

State of New Hampshire
Supreme Court

NO. 2015-0162

2015 TERM

NOVEMBER SESSION

State of New Hampshire

v.

Justin Cassidy

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

BRIEF OF DEFENDANT, JUSTIN CASSIDY

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QUESTIONS PRESENTED

- I. Did the court err when, after substituting a juror who took ill, it did not undertake individual *voir dire* regarding whether each juror could start the deliberations anew?

- II. Was the evidence insufficient to convict Mr. Cassidy of the crime charged?
Preserved: Motion to dismiss at the end of state's evidence, *Trn.* at 270.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Taylor Bacon Says She Bought Heroin from Justin Cassidy and Sold it to Luke Levesque

Taylor Bacon was a teenage drug addict in Hillsborough, New Hampshire. She testified she had a daily habit of a half gram, “[g]ive or take ... [p]robably a little more.” *Trn.* at 140.

Luke Levesque, to lessen his liability for an unrelated crime, made a bargain and became an “individual working with the [State].” *Trn.* at 90; INDICTMENT #939336, *Appx.* at 16. On May 20, 2014, the police searched Mr. Levesque, gave him money, and targeted him on Ms. Bacon for a controlled buy. *Trn.* at 228-29; *Exh.* 8.

Mr. Levesque noted: “The specific arrangement was, for \$220 I would come to [Ms. Bacon’s] house and she’d give me a ride to go get ... heroin.” *Trn.* at 106.

Ms. Bacon testified that Justin Cassidy, the defendant here, picked her up at her house and drove her the short distance to McDonalds in Hillsborough where she “got food.” *Trn.* at 130. One officer, surveilling the scene, saw Mr. Cassidy pick her up and drop her off. *Trn.* at 129-30, 201. At McDonalds, the police saw Mr. Levesque separately arrive. They observed Ms. Bacon get out of Mr. Cassidy’s car, and saw her climb into Mr. Levesque’s. *Trn.* at 201, 231-32.

Mr. Levesque testified that in accord with the police plan, *he* picked up Ms. Bacon, and “dropped her off at McDonalds because ... she said she had to meet someone there to get the heroin.” *Trn.* at 107. Mr. Levesque said Ms. Bacon was gone from his car for “[a]bout ten minutes,” and when she returned she handed him a baggie of heroin. *Trn.* at 107.

In any event, Ms. Bacon testified she paid Mr. Cassidy for heroin, which she sold to Mr. Levesque. *Trn.* at 129-30. Mr. Levesque later ceded the baggie to the police, which contained 0.843 grams of the drug. *Trn.* at 268; *Exh.* 4. Ms. Bacon was arrested for her role, pleaded guilty, and was incarcerated at the time of her testimony here. *Trn.* at 120.

II. Indictment Charges Justin Cassidy as an Accomplice

In August 2014 Justin Cassidy was indicted on four counts of accomplice sale of drugs to Ms. Bacon, on four separate days. The indictment regarding conduct on May 20 at the McDonalds in Hillsborough alleged Mr. Cassidy:

did commit the crime of sale of a controlled drug in that in concert with Taylor Bacon, Justin Cassidy did knowingly sell a quantity of a controlled drug, to wit, heroin, in a quantity of less than one gram, ... to an individual working with the [State], in exchange for United States currency.

INDICTMENT #939336 (Aug. 14, 2014), *Appx.* at 16 (capitalization altered); *Trn.* at 54.

III. Jury Deliberation, Juror 8 Excused, Alternate Juror Seated, Charge to Reconstituted Jury

Over two days, January 12 and 13, 2015, trial was held in the Hillsborough County North Superior Court (*Gillian L. Abramson, J.*). On Day 1, a jury was empaneled.

During Day 1 and Day 2, a Monday and a Tuesday, the jury heard testimony from Mr. Levesque the confidential informant, Ms. Bacon the alleged accomplice, several state forensic chemists, and the officers who directed the operation and conducted the stakeout. At the end of Day 1, presumably on the basis of gaps in the Ms. Bacon's testimony, the State *nolle prosequi* one of the charges. INDICTMENT #939333 (Aug. 14, 2014), *Appx.* at 13 (margin note); *Trn.* at 118. At the close of the State's evidence, Mr. Cassidy moved to dismiss. *Trn.* at 270. At the end of Day 2, Tuesday, the defendant rested, the parties gave closing arguments, and the court read instructions on the remaining three indictments. *Trn.* at 271, 274-297; CRIMINAL JURY INSTRUCTIONS (Jan. 13, 2015) at 12, *Appx.* at 17.

The court then selected the alternate jurors, identified as "Jurors Number 13 and 14," *Trn.* at 298, and told them:

The alternate jurors remain separate from the jury while they are deliberating. If for either reason we need to call upon you during the course of the deliberations, we need to substitute you into the panel, then deliberations start all over again so you are not disadvantaged by not hearing what everybody has said previously. In addition, you are returned to the courtroom for the verdict.

Trn. at 298-99. In mid-afternoon on Tuesday, the court sent the jury into the deliberation room.

Trn. at 299.

The jury deliberated during the remainder of Tuesday, on Wednesday, and on Thursday.

On Thursday, the jury sent a message to the court indicating it had reached a verdict on one of the indictments, but not on the other two. JURY QUESTION (Jan. 15, 2015), *Appx.* at 36; ORDER (Jan. 16, 2015), *Appx.* at 37. The record does not indicate what time of day the message was sent or received, nor if any action was taken by the court.

On Friday morning, a juror called in sick. *Trn.* at 303. Meanwhile, however, through some misunderstanding involving another case or another judge, the alternates were told to go home and “wait for the phone call.” *Trn.* at 303. Then there were problems reaching the alternates to hail them back. *Trn.* at 304-05, 312. The court apologized to the prosecutor and defense attorney for both sending the alternates away and for difficulty recalling them. *Trn.* at 303, 306.

A short time later, one of the alternates, Juror Number 13, arrived. *Trn.* at 308. At sidebar, the court ruminated:

It would seem to make sense to instruct them that they cannot confer with Juror Number 13 with the views of the juror [who] has been excused. Nor may they consider any of her views in a deliberation. Because to do otherwise adds her back into the panel.

Trn. at 308. Both parties agreed with that sentiment. *Trn.* at 308. The court then instructed the newly-constituted jury:

Good morning, members of the jury panel. You will see that one juror has been excused due to illness. And now Juror Number 13 had substituted as Juror Number 8.

Thank you, sir, for coming in this morning.

Members of the jury, as I previously alluded to you in my prior instructions, deliberations must now start all over again, because Juror Number 8 cannot be disadvantaged by the fact that he hasn't been privy to your discussions over the last few days. I would ask you all to please listen to Juror Number 8's views and positions and arguments on the evidence and the law, and then speak up and let him know what your positions are on the evidence and the law. Please do not refer to any views that may have been expressed by the juror who has been excused. Nor should you consider any of her views, positions, or arguments in deliberations, because that would effectively add a juror to the panel, and that is not allowed. This is why you have to start all over again. Start afresh. And – and consider the verdict of each charge as it has been – as you've been instructed.

... So I'd ask you to please go in, start your deliberations over again so that Juror Number 8 has the benefit of your positions.

Trn. 308-310. When asked by the court if the parties had anything to add, both declined. *Trn.* at 310. The court and the parties agreed the new juror “didn't have the benefit of the deadlock instruction,” and also agreed with the defense attorney's suggestion that “technically they're not deadlocked now.” *Trn.* at 310.

The reconstituted jury began deliberations on Friday morning at 9:40AM.

On Friday afternoon at 2:30PM, the court announced that “they're locked on two and have a verdict on one,” which the parties commented sounded like the same result as the original jury. *Trn.* at 314, 320. The defense attorney apprised the court that the defendant would “accept the verdict on the one, and request a mistrial on the other two.” *Trn.* at 318. The jury delivered its verdict of guilty on the one charge, *Trn.* at 320-21, and the court declared a mistrial on the other two, *Trn.* at 323; ORDER (Jan. 16, 2015), *Appx.* at 37, which the State then *nolle prosequi*. INDICTMENT #939334 (Aug. 14, 2014), *Appx.* at 14 (margin note); INDICTMENT #939335 (Aug.

14, 2014), *Appx.* at 15 (margin note).

A month later the court sentenced Mr. Cassidy to 5 to 10 years, stand committed, and a fine of \$500. RETURN FROM SUPERIOR COURT - STATE PRISON SENTENCE (Feb. 17, 2015), *Appx.* at 38.

SUMMARY OF ARGUMENT

Justin Cassidy first argues that because the state at most proved he was selling someone her personal dose, he did not knowingly participate in a resale, and thus cannot be guilty of accomplice.

He then argues that at trial, the court did not give adequate individualized instructions regarding the jury's duty to start deliberations anew after one juror was dismissed and replaced with an alternate.

Accordingly, Mr. Cassidy asks this Court to reverse his conviction.¹

¹Mr. Cassidy declines to address an issue raised concerning sentencing.

ARGUMENT

I. State Failed to Prove Accomplice Because Mr. Cassidy Did Not Knowingly Aid a Resale

The indictment charged Mr. Cassidy with being an accomplice to a drug sale. *State v. Thresher*, 122 N.H. 63, 69 (1982); INDICTMENT #939336. To convict for accomplice liability, the State must prove:

(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).

The State's evidence is that Ms. Bacon said she bought a baggie of heroin from Mr. Cassidy, and in turn sold it to Mr. Levesque. Mr. Levesque was not asked to identify Mr. Cassidy, and there is no evidence Mr. Cassidy was ever aware of Mr. Levesque. There is also no evidence Mr. Cassidy was ever aware Ms. Bacon intended to sell heroin to Mr. Levesque or to any other person. The amount of drugs Ms. Bacon bought and sold was 0.843 grams – roughly the amount of her daily habit.

The most Mr. Cassidy could have known was he allegedly sold Ms. Bacon her day's fix. He did not "knowingly sell a quantity of a controlled drug ... to an individual working with the [State]." He was unaware of Ms. Bacon's sale, and unaware he was allegedly aiding it. Thus, while the State may have succeeded in proving the first and third elements, it did not meet the middle element of accomplice – that he knowingly "solicited, aided or attempted to aid another" to sell drugs.

Accordingly, the State failed to prove an element of the crime charged, and this Court should reverse.

II. Jurors Given Inadequate Individualized Instruction of Duty to Start Deliberation Anew

Criminal defendants have a constitutional right “to have each juror arrive at his or her own decision after careful independent consideration of the law and evidence and after engaging in all of the jury’s deliberations.” *Opinion of the Justices*, 137 N.H. 100, 103-04 (1993); U.S. CONST., amd. VI; N.H. CONST. pt. I, art. 15; N.H. CONST. pt. I, art. 20; RSA 500-A:13, V (“If, at any time after the final submission of the case to the jury, and before the jury has agreed on a verdict, a juror becomes incapacitated, ... the presiding justice may order him or her to be discharged.... The presiding justice shall instruct the jury to recommence deliberations.... The jury shall then *renew* its deliberations with the alternate juror.”) (emphasis added).

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member’s viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations.”

Opinion of the Justices, 137 N.H. at 104 (1993) (quoting *People v. Collins*, 552 P.2d 742, 746 (Cal. 1976)).

Thus this Court has imposed procedural safeguards, including that the court should make “a finding ... on the record that the alternate juror has not been tainted subsequent to the original panel retiring to deliberate,” and that “the remaining jurors should affirmatively state that they can and will start the deliberations anew.” *Opinion of the Justices*, 137 N.H. at 104.

In *State v. Sullivan*, 157 N.H. 124 (2008), a juror brought a law dictionary into the deliberation room. The trial judge conducted an individual *voir dire* of each the remaining 11

jurors to determine whether their deliberations were prejudiced by the book, to which each responded they were not. The judge did not, however, inquire individually whether each juror would start their deliberations anew.

This Court found that because the dictionary was never actually consulted, the juror's transgression was not so inimical to banish him from the jury. *Sullivan*, 157 N.H. at 141. Nonetheless, the Court said the requirement that "the remaining jurors *should affirmatively state* that they can and will start the deliberations anew ... is not merely hortatory." *Sullivan*, 157 N.H. at 142-43 (emphasis in original). The Court was concerned:

It is uncertain that, even when so instructed by the court, the jury could truly go back to "square one," discussing the case anew as though no prior deliberations had occurred, and repeating all prior arguments for the sake of the newcomer. Therefore, prior to substituting an alternate for a deliberating juror, trial courts in this state must *ask* each remaining juror whether he or she can and will start the deliberations anew. In other words, each juror should be certain of his or her ability to set aside all opinions and conclusions formed during prior deliberations. Only in cases where this is possible is a defendant's constitutional right to have a jury of twelve arrive at a common verdict sufficiently protected in the event that it becomes necessary to seat an alternate juror after the commencement of deliberations.

Sullivan, 157 N.H. at 143 (emphasis in original, capitalization altered, quotations and citations omitted). The Court thus reversed the convictions. *Id.*

Here, there were two errors. The court did not individually "*ask*" each juror, nor did each juror "affirmatively state," they would "start the deliberations anew." Accordingly, this Court must reverse.

Further, the timing of the jury's deliberations cast doubt on whether the jury actually started "anew." Before the substitution, the original jury had deliberated from the afternoon on Tuesday all the way through Thursday, prompting the court to quip, "they've deliberated now longer than the trial." *Trn.* at 315. After the substitution, the reconstituted jury deliberated less

than six hours. *C.f. People v. Bryant*, 334 P.3d 573, 666 (Cal. 2014) (“After Number 77 was excused, the jury met for more than three court days.”) (subsequent history omitted).

Finally, if it appears the defendant did not contemporaneously object to the trial judge’s abbreviated procedure, this Court should nonetheless reverse for plain error. Given this Court’s statements in *Opinion of the Justices*, 137 N.H. at 100, and *State v. Sullivan*, 157 N.H. at 124, the court’s error of *en masse* rather than individual *voir dire* is “plain.” And the trial judge’s oversight is structural error “not subject to harmless error analysis.” *State v. Russell*, 159 N.H. 475 (2009) (applying plain error to faulty jury instructions); SUP.CT. R. 16-A.

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.

REQUEST FOR ORAL ARGUMENT

Justin Cassidy requests that his attorney, Joshua L. Gordon, be allowed oral argument because this case gives this Court the opportunity to make clear that individual juror *voir dire* is a constitutional requirement after a jury is reconstituted.

Respectfully submitted,

Justin Cassidy
By his Attorney,

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Dated: November 17, 2015

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CERTIFICATIONS

I hereby certify that the conviction and state prison sentence being appealed is added to this brief.

I further certify that on November 17, 2015, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: November 17, 2015

Joshua L. Gordon, Esq.

APPENDIX

1. INDICTMENT #939333 (Aug. 14, 2014). 13
2. INDICTMENT #939334 (Aug. 14, 2014). 14
3. INDICTMENT #939335 (Aug. 14, 2014). 15
4. INDICTMENT #939336 (Aug. 14, 2014). 16
5. CRIMINAL JURY INSTRUCTIONS (Jan. 13, 2015). 17
6. JURY QUESTION (Jan. 15, 2015). 36
7. ORDER (Jan. 16, 2015). 37
8. RETURN FROM SUPERIOR COURT - STATE PRISON SENTENCE (Feb. 17, 2015). . . . 38