

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**APRIL SESSION
2003 TERM**

No. 2002-0287

State of New Hampshire

v.

Chad Evans

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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QUESTIONS PRESENTED

1. Whether the trial court erred when it gave a "false exculpatory evidence" instruction that was applicable to statements made by Chad Evans, but not by Jefferey Marshall?

Issue preserved by objection to "false exculpatory evidence" instruction and request that trial court make instruction equally applicable to statements made by Marshall. T-VIII* 4-11; T-X 2-4.

2. Whether the State excluded the rational conclusion that Jefferey Marshall killed Kassidy Bortner?

Issue preserved by motion to dismiss, arguments, and ruling. T-IX 165-176.

*
NOA designates the notice of appeal;
T-I through T-X designate the ten volumes of trial transcript,
from December 4, 2001, through December 18, 2001.

STATEMENT OF THE CASE

A Strafford County grand jury returned a total of nine indictments against Chad Evans: one for second degree murder on November 8-9, 2000, six for second degree assault between September 1 and November 8, 2000, and two for first degree assault. NOA 7-18, 23. The victim in each instance was Kassidy Bortner, who was 21 months old when she died. Additionally, the State brought one information charging Evans with endangering the welfare of a child, Kassidy, and another alleging simple assault against his girlfriend, Amanda Bortner. NOA 19-22.

All of the charges were consolidated for trial. At trial, Evans contended that Kassidy's babysitter, Jefferey Marshall, was responsible for her death. The trial court dismissed one of the first degree assault charges at the close of the State's case. T-IX 17. After deliberations, the jury convicted Evans of all other charges except the remaining first degree assault. NOA 2. The trial court (Nadeau, T., J.) sentenced Evans to serve 28 years to life in prison. NOA 1.

STATEMENT OF FACTS

Kassidy Bortner died on November 9, 2000 at the age of 21 months. T-II 27, 63. In the hours immediately before her death, Kassidy was in the custody and care of Jefferey Marshall, the live-in boyfriend of her mother's sister, Jennifer Conley, at Conley and Marshall's home in Kittery, Maine. T-II 138; T-III 141-145, 168-177, 228-259; T-IV 109-113. Both forensic pathologists who testified at trial confirmed that Kassidy suffered injuries while she was in Marshall's care on the morning of her death. T-VII 178-179, 227-229, 242-243; T-IX 36, 58-60. The State's expert could not rule out that Marshall inflicted further injuries to Kassidy the day before she died, when she was also in his care. T-VII 220-223. The defendant's expert specifically testified that Marshall inflicted the injuries that caused Kassidy's death. T-IX 36, 64. In spite of this evidence, the jury found Chad Evans guilty of second degree murder.

Amanda Bortner was Kassidy's mother. T-II 63-64. Amanda met Evans in June of 2000, and with Kassidy, moved into Evans' home in Rochester a month later. T-II 66, 69. Travis Hunt, whom Evans met through work, rented a room in the basement of the home. T-VI 104-105. Evans has two sons from a prior relationship, Kyle, 3, and Brent, 8. T-V 210. Kyle often visited the Rochester home and stayed overnight, as part of a custody arrangement. T-V 224.

Sometime during the fall of 2000, after Amanda and Kassidy moved in with Evans, various people began to notice bruises on

Kassidy. T-IV 89; T-V 42, 59, 81; T-VI 70, 94; T-VII 17.

Occasionally, the bruising was accidental. For example, Hunt saw Kassidy fall off the couch and hit her head on a coffee table. T-VI 139. He also noticed that she used to fall without using her hands to break the fall. T-VI 110.

However, according to Amanda, other bruises were caused by Evans. Amanda admitted that Evans used to discipline Kassidy, sometimes harshly. According to Amanda, Kassidy would cry whenever Amanda displayed affection toward Evans. T-II 80-81. In turn, Amanda said, Evans would become frustrated. T-II 81. According to Amanda, on several occasions, Evans grabbed Kassidy's face, causing bruising. T-II 82, 84. She told Hunt that she wished Evans "wouldn't grab her like that." T-VI 114. One time, he threw her onto the bed, T-II 92-93, and jerked her arm. T-II 112. Other times, he picked her up roughly and forced her to stand in the corner. T-II 86-87, 90-91. Amanda testified that Evans sometimes referred to Kassidy as a "little bitch," or called her "slow" or "retarded". T-II 97.

Evans and Amanda agreed to make up excuses for the bruising, so people would not suspect either of them of abusing Kassidy. T-II 99, 101-102. They told various people that Kassidy had fallen off a trampoline, and Evans had to grab her by the face to prevent her from falling to the ground. T-II 26, 103; T-III 105; T-IV 71, 94; T-V 61, 83, 216; T-VII 17. They told others that Kassidy was clumsy, another girl hit her, or that she accidentally bumped her head. T-II 103-105; T-IV 94; T-V 61;

Kassidy. T-IV 89; T-V 42, 59, 81; T-VI 70, 94; T-VII 17.

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T-VI 95; T-VII 18. Due to the bruises, Amanda was reluctant to place Kassidy in day care. T-II 107; T-III 116.

While Evans' disciplining of Kassidy caused bruises, the defense contended that Marshall inflicted injuries on her even before Marshall struck the blows that caused her death. Marshall began to babysit Kassidy in the fall of 2000, when the bruises began to appear. T-II 154. According to Amanda, Kassidy appeared to have suffered several injuries while she was in Marshall's care. One time, Amanda noticed extensive bruising on Kassidy's buttocks. T-II 158, 176-177. Marshall told Amanda that Kassidy drank Windex, and he gave her a "pat" on the buttocks, through her diaper. T-III 112. Evans showed the bruises to Jeremy Hinton, a friend he knew from work. T-V 125. Evans told Hinton that Marshall inflicted these injuries. I-93.

When Kassidy came home with bumps on her head, Marshall told Amanda that she "ran off the bed," that the "dog bowled her over," or that she fell out of the truck. T-II 171, 175, 177. When Kassidy was limping, Marshall claimed he accidentally tripped over Kassidy. T-II 174-175. According to Amanda, one time when Kassidy returned from Marshall's, she was so dehydrated and hungry that she put her face in a bowl of cereal to drink the milk. T-II 168-169. Another time, when Amanda noticed what appeared to be small pin pricks on the bottoms of Kassidy's feet, Marshall said there must have been nails sticking out of the floor. T-II 173. The Kittery Police, who searched Marshall's

house after Kassidy died, did not find any evidence to corroborate his claim. T-VI 180.

Marshall admitted that while Kassidy was in his care, she fell out of his truck. T-III 113. Marshall's landlord saw this happen once. T-III 167-169. On this occasion, sometime in October of 2000, Kassidy fell out of the car seat and into Marshall's hands. T-III 167-168. Marshall acted as if there was something wrong with Kassidy, telling the landlord, "see, she just falls out of the truck." T-III 182. Marshall told Amanda that Kassidy fell out of the car seat in his truck, and Conley also heard that Kassidy fell out of the truck. T-II 171; T-IV 127.

At the time he met Amanda, Evans was in the process of divorcing his wife, Tristan. T-II 68. In spite of the divorce, Evans and Tristan maintained frequent contact. T-V 221. Tristan met Amanda and had spent some time around Kassidy at Evans' home. T-V 213-214. During late October of 2000, Tristan noticed bruising on Kassidy's face. T-V 214. Amanda told Tristan that Kassidy had fallen down the stairs. T-V 215. In a conversation a couple of days later, Evans told Tristan that Kassidy fell off the trampoline. T-V 216. Tristan became concerned that someone was abusing Kassidy. T-V 218. She specifically did not suspect Evans, because she knew how well he treated his sons. T-VI 19. However, when she saw other bruises a short while later, Tristan filed an anonymous report with DCYF on October 31, 2000. T-V 218. The DCYF social worker assigned to the case did not call

Evans' home until November 6, and did not speak to anyone about the report before November 9. T-IV 49, 52.

On November 8, 2000, Amanda dropped Kassidy off at Marshall's in the mid to late afternoon. T-II 118; T-III 117. Evans picked Kassidy up at about 5:45 p.m. T-III 125. As he was driving back to Rochester, Evans noticed that Kassidy was leaning forward in the seat, her head was bobbing, and she was drooling. T-III 269-270. Both forensic pathologists indicated that such behavior may be symptomatic of a head injury. T-VII 188, 231; T-IX 38-39. Evans immediately called Marshall, and asked him if anything had happened to Kassidy while she was in his care. T-III 132. Marshall denied that anything happened. T-III 135. He claimed that when Evans picked up Kassidy, she was "pretty normal"; and only had some fading bruises on her face. T-III 131.

According to Marshall, he received two other calls from Evans later that night. In the first call, Evans said that Kassidy fell in the driveway when he took her out of the truck. T-III 135-136. In a later call, Marshall claimed that Evans told him that Kyle accidentally hit Kassidy in the face with a batted ball, that her eyes rolled back in her head, and that he kept yelling her name to try to get her to respond. T-III 137-140. At trial, however, Marshall admitted that he did not tell the police about how Evans had to yell Kassidy's name to arouse her when detectives interviewed him immediately after Kassidy's death. T-IV 5.

Two witnesses provided testimony that tended to cast doubt on Marshall's account. Tristan Evans spoke to both her husband and her son, Kyle, on the night of November 8th. Evans told her that Kassidy fell earlier, and that Kyle had just hit her in the face with a batted ball when they were playing in the bedroom. T-V 234-236. Kyle repeated the same story. T-VI 9-10. Based on her conversations with Evans and Kyle, Tristan, who, unbeknownst to Evans had already made a report of abuse, was not alarmed. T-V 10.

Travis Hunt's observations also tended to contradict Marshall's testimony. Hunt testified that when he got home after work, at around 7:45 p.m., Evans was giving Kassidy a bath. T-VI 117. Hunt noticed the mark on Kassidy's face, which Evans said resulted from Kyle hitting Kassidy with the ball. T-VI 118. Hunt also saw a bruise on Kassidy's leg, but to him, she otherwise seemed alert and attentive. T-VI 120, 123. When shown a photo of what Kassidy looked like after she died, Hunt was clear that she was not injured to such a great extent when he saw her in the bathtub. T-VI 161-162. Specifically, Hunt did not note any abdominal bruising. T-VI 147. Before Hunt left to visit a girlfriend, Chad was holding Kassidy while she ate a popsicle. T-VI 130.

On the night of November 8, Evans called Amanda at work and told her about Kyle hitting Kassidy in the face with a ball. T-II 122-123. Evans told Amanda that he did not want to babysit Kassidy anymore, because it seemed as if she always got hurt when

he did. T-II 123. After she finished speaking to Evans, Amanda told her sister, Conley, that she "was sick of Kassidy getting hurt with [Evans]." T-II 124; T-IV 107.

Amanda got home from work on the 8th at about midnight. T-II 125. She checked on Kassidy, who was asleep, and seemed fine aside from a red mark on her face near her left eye. T-II 126-127. The next morning, Amanda noticed that Kassidy was not as energetic as she usually was. T-II 136-137. Kassidy was not talking, and she just sat on the couch while Amanda got ready for work. T-II 136. Amanda dropped Kassidy off at Marshall's at about 7:30 a.m. on the 9th. T-IV 109. Referring to Kassidy's bruised face, Amanda told Marshall and Conley that Kassidy's face "look[ed] like shit." T-II 140; T-III 142; T-IV 110. While Amanda was aware of the facial bruising at the time she dropped Kassidy off, she testified that Kassidy did not have any bruising in her abdominal area, and that Kassidy looked much worse in a post mortem photo than she did when Amanda left her with Marshall. T-II 189, 193.

Both Conley and Marshall also noticed that Kassidy appeared unusually lethargic that morning. T-III 144-145; T-IV 111-112. Conley testified that Kassidy was quiet, as if she was sick. T-IV 111-112. Kassidy did not want to get out of bed, and was laying on the bed when Conley left for work, a little before 9:00 a.m. T-IV 112. Marshall let Kassidy sleep on the bed, and turned on the TV in the bedroom. T-III 168. He went out to the living room to watch the election results. T-III 169, 228.

Marshall testified that at about 9:30 he went into the bedroom to check on Kassidy, T-III 170, although he admitted he only went into the bedroom initially because the cat had taken something off his desk, T-III 232, and he did not check on her regularly. T-III 232. He said that Kassidy appeared to be asleep, but claimed he did not get close enough to confirm that she was breathing or had a pulse. T-III 169, 233-235, 245.

Marshall claimed that shortly after he checked on Kassidy, Evans called. T-III 170. According to Marshall, Evans told him that "the town" had called and was checking on Kassidy. T-III 171. Marshall testified that Evans said, "if this shit's going to keep up, Mandy and that little bitch is [sic] going to have to get out of my house." T-III 172. Marshall tried to reassure Evans that he had nothing to worry about, and continued to watch TV. T-III 173.

Marshall did not check on Kassidy again until about noon or 12:30. T-III 173. According to him, Kassidy's eyes were in the back of her head. T-III 174. He did not call 911. T-III 175. Instead, Marshall tried to see if Kassidy was choking, tried CPR even though he did not know how to do it, and splashed water on Kassidy's face. T-III 174-176. Marshall called Conley twice at work. T-IV 134-137. According to Conley, during the first call, Marshall said Kassidy was acting weird and her eyes were rolling back in her head, and asked what he should do. T-IV 134-135. She told him to call the hospital. T-IV 135. During the second call, a couple of minutes later, Conley felt Marshall was much

more relaxed. T-IV 144. He indicated that the ambulance was on its way, and told Conley that she should not worry. T-IV 137-138.

By the time the ambulance arrived, at about 12:42 p.m., Marshall had taken Kassidy outside to the porch. T-II 39, 41. All efforts to resuscitate her failed. Without any prompting by the police, Marshall made the following statements to a detective who responded to the scene:

I understand what it looks like. This is not me. You need to be talking to Chad. Chad's the one who did this. You guys really need to talk to Chad. This isn't me.

T-II 49.

In the immediate aftermath of Kassidy's death, Amanda blamed Evans. According to Marshall and Conley, Amanda spoke to Evans on the telephone during the early morning of November 10th, and said, "I know you killed my baby." T-II 45; T-III 192; T-IV 117. After Evans was arrested, on November 16, Amanda told her friend, Tracy Foley, about various times Evans abused Kassidy. T-V 85-88. She said to Foley, "And you knew, and I didn't listen." T-V 85. However, Amanda soon reconciled with Evans and spent time with him even though they were not supposed to have contact, because he provided Amanda emotional support she was not getting from her family. T-III 10.

In his interview with the police, Evans denied killing Kassidy. A New Hampshire State Police search of Evans' home turned up several balls and bats, T-VII 37-54, but no forensic

evidence tying him to Cassidy's death. T-VII 54. A Kittery Police search of Marshall's home, and photographs, revealed that there was a bloody food wrapper on the bed on which Cassidy was laying, and some stains on a bed sheet. T-VII 190, 193-194. The police did not seize the sheet. A photo revealed that the pajama bottoms Cassidy wore that morning were on the bed, T-VI 199-200, although the bottoms were on Cassidy when Amanda brought her to Marshall's on the morning of the 9th, and Marshall did not testify that he ever removed them. T-IV 125-126.

Two forensic pathologists testified at trial. Dr. Margaret Greenwald, the Chief Medical Examiner for the State of Maine, conducted the autopsy on Cassidy. T-VII 118, 126. Dr. Greenwald ruled the death a homicide, as the result of multiple, blunt force injuries. T-VII 126-127. Her examination revealed that Cassidy's body was covered with numerous non-fatal injuries, including bruises and abrasions of different ages, as well as "pinpoint scratches" on the bottoms of Cassidy's feet. T-VII 132-150. As a result of post-mortem tests, Dr. Greenwald was able to narrow the time frame during which many of these non-fatal injuries occurred. T-VII 163. While many of them were between eight hours and four or more days old, T-VII 164-180, Dr. Greenwald testified that a bruise on her lower lip and bruises to her back occurred within the last four hours of Cassidy's life, while she was with Marshall. T-VII 179, 235, 243.

Dr. Greenwald testified that Cassidy suffered from "battered child syndrome," which is largely characterized by evidence of repeated trauma. T-VII 213. Other non-fatal injuries Dr. Greenwald found were healed or healing fractures of the ulnae, left tibia, and a finger on the right hand. T-VII 197-201. Dr. Greenwald did not find that any of Cassidy's facial injuries were "completely consistent" with her having been struck by a ball. T-VII 210.

According to Dr. Greenwald, Cassidy suffered blunt force injuries to her head and abdomen, either or which could have caused her death. T-VII 219. As with the non-fatal injuries, Dr. Greenwald conducted tests to try to determine when the more severe injuries likely occurred. T-VII 181-188, 193-196. Dr. Greenwald stated that the injuries were likely inflicted within the last 24 hours of Cassidy's life. T-VII 186, 194. Specifically, the injuries that caused the subdural hematoma and optic nerve trauma could have occurred anywhere between one and 24 hours before Cassidy died. T-VII 230, 237.

According to Dr. Greenwald, one head injury, an acute contusion to Cassidy's scalp, occurred within four hours of Cassidy's death, again, while Cassidy was in Marshall's care, and Evans had no access to her. T-VII 178. Dr. Greenwald, therefore, could not eliminate the possibility that Marshall had either inflicted the injuries within the last few hours of Cassidy's life, or, that he inflicted them during the roughly two hours when he babysat Cassidy on November 8. T-VII 220-223.

During her autopsy, Dr. Greenwald noted fat emboli, or small clots of fat cells that clog capillaries, in Cassidy's lungs and kidneys. T-VII 233. She agreed that these emboli were potentially consistent with a substantial injury to Cassidy in the couple of hours that preceded her death. T-VII 233. The defense's expert forensic pathologist, Dr. Michael Baden from the New York State Police Laboratory, testified that the trauma that caused these emboli to form and migrate occurred within roughly two hours of Cassidy's death, and that it was this embolization that ultimately caused her to die. T-IX 30-33. Dr. Baden testified that Cassidy was dead before noon on November 9, and the blows that killed her were inflicted as early as 9:30 that morning, when Cassidy was in Kittery. T-IX 47, 64.

SUMMARY OF THE ARGUMENT

The trial court erred when it gave a "false exculpatory evidence" instruction with regard to Evans' allegedly false explanations for Cassidy's bruises. The instruction was not legitimately necessary to assist the jury in understanding the applicable law, and it constituted an inappropriate comment on the evidence.

If the instruction was proper, the trial court should have made it equally applicable to the allegedly false, exculpatory statements made by Marshall. By limiting the inference permitted by the instruction to only Evans' statements, the court prevented the defense from fully mounting the same attack on Marshall that the State maintained against Evans, i.e., Marshall's lies betrayed his consciousness of guilt over having caused Cassidy's death. The court's unbalanced instructions were fundamentally unfair to the defense. At a trial in which the circumstantial evidence and forensic testimony created the legitimate possibility that Marshall killed Cassidy, the court's failure to make the false statement inference equally applicable to Marshall was so prejudicial that the Court must reverse and remand for a new trial.

I. THE TRIAL COURT ERRED WHEN IT GAVE A "FALSE EXCULPATORY EVIDENCE" INSTRUCTION THAT WAS APPLICABLE TO STATEMENTS MADE BY CHAD EVANS, BUT NOT BY JEFFEREY MARSHALL.

At the close of the evidence, the trial court instructed the jury 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 such evidence.

T-X 23-24. The defendant objected to the instruction on two grounds: it constituted an improper comment on the evidence, or, in the alternative, the instruction should have had equal application to Marshall's false, exculpatory statements. T-VIII 4-11; T-X 2-4.

Evans urges this Court to reverse. While it was appropriate for the State to argue an adverse inference from the defendant's false, exculpatory statements, an instruction on the matter unnecessarily and improperly highlighted this evidence. As applied to this case, an instruction that the jury may consider the evidence as it related to Evans, without a similar instruction regarding statements made by Marshall, engendered special prejudice, by implying to the jury that the defense could not use this same type of evidence to attack Marshall's credibility. As a result of the trial court's error, Evans is entitled to a new trial.

A. The trial court erred when it gave a "false exculpatory evidence" instruction.

In State v. Fischer, 143 N.H. 311, 318-320 (1999), this Court held that the trial court did not err in giving a "false exculpatory evidence" instruction under the particular facts of the defendant's case, but did not reach, due to lack of preservation, the broader question of whether such an instruction is ever appropriate. That issue is preserved in this case. T-X 2 (trial court notes that "[t]he defense argued that the Court should not give [the "false exculpatory evidence" instruction] for a couple of reasons. Number one, that it's an improper comment on the evidence."). The Court should rule that the "false exculpatory evidence" instruction is improper because it inappropriately stresses the defendant's allegedly false statements.

In Fischer, this Court explained that

[a] "false exculpatory evidence" instruction advises the jury that, if a defendant has intentionally made a statement tending to demonstrate his or her innocence, and that this statement is later discovered to be false, then the jury may properly consider whether this constitutes circumstantial evidence of a consciousness of guilt. . . .The instruction merely informs the jury that it may infer consciousness of guilt from an exculpatory statement if, in the light of other evidence produced at trial, the jury determines that the defendant knew the statement was false when it was made.

Id. at 319 (citations and quotations omitted). As commentators have stated, the inference is permissible because "[o]rdinarily, it is reasonable to infer that an innocent person does not

usually find it necessary to invent or fabricate an explanation or statement tending to establish innocence." 1 Devitt & Blackmar, Federal Jury Practice and Instructions Sec. 15.12, at 466-467 (3d Ed. 1977).

The State put forth sufficient evidence to argue that the jury could draw an adverse inference from Evans' false, exculpatory explanations for Cassidy's bruises. See State v. Vandebogart, 139 N.H. 145, 160 (1994) ("A prosecutor may draw reasonable inferences from the facts proven, and has great latitude in closing argument to both summarize and discuss the evidence presented to the jury and to urge the jury to draw inferences of guilt from the evidence.") (quoting State v. Sylvia, 136 N.H. 428, 431 (1992)). The issue is whether the trial court should have specially instructed the jury as to the evidence from which it may, or may not, infer consciousness of guilt.

"The purpose of jury instructions is to explain the rules of law applicable to a case." State v. Blackstock, 147 N.H. 791, 795 (2002). Given that it is the jury's exclusive province to find facts and determine the weight of evidence and testimony, it is crucial that the trial court avoid giving instructions that resolve contested facts, remove factual issues from the jury's consideration, or otherwise unduly interfere with the jury's prerogative to weigh the evidence. Compare State v. Ross, 141 N.H. 397, 399-400 (1996) (holding trial court's instruction that it was not unusual for party to file civil suit "invaded the

usually find it necessary to invent or fabricate an explanation or statement tending to establish innocence." 1 Devitt & Blackmar, Federal Jury Practice and Instructions Sec. 15.12, at 466-467 (3d Ed. 1977).

The State put forth sufficient evidence to argue that the jury could draw an adverse inference from Evans' false, exculpatory explanations for Cassidy's bruises. See State v. Vandebogart, 139 N.H. 145, 160 (1994) ("A prosecutor may draw reasonable inferences from the facts proven, and has great latitude in closing argument to both summarize and discuss the evidence presented to the jury and to urge the jury to draw inferences of guilt from the evidence.") (quoting State v. Sylvia, 136 N.H. 428, 431 (1992)). The issue is whether the trial court should have specially instructed the jury as to the evidence from which it may, or may not, infer consciousness of guilt.

"The purpose of jury instructions is to explain the rules of law applicable to a case." State v. Blackstock, 147 N.H. 791, 795 (2002). Given that it is the jury's exclusive province to find facts and determine the weight of evidence and testimony, it is crucial that the trial court avoid giving instructions that resolve contested facts, remove factual issues from the jury's consideration, or otherwise unduly interfere with the jury's prerogative to weigh the evidence. Compare State v. Ross, 141 N.H. 397, 399-400 (1996) (holding trial court's instruction that it was not unusual for party to file civil suit "invaded the

exclusive province of the jury to decide what facts are proved by competent evidence") with State v. MacRae, 141 N.H. 106, 114 (1996) (holding trial court's instruction, after defendant created misleading impression during cross of victim, did not constitute impermissible comment on victim's credibility). The more the trial court's instructions deviate from general legal principles into the resolution of discrete evidentiary issues, the greater the risk that the instruction will be deemed improper. See State v. Bruneau, 131 N.H. 104, 118 (1988) ("Indeed, the more specifically a jury charge adverts to the evaluation of particular items of evidence, the greater the risk of its becoming argumentative.").

While many appellate courts have permitted the "false exculpatory evidence" instruction, those same courts recognize the instruction's inherent risks and carefully circumscribe the circumstances under which the instruction may be properly given. The instruction may not be framed to allow the jury to use the false statements as direct evidence of the defendant's guilt. United States v. Zang, 703 F.2d 1186, 1191 (10th Cir. 1982) ("Such statements cannot be considered by the jury as direct evidence of guilt."); United States v. DiStefano, 555 F.2d 1094, 1104 (2d Cir. 1977) ("False exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt."). The jury may only consider the false, exculpatory statements in conjunction with other evidence in determining guilt, i.e., a defendant's conviction cannot stand if it rests

upon the statements alone, or if the evidence offered in addition to the statements is weak. United States v. Schiebel, 870 F.2d 818, 822 (2d Cir. 1989) ("A defendant's fabrication of exculpatory evidence cannot be the sole basis for a conviction."); Martin v. Foltz, 773 F.2d 711, 720 (6th Cir. 1985) ("There is authority that on a direct appeal in a federal criminal case a conviction supported by false exculpatory evidence and an otherwise weak case rests upon insufficient evidence.").

As the Fischer Court noted, the First Circuit has approved the instruction, but only under limited circumstances. Fischer, 143 N.H. 311, 319 ("The First Circuit has held that a "false exculpatory evidence" instruction may be appropriate only in a limited set of circumstances, such as where the false exculpatory statement involves a matter collateral to the facts establishing guilt, is undeniably implausible on its face, or involves a defendant charged with a specific intent crime who admitted certain conduct but claimed not to know it was illegal.") (citing United States v. Littlefield, 840 F.2d 143, 149-150 (1st Cir.), cert. denied, 488 U.S. 860 (1988)). See also United States v. Durham, 139 F.3d 1325, 1332 (10th Cir), cert. denied, 119 S. Ct. 158 (1998) ("[A] circularity problem occurs whenever a jury can only find an exculpatory statement false if it already believes other evidence directly establishing guilt. Under such circumstances, it is error to give a false exculpatory statement instruction.") (citing Littlefield, 840 F.3d 143, 149).

Because the instruction, even when properly worded and carefully circumscribed, may be received by the jury as a judicial comment on the evidence, some courts and authorities have specifically refused to embrace it. See e.g. State v. Nelson, 48 P.3d 739, 745 (Mont. 2002) ("We agree with the Ninth Circuit Model Jury Instruction Committee's recommendation that an instruction concerning false exculpatory statements should not be given. . . . There is little probative value in giving a "fabrication instruction" when the jury is properly instructed on assessment of witness credibility."). The jury instruction committees for four federal circuits, the Fifth, Seventh, Ninth and Eleventh, have declined to adopt a "false exculpatory evidence" instruction. See 1A Federal Jury Practice & Instructions Sec. 14.06 (5th Ed. 2000), Committee Comments, 6th Circuit Jury Instruction Committee ("The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instructions be given."); 7th Circuit Jury Instruction Committee ("The Committee is of the opinion that an instruction on this subject should not be given. The general subject is adequately covered in other instructions, and the specific references to evidence are likely to be viewed by the jury as judge's comments on the evidence."); 9th Circuit Jury Instruction Committee ("The Committee recommends that such an instruction not be given and that, if the evidence permits and adverse inference, counsel be permitted to argue the point.").

Cf. 8th Circuit Jury Instruction Committee (noting that "the Committee does not normally recommend an instruction on this issue").

This Court should hold that while the State is free to argue an appropriate inference from the defendant's false, exculpatory statements, the trial court should not comment on such statements in its instructions to the jury. As an advocate, the prosecutor's chief function is to urge the jury to draw adverse inferences from the evidence introduced at trial. The "false exculpatory evidence" instruction highlights not only the defendant's statements, but his false statements, the very evidence the State will ask the jury to embrace. The instruction's resonance with the prosecution's position creates the danger that the jury will place undue weight on the evidence, or see the instruction as the court's endorsement of this special type of evidence and inference. See Bruneau, 131 N.H. 104, 118 (cautioning courts to avoid giving instructions on how to evaluate specific pieces of evidence).

This Court has endorsed "consciousness of guilt" instructions in two other situations. However, both of are distinguishable from the "false exculpatory evidence" instruction at issue in this case.

In State v. Parker, the Court affirmed the trial court's instruction in a driving while intoxicated case that the defendant's refusal to take a blood alcohol test "may be considered . . . as evidence of guilt. . . ." Parker, 142 N.H.

319, 323 (1997). In response to the defendant's claim that the instruction inappropriately invaded the jury's province to weigh the evidence, the Court held that the instruction accurately stated the law as set forth in the statutes governing blood alcohol tests, including a statute that specifically permits the negative inference on which the court instructed. Id. at 324.

In State v. Cassell, the Court affirmed an instruction that the jury may draw an inference of guilt from post-offense flight. Cassell, 129 N.H. 22, 24 (1986). As the Court explained in a later case, "[i]t is beyond dispute that post-offense flight is probative on the issue of the defendant's consciousness of guilt." State v. Torrence, 134 N.H. 24, 27 (1991). But see Wong Sun v. United States, 371 U.S. 471, 484 n.10 (1963) (questioning probative force of flight evidence); State v. Philbrook, 138 N.H. 601, 604 (1994) (holding flight inference inapplicable because under facts, did not conclusively demonstrate defendant's own consciousness of guilt).

Both the blood alcohol test refusal and flight instructions are different than the "false exculpatory evidence" instruction at issue here. In Parker, not only was the inference dictated by a special statute, but it would not be reasonably evident to jurors, absent an instruction, how the defendant's refusal to take the test was relevant, if at all. Moreover, in the flight cases, as well as Parker, the instruction merely focused the jury on how to evaluate the defendant's actions. The false exculpatory evidence instruction goes beyond the defendant's

actions. It highlights the defendant's inculpatory words, which are typically the most powerful evidence the State can introduce in a criminal trial. See State v. Barnett, 147 N.H. 334, 337 (2001) (commenting on persuasive power of confession). It is precisely because such statements are less ambiguous than flight, and more directly relevant to the jury's determination of the defendant's credibility, that the trial court should abstain from addressing them with a special instruction.

For all of these reasons, the trial court should not have given the "false exculpatory evidence" instruction in this case.

B. If the "false exculpatory evidence" instruction was proper, the trial court nonetheless erred when it refused to make it equally applicable to Marshall's statements.

If this Court affirms the trial court's decision to instruct on the defendant's false, exculpatory statements, it must nonetheless reverse because the court refused to instruct the jury that the inference was equally applicable to false statements made by Marshall.

The defendant's theory was that Marshall physically abused Cassidy when he babysat her over the several weeks immediately preceding her death, and inflicted the ultimately lethal blows on the morning of November 9, 2000. At trial, when directly confronted with these allegations, Marshall offered denials and excuses, many of which permitted the inference flowing from false, exculpatory statements.

For example, when asked to explain the small, pin pricks on the bottoms of Cassidy's feet, Marshall attributed them to nails

protruding from a linoleum floor at his home. T-II 173; see also T-IV 103-104 (Conley offers same explanation). The Kittery Police found no such nails when they searched Marshall's home. T-VI 180. When asked to explain extreme bruising on Kassidy's bottom, Marshall claimed he patted her on the buttocks, through her diaper, because she had grabbed a bottle of Windex. T-III 112. Amanda saw the bruises when Kassidy returned home from Marshall's, and described them as being clearly inconsistent with Marshall's explanation. T-II 158, 176-177. Moreover, Travis Hunt saw the bruises the day after Marshall told him that Kassidy "was being a real bitch this weekend," when Marshall had been babysitting her. T-VI 144.

The allegedly false statements continued as the date of Kassidy's death approached. Marshall testified that Kassidy was "pretty normal" on November 8, and that nothing happened to her while she was in his care that afternoon. T-III 131. However, he admitted that Evans called him immediately after he picked Kassidy up and described that she was leaning forward in the car and drooling, symptoms that the State's expert forensic pathologist characterized as being consistent with blunt trauma to the head. T-III 266-270; see T-VII 188 (Dr. Greenwald's testimony). Finally, Marshall claimed that he did not hit or abuse Kassidy on the morning of November 9, when she was in his sole custody. Both medical examiners contradicted his explanation. One testified that Marshall killed Kassidy, and the other traced certain injuries to the last four hours of her life,

and could not definitively rule out that Marshall killed Cassidy. T-IX 33, 36, 64 (Dr. Baden); T-VIII 178, 223, 229-230, 242-243 (Dr. Greenwald).

The defense wanted the same "false exculpatory evidence" instruction the trial court gave regarding Evans's statements, to apply to Marshall. The court did not grant the request "because I think the false exculpatory evidence instruction is specific to exculpatory evidence, which is defined as defendant's statements tending to demonstrate innocence that are later proven to be false. . . ." T-X 4. The court's decision that the instruction was not equally applicable to Marshall was an unsustainable exercise of discretion, that directly and adversely affected Evans' defense.

Evans admits that he would not, had the trial court not given a "false exculpatory evidence" instruction as it related to his own statements, have been entitled to a "false exculpatory evidence" instruction applicable to Marshall's statements. See Bruneau, 131 N.H. 104, 117 (holding not error to deny proposed instruction that jurors consider flight of co-defendants). However, once the court specifically informed the jury about the inference as it applied to Evans, it was fundamentally unfair not to extend the instruction to Marshall. See Parker, 142 N.H. 319, 323-324 (instructions must provide neutral guidance to jury); State v. Langdon, 121 N.H. 1065, 1069 (1981) (instructions must set forth neutral guidelines to gauge credibility). Evans was equally entitled to argue that the jury should consider

Marshall's false statements as evidence of his own consciousness of guilt in causing Cassidy's death. By instructing the jury as it did, the court created the risk that the jury would believe it could only draw an adverse inference from false statements Evans made, thus depriving Evans of a fair and effective line of attack on Marshall. See Gagnon v. Crane, 126 N.H. 781, 788 (1985) ("if an improper instruction could have misled the jury, it constitutes reversible error.").

The Court can see the unfairness of the trial court's decision if it considers the more familiar flight situation. If there is a car accident and two people flee from the scene, the defendant and another man, the trial court has several choices on how to instruct the jury to consider the flight evidence. It can opt to give no instruction, but let each side argue an inference from it, i.e., the State would argue the defendant fled because he caused the accident, and the defendant would be free to make the same argument with regard to the other man. The court could instruct the jury on flight generally, and allow either side to argue the inference it desired from the instruction. Finally, the court could limit the flight instruction to an inference about the defendant's conduct. The problem with this final choice is that the instruction, by encompassing only the defendant, implies that the same inference does not apply to the other man's conduct. As here, such an instruction deprives the defendant of a full and fair chance to present a legitimate and viable theory of defense to the jury.

If the court wanted to give the "false exculpatory evidence" instruction, it had to make the instruction equally applicable to statements made by Marshall. Its decision to deny the defense's request effectively informed the jury that Marshall's false statements were not consequential, and thus, removed an key feature of the defense's claim that Marshall killed Cassidy and lied to protect himself. As a result of the trial court's error, Evans is entitled to a new trial.

II. THE STATE FAILED TO EXCLUDE THE RATIONAL CONCLUSION THAT JEFFEREY MARSHALL KILLED KASSIDY BORTNER.

"In an appeal challenging the sufficiency of the evidence, the defendant carries the burden of proving that no rational trier of fact, viewing the evidence [in the light] most favorabl[e] to the State, could have found guilt beyond a reasonable doubt. . . . When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict." State v. Dugas, 147 N.H. 62, 66 (2001) (citations and quotations omitted). In this case, based on all the evidence presented to the jury, the trial court should have dismissed the second degree murder charge because the evidence failed to eliminate the rational conclusion that Jefferey Marshall killed Kassidy.

If, somehow, Marshall did not exist and Kassidy died in New Hampshire, the State's case against Evans, though circumstantial, would have been sufficient. The State presented sufficient evidence that Evans had subjected Kassidy to physical abuse. Without Marshall, he would have been the only physical abuser to have cared for her in the day preceding her death. However, Marshall did exist, and this Court must view the question of the sufficiency of the evidence in view of all the evidence presented at trial. See id. (holding evidence must be viewed in its entirety, not in isolation). Marshall's prominent role in the case changed the circumstantial evidence calculus such that the State failed to meet its burden of proof.

There is no direct evidence that Chad Evans killed Kassidy. When Kassidy died, it is undisputed that she was in Marshall's care. While Marshall denied having any substantial contact with Kassidy in the hours before her death, no one could explain how pajama bottoms were removed and left on the bed. T-IV 125-126; T-VI 199-200. In spite of his claims that he did not abuse Kassidy, even the State's forensic pathologist traced certain, acute injuries to the period during which Kassidy was in Marshall's exclusive care. T-VIII 227, 229-230, 235, 237, 242-243. Moreover, the State's forensic pathologist could not exclude either the possibility that Marshall struck a lethal blow to Kassidy when he babysat her on November 8, or that he did so on the morning of November 9. T-VIII 222-223.

This case is similar to a recent case in which the Court vacated an assault conviction due to insufficient circumstantial evidence. State v. Haycock, 146 N.H. 302 (2001). In Haycock, the defendant, his father, and the victim were at a bar when a fight ensued. Both the defendant and his father punched the victim in the face. The defendant's father apologized for breaking the victim's nose. Id. A jury acquitted the defendant of accomplice to second degree assault, but convicted him of second degree assault. Id. at 303. This Court vacated his conviction due to lack of sufficient evidence.

At the outset of its analysis, the Court noted that "[t]he State presented no direct evidence that the defendant broke the victim's nose, but rather relied solely on circumstantial

evidence to prove culpability." Id. The victim did not identify who, specifically, struck the blow that broke his nose. Id. A doctor concluded that the blow that broke the nose was consistent with having been struck by a left-handed person; the defendant was right-handed. Id. at 303-304. "Taking all the evidence in the light most favorable to the State, it cannot be said beyond a reasonable doubt that the circumstantial evidence necessarily excluded the rational inference that someone other than the defendant, namely, his father, caused the victim's broken nose." Id. at 304.

In this case, as in Haycock, the State failed to exclude the rational inference that Marshall, in spite of his protestations and testimony to the contrary, killed Cassidy Bortner. As a result, this Court must vacate Evans's conviction for second degree murder.

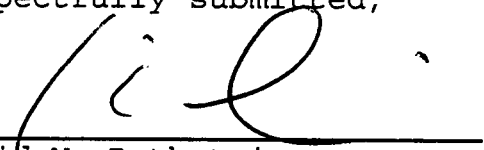
CONCLUSION

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court reverse his convictions and remand for a new trial if he prevails on Issue I, or vacate his second degree murder conviction if he prevails on Issue II.

Oral argument is requested.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 1st day of April, 2003.



David M. Rothstein

DATED: April 1, 2003