
603-224-1236
cjohnson@nhpd.org
(15 minutes oral argument)

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Cases

I. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, IN ITS CASE-IN-CHIEF, EVIDENCE OF BOUDREAU'S PRE-ARREST REFUSAL TO ANSWER POLICE QUESTIONS OR MAKE A STATEMENT.

In his opening brief, Boudreau advanced two claims. First, he argued that the court erred in answering a jury question, asked during deliberations, about the applicable burden of proof. DB* 16-28. In response, the State contends that the court properly, or at least adequately, answered by referring the jury to the standard definition of reasonable doubt. SB 26-31. On that claim, the State does not cite State v. Racette, 175 N.H. 132 (2022), or assert that a substantively erroneous answer could be harmless beyond a reasonable doubt.

Second, Boudreau argued that the court erred in allowing the State to introduce, in its case-in-chief, evidence that, before his arrest, Boudreau refused to answer police questions or make a statement about the allegations. DB 29-32. The State makes several arguments in response. SB 31–40. Among other points, the State argues that Boudreau's convictions should nevertheless be affirmed on harmless error grounds. SB 37–40. This reply brief responds to that harmless error argument.

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* Citations to the record are as follows:
"DB" refers to Boudreau's opening brief;
"SB" refers to the State's brief.

The State has the burden to "prove beyond a reasonable doubt that the erroneously admitted [or excluded] evidence did not affect the verdict." State v. Mackenzie, 175 N.H. 87, 93 (2022). In arguing that any error here was harmless, the State relies on *dicta* in State v. Racette, 175 N.H. 132, 137-38 (2022), purporting to modify the established harmless-error standard. While the established standard is relatively demanding, the standard proposed in Racette is extremely permissive. Even assuming that a modification of the established standard is appropriate, this Court should adopt a more neutral, balanced standard than that proposed in Racette.

Before Racette, this Court's harmless-error analysis was well settled. An error was harmless only if "the other evidence of the defendant's guilt [wa]s of an overwhelming nature, quantity, or weight *and* if the improperly admitted [or excluded] evidence [wa]s merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt." Mackenzie, 175 N.H. at 93 (emphasis added). In conducting this analysis, this Court considered both "the other evidence presented at trial [and] the character of the erroneously admitted [or excluded] evidence itself." Id. For at least twenty-seven years, this Court articulated that standard, including the conjunction, more than one hundred

times. See State v. Vandebogart, 139 N.H. 145, 158 (1994) (as modified on reconsideration, Jan. 19, 1995).

In Racette, this Court, after ruling that the trial court erred when it excluded the evidence offered by the defendant, stated, "We take this opportunity to clarify our harmless error standard." Racette, 175 N.H. at 137. Then, for the first time, this Court replaced the conjunction "and" with the disjunction "or" and asserted, "Either factor can be a basis supporting a finding of harmless error." Id. Under Racette's proposed standard, this Court could conclude that an error was harmless without considering "the character of the erroneously admitted [or excluded] evidence" at all.

This Court went on to note that the State did not argue that the evidence was overwhelming. Id. After concluding that the erroneously excluded evidence was not cumulative or inconsequential in relation to the evidence of the defendant's guilt, this Court concluded that the error was not harmless beyond a reasonable doubt. Id.

In Racette, the parties did not brief whether — and if so how — this Court should modify the established harmless-error standard. This Court did not address the *stare decisis* factors. See Appeal of New Hampshire Dep't of Transportation, 174 N.H. 610, 615 (2021). Because the disjunctive would result in a standard more favorable to the prosecution, the State had no incentive to seek

reconsideration. And because Racette won reversal of his conviction, he too had no incentive to seek reconsideration. Moreover, because this Court did not find that either component was satisfied, its proposed modification of the established standard was *dicta*. See In re Est. of Norton, 135 N.H. 62, 64 (1991) (statements "not necessary to the decisions" are "truly *dicta*").

Even if some modification of the established harmless-error standard is appropriate, this Court should not make the modification by substituting "or" for "and." As this Court acknowledged in Racette, the central question in the harmless error analysis is whether "the error . . . affect[ed] the verdict." Racette, 175 N.H. at 137. If there is a flaw in the established standard, it is that this Court considers the effect of the error only if it concludes that the evidence of guilt was overwhelming. If the evidence of guilt is not overwhelming, then no error, no matter how trivial or inconsequential, can be harmless.

Substituting "or" for "and" solves this problem only by creating another one. Under the disjunctive standard, if this Court concludes that the alternative evidence of guilt was overwhelming, then, except for the rare structural error, any error, no matter how prejudicial, must be deemed harmless. Under the disjunctive standard, this Court will find some errors harmless based solely on its view of the strength of the

alternative evidence, without any consideration of the error or its effect.

Courts have long cautioned against finding an error harmless based solely upon judges' opinion of the defendant's guilt. As the United States Supreme Court explained in Kotteakos v. United States, 328 U.S. 750, 763, (1946), "it is not the appellate court's function to determine guilt or innocence." Id. at 763. "Those judgments are exclusively for the jury." Id. While "[a]ppellate judges cannot escape such impressions[,] . . . they may not make them sole criteria for reversal or affirmance." Id. "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." Id. at 764. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting," although the Court acknowledged that the "difference" is "easy to ignore when the sense of guilt comes strongly from the record." Id.; see also Chapman v. California, 386 U.S. 18, 22 (1967) (reversing state supreme court's harmlessness determination, noting that court's "emphasis, and perhaps overemphasis, upon [its] view of 'overwhelming evidence'"); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (harmless-error inquiry involves "a host of

factors," of which "the overall strength of the prosecution's case" is but one).

Put simply, the question is "whether the error itself had substantial influence" on the result. Kotteakos, 328 U.S. at 765. The strength of alternative evidence of guilt is a relevant factor in answering that question, but it cannot be the only one. Id.

While the United States Supreme Court arguably has, more recently, strayed from this principle, this Court has not. In Neder v. United States, 527 U.S. 1 (1999), the United States Supreme Court held that a trial court's failure to instruct the jury on an element of the offense can be deemed harmless based solely on the "overwhelming" nature of the proof of that element. Id. at 7–20. This Court, however, noting that "Neder . . . has been widely criticized, . . . decline[d] to follow it." State v. Kousounadis, 159 N.H. 413, 428 (2009).

Permitting a finding of harmlessness based solely on judges' views of the strength of the evidence risks a deleterious effect on trial court practice. Once the evidence of guilt in a case reaches a point at which prosecutors and judges anticipate that this Court will call it "overwhelming," they need not take great care on questions about the defendant's constitutional rights, the rules of evidence, and other court rules, confident that, except for the rare

"structural error," no error, no matter how prejudicial, will result in reversal. The purpose of the harmless-error doctrine is to "promote[] public respect for the criminal process by focusing on the underlying fairness of the trial." State v. Dana, 175 N.H. 27, 34 (2022) (cleaned up). Freeing prosecutors and trial judges from the constraints of constitutional provisions, statutes and court rules when, in their view, the evidence of the defendant's guilt is "overwhelming" will undermine, rather than promote, public respect for the criminal process.

If this Court concludes that modification of the established harmless-error standard is appropriate, then it should hold that "overwhelming" evidence of guilt is neither necessary nor sufficient to find an error harmless. Rather, the question is whether the improperly admitted or excluded evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. While the strength of alternative evidence of guilt is obviously a component of this balancing, it cannot serve as the sole factor in determining that an error either was, or was not, harmless.[1]

[1] State v. Newton, ___ N.H. ___ (July 8, 2022), the only instance in which this Court has relied on Racette, is consistent with this modification. In Newton, this Court held that "the excluded evidence was cumulative and inconsequential in relation to the strength of the State's evidence of guilt," without determining whether that evidence was "overwhelming." Id.

Under any formulation of the harmless-error standard, the error here was not harmless. For the reasons stated in Boudreau's opening brief, DB 32, the error was prejudicial. The State's case rested substantially on the testimony of civilian witnesses, as the State introduced no evidence of a confession by Boudreau to the police. Boudreau testified at trial and denied committing the charged crimes. For that reason, the case turned largely on the jury's evaluation of the witnesses' credibility. Under these circumstances, evidence that Boudreau refused to talk to the police functioned as a confession, given the common view that innocent people who have nothing to hide will answer the questions of the police. This Court must reverse Boudreau's convictions.

CONCLUSION

WHEREFORE, Ian Boudreau respectfully requests that this Court reverse his convictions.

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

This brief complies with the applicable word limitation and contains 1646 words.

Respectfully submitted,

By /s/ Christopher M. Johnson
Christopher M. Johnson, #15149
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 is being timely provided to Audriana Mekula-Hanson, counsel for the State, through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: November 29, 2022