STATE OF MAINE
PENOBSCOT, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: PEN-24-248

STATE OF MAINE,
Appellee

v.

ROCHELLE GLEASON,
Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On September 28, 2022, the Penobscot County Grand Jury returned an indictment charging Rochelle Gleason (Gleason) with one count of Aggravated Trafficking of Scheduled Drugs, Class A[1]. (*State of Maine v. Rochelle Gleason,* PENCD-CR-2022-03059, Appendix 30 (A. __)). On September 30, Gleason entered a not guilty plea at her arraignment. (A. 4).

A jury was selected on April 17, 2024. (A. 8). The trial commenced on April 29, 2024. (A. 9). On April 30, 2024, Gleason moved to exclude the testimony of Chelsey Deisher and for a mistrial arguing that her right under the Sixth Amendment's Confrontation Clause had been violated. (Trl. Tr. 457). The Court denied the motions. (Trl. Tr. 491-493). On May 3, 2024, Gleason requested to add the language of 17-A M.R.S. § 33(2) to the jury instructions. (Trl. Tr. 847). The Court denied the request. (Trl. Tr. 853). The jury returned a verdict of guilty on May 3, 2024. (A. 11).

On May 16, 2024, Gleason was sentenced to 18 years, with all but 8 years suspended, and 4 years of probation, with a $400 fine. (A. 12). Notice of appeal was filed timely on May 31, 2024. (A. 14).

[1] 17-A M.R.S. § 1105-A(1)(K) (2017).

STATEMENT OF FACTS

[redacted] ("[redacted]") was, unbeknownst to his family, a high-functioning, illicit substance user. (Trl. Tr. 53-54, 118-119, 704). He was a respected, well-liked, and functional employee of his family's appliance business. (Trl. Tr. 117, 703, 705). However, his friends and family knew he made frequent, brief stops at two residences where Gleason and her sister stayed. (Trl. Tr. 58-60, 113-116).

In October 2021, [redacted] was having a particularly hard time with the impending death of his close grandfather. (Trl. Tr. 72-73). Facebook communications between Gleason and [redacted] showed an ongoing pattern of drug transactions during this month. (State's Exhibit 26). Between October 10 and his death, [redacted] communicated with Gleason more than anyone else on Facebook by a wide margin. (Trl. Tr. 319). On October 10 and 11, Gleason asked [redacted] to "go halves" on a large amount, a "fingy,"[2] and was persistent in asking him to chip in as much as $200. (State's Exhibit 26; Trl. Tr. 324-325). A deal was eventually reached, and after midnight, Gleason asked [redacted] er had made it back. (State's Exhibit 26; Trl. Tr. 330-335). [redacted]

[2] Short for "finger," a slang term for a bulk package of fentanyl. (Trl. Tr. 326-327).

confirmed he was back "with lots of fetty,"[3] and he was high. (State's Exhibit 26; Trl. Tr. 335-336).

On October 12, Gleason told [redacted] she was "grabbing goods" and had "brown"[4] too. (State's Exhibit 26; Trl. Tr. 337). [redacted] asked if he could come grab some, and Gleason responded she was at Missy's house, turning on to 3rd street. (State's Exhibit 26; Trl. Tr. 337-338). On October 13, Gleason messaged [redacted] repeatedly, apparently soliciting him to come get more illegal drugs, stating "I got that fire;"[5] however, there was no record of [redacted] responding. (State's Exhibit 26; Trl. Tr. 340). On October 14, Gleason messaged [redacted] asking if he needed "down."[6] (State's Exhibit 26; Trl. Tr. 350). [redacted] responded that he needed something, and an exchange was arranged. (State's Exhibit 26; Trl. Tr. 350-352). Later the same day, they arranged another exchange. (State's Exhibit 26; Trl. Tr. 353-359). On October 15, Gleason again solicited [redacted] which resulted in another exchange being arranged. (State's Exhibit 26; Tr. Tr. 365-367).

[3] Slang for fentanyl. (Trl. Tr. 320-321).

[4] Slang for heroin. (Trl. Tr. 331).

[5] Also slang for a better or more potent substance. (Trl. Tr. 340).

[6] Slang for fentanyl and/or heroin. (Trl. Tr. 345).

On October 16, [redacted]'s family was making what they knew would be their final visit to his grandfather at a retirement home. (Trl. Tr. 120). [redacted] first messaged Gleason around noon, asking if she would be 'good' for 40 after he got off work, which she confirmed. (State's Exhibit 26; Trl. Tr. 367-368). Gleason then sent him a long string of Facebook voice messages. (State's Exhibit 26; Trl Tr. 368). These messages included that she had some "dark, dark, raw shit," for which "a half is 80." (State's Exhibit 26, Trl. Tr. 369). She then said "but for you, bro, I got some other fire stuff too, harsher shit, so it's gonna be a bit more expensive though," but that she could get him $40 worth of that. (State's Exhibit 26, Trl. Tr. 370). [redacted] agreed (by Facebook text message) and said he could do it either around 5:00 p.m. or 6:00 p.m. after he picked up his child. (Id.). Gleason responded (by Facebook voice message) that she would be ready or could even bring it to him, and that "it's fucking fire… holy fuck, get wrecked." (State's Exhibit 26; Trl. Tr. 371). As the time for the exchange approached, Gleason messaged [redacted] that she was right on 3rd Street at "Missy's house." (State's Exhibit 26; Trl. Tr. 372).

After work that day, [redacted], Jack ([redacted]'s father), and Hayden ([redacted]'s then 12-year-old daughter), among others, visited his grandfather for the final time. (Trl. Tr. 120). After leaving the retirement home, [redacted] and Hayden drove to Gleason and "Missy's" house on 3rd Street in

Bangor. (Trl. Tr. 113, 121, 308-309).[7] During this trip, [redacted] began messaging Gleason indicating that he was on the way, and Gleason asked if he had 40 and that she'd walk it out to him. (State's Exhibit 26; Trl. Tr. 374). [redacted] messaged "got my kid with me so keep it dl." (Id.). Upon arrival, Hayden watched her father exchange money for something with Gleason at the exterior door of the residence. (Trl. Tr. 121-122). [redacted] and Hayden then drove to their home where they lived together alone. (Trl. Tr. 109, 119, 123). At their home, [redacted] went to bed early, saying goodnight to Hayden, and shutting his bedroom door. (Trl. Tr. 123). Despite staying up late, Hayden never saw or heard her father come out of his bedroom. (Trl. Tr. 123-124).

The following day Hayden slept until almost noontime. (Trl. Tr. 124). She still never saw her father come out of his bedroom. (Trl. Tr. 125). Later that day, a family friend, Amber Peabody, asked Hayden to go check on her dad. (Trl. Tr. 125-126). Hayden went into her father's bedroom and found him on his hands and knees, dead on the floor. (Trl. Tr. 126-127). On a well-used tray in [redacted]'s master bathroom, responding officers found a powdery

[7] Hayden knows Gleason as "Shelley," has known "Shelley" and "Missy" (who is also referred to in many of the messages and was identified as Gleason's sister Malissa Gleason), as family friends since she was a toddler, and has been inside the Gleason sisters' residence on 3rd Street in Bangor. (Trl. Tr. 109-120).

substance divided into lines that was determined to contain 67 milligrams of fentanyl and heroin. (State's Exhibit 29; Trl. Tr. 288-289).

[redacted]'s death was reported to the Office of the Chief Medical Examiner (OCME). (Trl. Tr. 297). A community medical examiner, Dr. Howard Jones, was dispatched to conduct a field examination of [redacted]. (Trl. Tr. 180). Dr. Jones assisted in determining that, under the circumstances, a full autopsy was unnecessary, and he collected two vials of blood from [redacted]. (Trl. Tr. 184-187, 621). In accordance with OCME's ordinary business practice, the vials of [redacted]'s blood were sent to NMS Laboratories (NMS) in Pennsylvania for toxicology testing. (Trl. Tr. 623-624).[8]

Deputy Chief Medical Examiner Dr. Liam Funte reviewed and interpreted the toxicology results reported by NMS. (Trl. Tr. 627-628). Dr. Funte determined that the amount of fentanyl in [redacted]'s blood was well beyond the medical community's generally accepted toxic, i.e. potentially lethal, level for fentanyl. (Trl. Tr. 632-639).[9] Dr. Funte also determined that the small amount of norfentanyl, in relation to the amount fentanyl, indicated that

[8] OCME contracts with NMS Laboratories to perform forensic toxicology testing on blood samples.

[9] The amount, or concentration, of fentanyl in [redacted]'s blood was 26 nanograms per milliliter of blood (ng/mL); the generally accepted lethal level is 4 ng/mL of blood. (State's Exhibit 3; Trl. Tr. 632-639).

[redacted] died shortly after ingesting the fentanyl. (Trl. Tr. 631-632).[10] Dr. Funte concluded that [redacted]'s "cause of death was acute intoxication due to the combined effects of fentanyl and mitragynine." (Trl. Tr. 642).[11] Though mitragynine was present in [redacted]'s,[12] he opined that that the "level of fentanyl is the most likely cause of death. It is at a lethal level," and that it necessarily would have contributed to any other mechanism of death. (Trl. Tr. 644).

[10] [redacted]'s reported concentration of norfentanyl was 1.8 ng/mL of blood. (State's Exhibit 3).

[11] Mitragynine and fentanyl each can cause cardiac arrythmia, and when these two drugs interact each exacerbates the cardiac effects of the other. (Trl. Tr. 640).

[12] [redacted]'s reported concentration of mitragynine was 22 ng/mL of blood. (State's Exhibit 3). The lowest reported fatal concentration of this drug acting alone is 20 ng/mL. (Trl. Tr. 641.

STATEMENT OF THE ISSUES

I. Whether, in light of a recent United States Supreme Court decision, this case should be remanded for further proceedings related to admission of out-of-court statements and the Confrontation Clause.

II. Whether the trial court erred by declining to instruct the jury on concurrent causation.

SUMMARY OF ARGUMENT

1. The appropriate remedy in this case is to remand to the trial court for further proceedings. After the trial in this case, the United States Supreme Court issued a decision abrogating Maine precedent on the admissibility of hearsay statements relied upon to form an expert opinion. In light of the post-trial abrogation of the applied at trial, remand is appropriate for trial court to consider additional issues under the newly established precedent.

2. The specific instruction requested by defense was not raised by the facts in light of the interplay between the conflicting causation standards in the offense and the "unless otherwise provided" language in 17-A M.R.S. § 33. The argument was still substantially covered by the instructions given, requiring the jury to find that but for a controlled substance, the decedent would not have died. If there was any error, it was not prejudicial.

ARGUMENT

I. The appropriate remedy is to remand to the trial court for further proceedings related to the out-of-court statements relied upon by the State's expert witness.

Gleason primarily contends that this Court should vacate her conviction entirely, either because the State has forfeited its argument that certain statements are nontestimonial, or because the merits support the conclusion that the statements were testimonial. (Blue Brief 12-21 (Bl. Br. __). However, the proper remedy that Gleason agrees is available to this Court, is to remand for further proceedings in the trial court. (Bl. Br. 20-21).[13]

In *Smith v. Arizona,* 602 U.S. 779 (2024), decided *after* Gleason's trial, the United States Supreme Court rejected the "not for the truth" rationale for the admission into evidence of so-called "basis" testimony. 602 U.S. at 783, 792. Despite the rejection of this rationale, the *Smith* explicitly maintained its prior holding that the Confrontation Clause "applies *only* to testimonial hearsay." *Id.* at 784 (quoting *Davis v. Washington,* 547 U.S. 813, 823 (2006) (emphasis added). The *Smith* Court also expressly declined to decide whether the out-of-court statements were testimonial because the state courts had (1) "relied on

[13] The State agrees that the harmless error analysis cannot be applied in this case. (Bl. Br. 17). However, a prior laboratory scandal in Massachusetts cannot be extrapolated, as suggested by Gleason, to reach the conclusion that every analyst's statements are testimonial and thereby mandate a live witness for cross-examination.

the 'not for the truth' rationale [it had] just rejected;" and (2) the state courts had never decided or "ever take[n] a stance on" whether the out-of-court "statements were testimonial" *Id.* at 801. The Supreme Court also declined to decide whether, as argued by Smith, "the State ha[d] forfeited the [nontestimonial] argument," because that "dispute [was] best addressed by the state court." *Id.*

In this case, the trial court relied on, and properly applied, the Law Court's precedent affirming the "not for the truth" rationale for the admission of the out-of-court statements that formed the basis of toxicologist's opinion. (Trl. Tr. 491-493). Given the status of law at the time of trial, neither party raised an argument as to the testimonial, or nontestimonial, nature of the toxicologist's statements. (Trl Tr. 457-460, 483-493). Because neither party argued whether the out-of-court statements were testimonial (or not), the trial court did not decide the issue. (Trl. Tr. 491-493). Thus, just as the Supreme Court in *Smith* was unwilling to "be the pioneer court to decide" the testimonial issue because it was not presented to, and ruled on, by the lower courts, so too should this Court remand to trial court to initially decide whether certain statements are testimonial. *Smith,* 602 U.S. at 801.[14]

[14] The State maintains that the initial determination of the nature of the out-of-court statements should be made by the trial court on remand; however, the State does dispute Gleason's assertions that "[t]he merits clearly" indicate the statements are testimonial and the evidentiary purpose of the

For similar reasons, this Court should remand to the trial court for the determination of the issue of forfeiture or waiver of the argument regarding the testimonial nature of the out-of-court statements relied on by the toxicologist. Though this Court typically deems unpreserved, or waived, arguments not made to the trial court, this case presents an unusual circumstance: a live witness was presented and made available for cross-examination, the party's made their respective arguments, and the trial court made its ruling, all based on the law *at the time* of trial. (Trl. Tr. 457-493). Only *after* the trial did the *Smith* decision intervene and abrogate the known, well-established law, resulting in a uniquely distinct circumstance from a typical case on appeal.[15]

statements can be assumed. (Bl. Br. 19). The toxicologist testified usually does not "have any information [on] the case or the individual," she does not interpret the results but merely provides the results to the client, and the confirmation and review of the data generated is for validation, and compliance with NMS protocols and standards for accreditation – not for criminal prosecution. (Trl. Tr. 440-441). Additionally, the fact that the client in this case was OCME alone does not support Gleason's assertions. OCME is statutorily mandated to complete and certified reports of deaths in a medical examiner case. 22 M.R.S. § 3022(3). Many of the circumstances that statutorily determine a medical examiner's case would not result in a future criminal prosecution. 22 M.R.S. §§ 3025(1), (1-A). And statute allows OCME to "compile and preserve records and data" unrelated to criminal prosecution such as "public health, public safety and vital statistics, *as these relate to the Chief Medical Examiner's responsibilities."* 22 M.R.S. § 3022(3) (emphasis added). Gleason's assumptions highlight the necessity to remand for the parties and trial court to properly address these issues under the Supreme Court's new guidance.

[15] *State v. Adams,* 2019 ME 132, 214 A.3d 496 is not analogous for the proposition for which Gleason cites. In *Adams,* trial counsel did not specifically argue authenticity as part of a recorded recollection hearsay objection, or that the inability to cross-examine the interviewer in the recording violated the Confrontation Clause. *Id.* at ¶¶ 17, n.7, 22, n.9. Despite holding both issues were unpreserved for appellate review, the Law Court nonetheless addressed both arguments concluding each was unpersuasive. *Id.*

Given the intervening and disruptive decision by the Supreme Court, particularly due to its abrogation of the Law Court's precedent in *State v. Mercier,* 2014 ME 28, 87 A.3d 700, on which both parties and the trial court relied, the appropriate remedy is to remand to the trial court for further proceedings.

II. The trial court did not err by not giving the concurrent causation instruction, and if it did, such error was not prejudicial.

This Court reviews jury instructions as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law. *State v. Russell*, 2023 ME 64, ¶15, 303 A.3d 640. Where the appellant has preserved the issue for appeal, the Court determines whether the requested instruction 1) stated the law correctly, 2) was generated by the evidence, 3) was not misleading or confusing, 4) whether it was not sufficiently covered in the instructions the court gave, and 5) whether the court's refusal to give the requested instruction was prejudicial to the requesting party. *State v. Hanscom*, 2016 ME 184, ¶10, 152 A.3d 632.

A. The evidence did not generate the concurrent causation instruction based on the interplay with this specific statute.

The State agrees that Gleason's requested instruction stated the law correctly, and that there is evidence that the level of mitragynine in [redacted]'s blood was at the low end of the range found in fatal cases reported

in a toxicology reference book. (Trl. Tr. 641). However, and in contrast, the evidence established that the fentanyl in [redacted]'s blood was at a "very lethal level," would have necessarily contributed to any breakdowns in the body, and that the low level of metabolites, "indicate[d] the individual died shortly after taking this fentanyl." (Trl. Tr. 644, 631). To generate the instruction, the facts taken in a light most favorable to Gleason must still make concurrent causation a reasonable hypothesis. *State v. Athayde*, 2022 ME 41, ¶46, 277 A.3d 387. The totality of the record does not support a conclusion that concurrent causation was a reasonable hypothesis.

Additionally, the interplay between the statutory provisions must be considered here. Title 17-A M.R.S. § 33(2) (effective July 4, 2018), provides in pertinent part that "the defendant's conduct must also have been sufficient by itself to produce the result." Title 17-A M.R.S. § 1105-A(1)(K) (effective July 9, 2018), provides that "the scheduled drug trafficked by the defendant is a contributing factor to the death of the other person." That statute was amended by the Legislature to change the previous causation standard, which previously provided that the "death is in fact caused by the use of that scheduled drug…" 17-A M.R.S. § 1105-A(1)(K) (2011).

The plain language of these statutes make the second concurrent causation prong incompatible with the modern overdose death statute. To take

a statute which criminalizes a person's conduct as being only "a contributing factor" to the death, and then applying 17-A M.R.S. § 33(2) to it to require that the defendant's conduct be "sufficient by itself to produce the result," would effectively obviate the legislature's change to 17-A M.R.S. § 1105-A(1)(K), rendering it meaningless and functionally restoring the prior in fact causation standard.

This Court interprets statutes to avoid absurd, illogical, or inconsistent results. *Fortin v. Titcomb*, 2013 ME 14, ¶7, 60 A.3d 765. The legislative intent is clear from the amendment to 17-A M.R.S. § 1105-A(1)(K). Contrary to Gleason's assertion, the reasonable resolution of the question is that the "unless otherwise provided" language at the very beginning of 17-A M.R.S. § 33(1) applies to the entire statute. A different causation standard has been provided in 17-A M.R.S. § 1105-A(1)(K) as to the specific conduct of a defendant, rendering 17-A M.R.S. § 33 inapplicable.

B. Causation was sufficiently covered in the instructions the court gave and would have been confusing as a result.

Gleason argues that the "jurors first had to find beyond a reasonable doubt that the sole scheduled drug found in the decedent's blood caused his death…" (Blue Brief 21). However, the ultimate substance of what Gleason argues should have been given to the jury, was actually given to the jury.

The Court instructed the jury, in detail, that: "The State has to prove that the death of another is in fact cause by the use of one or more *scheduled drugs*, and a *scheduled drug* trafficked by Ms. Gleason contributed to the death. This means the State has to prove that *but for the use of one or more scheduled drugs* from whatever source, *Mr.* [redacted] *would not have died* and that a drug trafficked by Ms. Gleason to him contributed to his death." (Trl. Tr. 941), (emphasis added). The instructions specified fentanyl as a schedule W drug. (Trl. Tr. 940). The instructions never suggested that mitragynine is a scheduled drug, and there is evidence in the record confirming that it is not. (Trl. Tr. 440).

The jury was required to find that scheduled drugs were the but-for cause of [redacted]'s death; that but for those scheduled drugs, that [redacted] would not have died. That the scheduled drugs were sufficient to kill him is necessarily included the requirement that the jury find that but for those scheduled drugs, [redacted] would not be dead. If anything, the Court's instructions appear more restrictive than what Gleason now asks.

Additionally, for the same reasons described in the prior heading, it would be confusing to the jury to in the same breath be told they must find that the scheduled drugs Gleason sold *contributed* to his death, but that the scheduled drugs Gleason sold *were sufficient by themselves* to cause his death,

and that they must find *without the scheduled drugs, he would not be dead*. Such an instruction would be both confusing and internally inconsistent.

C. Omitting the requested instruction was not prejudicial.

The instructions, as given, clearly required that the jury find beyond a reasonable doubt that [redacted]'s death was caused by scheduled drugs. There was no confusion in the record about what was or was not a scheduled drug. Gleason was allowed to fully argue at closing the notion that kratom (mitragynine) could have killed the [redacted], that it was not a controlled substance, and that the [redacted] "died as a result directly from the use of one or more scheduled drugs, he had to have died from scheduled drugs, not from other drugs that he may have obtained gosh knows where." (Trl. Tr. 922). The instructions provided for and permitted that theory. Gleason was not unfairly prejudiced simply because the jury was not convinced by her argument.

CONCLUSION

For the foregoing reasons, the State respectfully asks that the conviction be affirmed.

Respectfully submitted,

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Dated: January 22, 2025

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CERTIFICATE OF SERVICE

I, Jason Horn, Assistant Attorney General, certify that I have sent a native PDF and mailed two copies of the foregoing "BRIEF OF APPELLEE" to Schlosser's attorney of record, Rory McNamara, Esq.

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