

State of New Hampshire
Supreme Court

NO. 2015-0162

2016 TERM
MARCH SESSION

State of New Hampshire

v.

Justin Cassidy

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

REPLY BRIEF OF DEFENDANT, JUSTIN CASSIDY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

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ARGUMENT

I. **Given the Elements of Accomplice and the Quantity of Drugs, There was Insufficient Evidence to Convict, and the Insufficiency Was Adequately Preserved**

As noted in Mr. Cassidy's opening brief, Mr. Cassidy was charged with a drug sale "in concert with Taylor Bacon," INDICTMENT #939336 (Aug. 14, 2014), *Appx.* at 16; *Trn.* at 54, and that the three elements of accomplice are:

(1) the accomplice had the purpose to make the crime succeed; (2) the accomplice's acts solicited, aided or attempted to aid another in committing the offense; and (3) the accomplice shared the requisite mental state for the offense.

State v. Winward, 161 N.H. 533, 543 (2011) (quotation omitted). Accordingly, there can be no finding of accomplice guilt without proof of an intent by Mr. Cassidy to facilitate Ms. Bacon's resale of the drugs to the State's witness.

In this context, the weight of heroin Mr. Cassidy sold is critical. Ms. Bacon testified she had a daily habit of a half a gram, "[g]ive or take ... [p]robably a little more." *Trn.* at 140. And her testimony was that on May 20, 2014 Mr. Cassidy sold her some heroin. *Trn.* at 130-31. The State's chemist testified the amount Mr. Cassidy sold Ms. Bacon on that day was about 0.8 grams – a little more than half a gram. Thus the quantity involved in this case is a personal use amount, sold to a user, who was known to use the amount sold.

Although Mr. Cassidy was convicted only for conduct that occurred on May 20, the State proved he knew of Ms. Bacon's habit, and the quantity necessary to feed it. *Trn.* at 123-24, 126, 128, 129-30, 151. Having sold her roughly that amount on May 20 proves, at most, that his awareness was Ms. Bacon was acquiring her daily dose. The State did not prove, however, that Mr. Cassidy had an intent, or even knowledge, that she would resell her acquisition.

This is not to suggest that Mr. Cassidy sold drugs to Ms. Bacon for her personal use, as

the State alleges in its brief. Rather an intent to sell for Ms. Bacon's personal use – and not an intent to facilitate a resale – is the most the State could prove beyond a reasonable doubt.

The State notes that Ms. Bacon was not questioned about Mr. Cassidy's lack of knowledge about her intent to resell, and suggests that oversight should be held against Mr. Cassidy. STATE'S BRf. at 14. Presumably the State did not ask her, just as it did not ask Mr. Leveque, because it would have not liked their answers. The lack of evidence on this point, however, is the reason the State failed to prove the elements of accomplice, and the reason this Court should reverse.

After the State's case, the defendant moved for a judgment of acquittal based on insufficient evidence. Neither the elements of the crime nor the quantity sold was mysterious. A request to dismiss on the grounds that the State failed to provide evidence to meet all the elements of accomplice was therefore adequate preservation. *State v. Guild*, 163 N.H. 475, 482 (2012) (“[T]he defendant's motion to dismiss ... made at the close of the State's case ... was, and could only have been, a challenge to the sufficiency of the evidence.”); *State v. Hill*, 163 N.H. 394, 395 (2012) (“When a sufficiency challenge is made at the close of the State's case, ... the evidence presented to that point in the trial can be examined in deciding the motion.”).

II. Failure to *Voir Dire* Each Juror Was Structural Error

The State suggests that the court's failure to individually interrogate each juror regarding their obligation to start deliberation anew should not matter because Mr. Cassidy was allegedly not prejudiced. Structural error is that which affects the process, regardless of prejudice.

Errors fall into one of two categories: (1) structural defects; or (2) trial errors. A structural defect affects the very framework in which a trial proceeds. Such defects arise from errors that deprive a criminal defendant of the constitutional safeguards providing a fair trial.... When a structural defect exists, a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. In contrast, a trial error occurs during the presentation of a case to a jury and can be quantitatively assessed in the context of other evidence in order to determine whether the error was harmless beyond a reasonable doubt. A structural defect, however, infects the entire conduct of the trial from beginning to end, and therefore constitutes an irreparable injustice that cannot be cured by jury instructions.... We have never clearly defined any single analytical framework for determining which constitutional errors are or are not subject to harmless error analysis.... We have, however, held that an erroneous jury instruction relieving the State of its burden of proving an element of the offense constitutes structural error.

State v. Etienne, 163 N.H. 57, 79-80 (2011).

Substitution of a juror after commencement of deliberations is structural error. *State v. Dushame*, 136 N.H. 309, 315 (1992). There is a sanctioned cure – *voir dire* conducted individually. *State v. Sullivan*, 157 N.H. 124 (2008); *Opinion of the Justices*, 137 N.H. 100 (1993). But that was neglected here, and consequently, regardless of preservation, “the jury’s verdict cannot stand.” *Dushame*, 136 N.H. at 315.

III. Irrelevant Alleged Facts Should be Disregarded

In its brief the State reviews evidence offered by the State regarding alleged acts that did not result in findings of guilt. STATE’S BRF. at 3-4, 6, 19. This Court should disregard any statements not relevant to the jury’s finding of guilt for the transaction on May 20, 2014.

CONCLUSION

Because the State did not prove the elements of the crime charged, and because the court made a structural error in its oversight of the jury, this Court should reverse Mr. Cassidy’s convictions.

Respectfully submitted,

Justin Cassidy
By his Attorney,

Law Office of Joshua L. Gordon

Dated: March 9, 2016

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

CERTIFICATION

I hereby certify that on March 9, 2016, copies of the foregoing will be forwarded to Elizabeth Woodcock, Esq., Assistant Attorney General.

Dated: March 9, 2016

Joshua L. Gordon, Esq.