THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Ken-24-423

STATE OF MAINE
Appellee

v.

MICHAEL E. GREENLEAF, JR.,
Appellant

ON APPEAL from the Kennebec County Unified Criminal Court

BRIEF OF APPELLANT

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STATEMENT OF FACTS

Defendant was convicted of Criminal OUI, Class D, in violation of 29-A M.R.S.A. §2411(1-A)(A) on August 22, 2024, following a jury trial (Mitchell, J., presiding), and sentenced to a $500 fine and court-ordered loss of license of 150 days. *See* Trial Transcript, Volume II of II (hereinafter "TT2"), page 38. He timely appeals, challenging (1) the trial court's ruling admitting testimony related to the administration of Horizontal Gaze Nystagmus ("HGN") that improperly quantified Defendant's blood alcohol level; and (2) the trial court's post-deadlock instructions to the jury as impermissibly coercive and procedurally flawed in such a way that deliberations continued when the jury was potentially genuinely deadlocked.

I. Evidence Developed at Trial.

At trial, the State primarily relied on the testimony of Waterville Police Officer Mikayla Hodge. Officer Hodge testified on direct that she stopped Defendant's vehicle on May 28, 2022, at approximately 1:30 a.m. coming out of the area known as the Concourse because it was traveling the wrong way in a one-way, because it was straddling between two directional lanes at the intersection of Spring Street and Silver Street, and that upon stopping it "almost" struck a curb. Trial Transcript, Volume I of II (hereinafter "TT1"), pp. 36-37. She testified that Defendant was the driver. TT1, p. 39. The Defendant admitted to having consumed two Margarita drinks while at the Cancun restaurant. TT1, p. 38. Officer Hodge observed the Defendant had red, glossy

eyes and could smell the odor of alcohol from Defendant's breath. TT1, p. 40. She testified that she asked Defendant when he drank, and Defendant said his first drink was at 10 p.m. and the second drink was at 11:15 p.m. TT, pp 40-41. Officer Hodge then went on to describe her administration of field sobriety tests on the Defendant, beginning with the administration of HGN. TT1, pp. 41-49. At the conclusion of her description of the administration of HGN, Officer Hodge testified—over the objection of Defendant—that the results of HGN indicated "[t]hat they're *over the legal limit* and they're impaired and should not be driving." TT1, p. 46 (Empasis added). Officer Hodge went on to discuss her observations of other field sobriety tests she administered on the Defendant, including the Walk & Turn test (2 out of 8 clues observed); One-Leg Stand (4 out of 4 clues observed); recitation of the alphabet (no clues observed); and counting backwards (Defendant did not stop counting on the correct number). TT1, pp. 49-54. Officer Hodge testified that Defendant rated himself a "four" on a scale of zero to ten, with zero representing "sober" and ten representing "falling-down drunk." TT1, p. 54. Hodge testified that Defendant stated that he felt "buzzed" but did not feel "drunk." *Id*. Based on these observations, Officer Hodge testified that she "believed that [Defendant] was over the legal limit and he was impaired." TT1, p. 55. She then placed Defendant under arrest and transported him for a breath test, which ultimately yielded a test result of 0.13. TT1, pp. 55, 61. The State also admitted into

evidence a portion of the booking room video where Defendant was administered a breath test and made statements which could be construed as incriminating.

On cross-examination, Officer Hodge made several concessions. An initial line of inquiry discussed the various COVID-related changes made to traffic patterns in the area of the Waterville concourse where Defendant was said to have gone the wrong way in a one-way. TT1, pp. 75-80. This testimony demonstrated that Defendant's direction of travel was influenced by these new traffic patterns, countering the implication that Defendant's actions were the result of impaired driving. Next, Officer Hodge conceded that Defendant had maneuvered his vehicle appropriately upon her signal to stop and had in fact not struck any curbing while doing so. TT1, pp. 80-81. Officer Hodge further conceded on cross that, sometimes when trying to evaluate whether someone is impaired by alcohol, her assessments on occasion can, and have been in the past, wrong, TT1, p. 82-83. She testified on cross that there are many causes of nystagmus other than alcohol, and that the test she performs cannot differentiate between them. TT1, p. 84. She conceded that, with regard to the Walk & Turn and One-Leg Stand, some people have general difficulties with these tests, and even nerves can cause people to make mistakes on the tests. TT1, p. 85. Officer Hodge admitted that, with regard to the Walk & Turn and One-Leg Stand tests, there were an equal number of indicators in this case suggesting impairment as they were indicators suggesting non-impairment. TT1, p. 86. She testified that Defendant performed the

alphabet segment perfectly, and had not otherwise demonstrated an inability to count (no missing numbers or numbers out of order) during her request to have Defendant count backwards. TT1, p. 87. She conceded that a learning disability like ADHD could effect how someone performs with these exercises (alphabet and counting). TT1, p. 88. Finally, Officer Hodge conceded that she could not opine on what Defendant's breath alcohol was at the time of operation in this case. TT1, pp. 89-90.

The State additionally called Officer Kyle McDonald as a witness, but his testimony added little to the facts of the case, as he only observed the initial operation of Defendant's vehicle as was described by Officer Hodge. TT, p. 98. Waterville Police Officer Blake Wilder testified to certain technical issues relevant to the admissibility of the intoxilyzer result, but conceded on cross-examination that he could not testify as to what Defendant's alcohol level was at the time of operation. TT1, p. 109.

The State's Chemist, Maria Pease, was called by the Defendant. She offered expert testimony to the jury concerning the meaning of the breath test results offered by the State. Ms. Pease testified that the breath test result represented a snapshot in time of what Defendant's alcohol concentration was at the time it was measured, in this case at 2:18 a.m., but that did not indicate what the concentration was at the time of driving of 1:30 a.m. TT1, pp. 121-22. Ms. Pease testified that Defendant's concentration of alcohol at the time of driving would more likely be different than at

the time it was measured. TT1, 123-24. At the time of operation, the alcohol concentration could either be higher than the measured result, lower than the measured result, or have a "very small chance" ("two percent") that it was the same. TT1, p. 124. Further, Ms. Pease testified that, based on the test result alone, there was no way to determine what Defendant's alcohol concentration was at the time of driving, including whether he was a .08 or more at the time of operation. TT1, p. 125. Ms. Pease was asked several hypothetical questions during her testimony. In summary, she testified that if Defendant's alcohol consumption ceased 2 hours of more before driving, he would be eliminating alcohol at the time of operation and therefore his alcohol concentration would be higher than when measured by the intoxilyzer. TT1, pp. 125-128. She testified that the timing of consumption can alter whether the Defendant was absorbing or eliminating alcohol at the time of operation, thus impacting whether the Defendant's alcohol concentration was lower or higher at the time of operation than the reported test result. TT, pp. 140-142. Ms. Pease testified that, based on the lack of detail in the reported drink history in this case, she could not independently calculate Defendant's BAC at the time of operation. TT1, pp.135-136.

The Defendant was the final witness in this case. He testified in relevant part that he was out in Waterville on the evening in question because he was celebrating having completed his board exam for his X-ray technician job at the hospital. TT1, pp 145-147. He arrived at the Cancun restaurant in Waterville at around 10 p.m. TT1, p.

147. His first drink, which was a strawberry margarita, was at 10pm. TT1, p.149. The second reported drink was ordered around 11 p.m. but was not consumed all at once. Instead, the Defendant testified that he "nursed" this second drink through the remainder of the evening until it was time to leave around 1 a.m. TT1, pp. 148-150. Defendant also discussed the unexpected changes to the layout of Silver Street he encountered which caused him to attract the attention of law enforcement as well as the reason behind being in the middle of the left/straight directional lanes at the intersection of Spring Street. TT1, pp. 150-152. He discussed his ADHD diagnosis and family history of Asperger's syndrome. TT1, p. 153. He testified that he had exercised his legs at the gym earlier that day, and that may have impacted his performance on some of the tests. TT1, p. 154. Defendant said he had told the officer he was okay to drive, and still believes that when he was operating he was "very good to drive." TT1, p. 155. Defendant testified that he felt the alcohol was affecting him more as the evening progressed after the stop, saying that he felt the most affected after being released from custody. TT1, pp. 159-160. This led Defendant to believe that his alcohol level was rising after he left Cancun restaurant. *Id.*

II. <u>Proceedings Following a Reported Deadlock</u>.

Following the Court's initial instructions regarding deliberations, the jury retired to begin deliberations at approximately 3:15 p.m. on the fist day of trial. TT1, p. 202. After one hour, the Court convened to discuss a note ("Note #1") it had received from

the jury. *Id*. Note #1 read, "Can we have a copy of the statement for OUI, impaired or .08?" *Id*. After some discussion with counsel, the Court gave the following response to the jury in open court:

> Ladies and gentlemen of the jury, the Court has received the note from the foreperson. The Court has reviewed the note. The Court has also discussed the note with counsel in this case. And the Court believes that the way to address the note is to review with you again the instruction on when a person is impaired for the purposes of the operating under the influence law in the State of Maine. And so I'm going to carefully reread that instruction to you. And I'm hopeful that that will provide the information that you need to the extent that you're looking for a clarification, that it provides the clarification. And okay? Operating under the influence. A person is guilty of operating under the influence if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle, and at the time of the operation, the defendant had a blood alcohol content .08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath or was under the influence of alcohol. That is the definition of impaired driving under the statute. TT1, pp. 206-207.

Even though the Court mistakenly referred to the general law of OUI as a definition of "impairment," Defendant did not object because the substantive instruction appeared to have been responsive to what the jury was requesting in Note #1, despite the Court mischaracterizing it as defining "when a person is impaired". The State also voiced no objection. With that instruction, the jury was sent back to resume deliberations at

4:23 p.m. TT1, p. 207.

A little over an hour later, at 5:32 p.m., the Court met with counsel to discuss another note ("Note #2"). This note read, "What happens if we can't come to a unanimous decision? We seem to be deadlocked." TT1, pp. 207-208. Following that discussion, counsel were in agreement that, at this point, the Court should give the instruction laid out in Section 8-6 of Alexander's *Maine Jury Instruction Manual*. Thus, the jury was brought back in at 5:36 p.m., and given the following instructions:

> Ladies and gentlemen of the jury, I have received the most recent note from the foreperson, which indicates that you're having some difficulty reaching a unanimous decision. I'm going to give you a further instruction, and I am going to send you back once again to try to reach a decision. And that is standard practice, okay? I'm not -- not singling this particular jury out. Let me give you the following instruction. Members of the jury, your note indicates the difficulties you are having agreeing upon a verdict. Let me make some observations that may be helpful for your consideration when you return to the jury room. First of all, the amount of time you've spent in deliberations so far is not unusual for this type of case. Responsible deliberation requires a thorough discussion of all issues and points of view. The fact that you have taken this amount of time suggests you are doing your job responsibly. As I indicated in my closing instructions, the verdict you reached must represent the considered judgment of each of you as a juror. In order to return a verdict, that verdict must be unanimous. Whether the verdict is not guilty or guilty, all 12 of you must agree, as you are aware. It is your duty as jurors

> to talk with one another and to deliberate with a view toward reaching an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, keep an open mind. Do not hesitate to reexamine your own views and change your opinions if you are convinced that your opinion -- your particular opinion is erroneous. But -- but do not surrender your honest belief as to the weight or effect of evidence solely because --That's -- that's a sign, right? When they flick the lights, you don't (indiscernible) but you can't stay here. But do not surrender your honest belief as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times (indiscernible) instructions, you are not partizans, okay? You are judges of the facts. Your sole interest is to determine the facts, determine whether the State has proven the charge beyond a reasonable doubt based on the evidence in the case. Keep these observations in mind as you return to the jury room for further deliberations. At this point, I am going to recess you again in order to -- to consider the case. If after further consideration, you are able to reach a verdict, you should report that to the Court in accordance with my closing instructions. If, after further deliberations, you still believe you cannot reach a verdict, you should advise me of that in writing. So that is my instruction, and I'll send you back to the jury room for further deliberation. Thank you. TT1, pp. 211-213.

The Court's reference to the lights going out during this instruction, TT1, p. 212, lines 14-15, occurred because the court lights did in fact go dark for a brief period of time.

Neither the State, nor the Defendant, objected even though there was a reference to this meaning people couldn't stay in the building because it appeared to be just a comical circumstance at the time. With that instruction given, the jury was sent back to deliberate at 5:50 p.m.

There is then discussion in the transcript of a third note ("Note #3") although it is unclear from the transcript when this note was received. It appears that it may have been received during the time when counsel and the Court were preparing to respond to Note #2 because the discussion between counsel and the Court occurs immediately after 5:50pm and concludes at 5:52 p.m. TT1, pp. 214-215. This third note read, "May we have a copy of the arrest report?" TT1, p. 213. Defendant requested the Court give the response, "No, the report is not in evidence." TT1, p. 214. After some discussion, the Court adopted the request of the State and responded in writing with, "No, we cannot do that." TT1, p. 214-215.

At 6:30 p.m., the Court reconvened to discuss another note ("Note #4"). This note read, "The information that is necessary to achieve a unanimous decision is not in evidence. We are deadlocked. The jury is at an 8, 4 split. This split has not changed by one single vote in two hours and 20 minutes." TT1, p. 215. The ensuing discussion between the Court and counsel about how to properly respond to Note #4 went on for some length of time. TT1, pp. 215-236. Defendant requested that the Court respond to Note #4 by instructing the jury that the Defendant has no obligation in a criminal

trial to present any evidence, to call any witnesses, or to testify himself; to instruct the jury they should not speculate about what other witnesses or evidence may have been presented; and to re-instruct them on the presumption of innocence and burden of proof. Over Defendant's repeated objections, the Court at 6:56 p.m. delivered the following response to Note #4:

> Ladies and gentlemen of the jury, I've received the last note that came in. Court has had some extended discussion with the parties about it. First of all, I want to say that it is absolutely clear to the Court that you are approaching this task in a very serious and conscientious fashion. And the Court appreciates that and -- and understands that. The Court also understands that you've been at it for a while, okay? And it will not go on indefinitely, I promise you. That being said, there are a couple of portions of the instructions that I provided to you that I am going to repeat. And let me -- let me get to those.
>
> First of all, with regard to the presumption of innocence and the burden of proof in this case, the law presumes the defendant to be innocent. The defendant, although accused, begins the trial with a clean slate with no evidence against him. This presumption of innocence alone is sufficient to acquit the defendant unless you decide that the defendant's guilt is proven beyond a reasonable doubt after careful consideration of all the evidence in this case. The State is not required to prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is just what the words imply, a doubt based on reason and common sense. It is not a doubt based upon mere guess, surmise, or bare possibility. It is a doubt which a reasonable person without bias,

prejudice or interest, and after conscientiously weighing all the evidence, would entertain as to the guilt of the accused. To convict the defendant of a criminal offense, the evidence must be sufficient to give you a conscientious belief that the charge is almost certainly true. You must consider only the evidence in the case in reaching your verdict.

With respect to operating under the influence, a person is guilty of operating under the influence if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle and at the time of the operation the defendant had a blood alcohol content of .08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath or was under the influence of alcoholic beverages. State -- Maine State Law does not prohibit drinking and driving. The question is whether someone was under the influence. If a person is under the influence, they -- pardon me -- a person is under the influence if that person's senses, their physical and mental faculties are impaired, however slightly or to any extent, by the alcohol that person had to drink. The State does not have to prove that the person was falling-down drunk. The State need only prove beyond a reasonable doubt that -- that the person's physical and mental capacities -- faculties were impaired as I have described.

And then finally, what I want to say to you is if after further consideration, you're able to reach a verdict, you should report that to the Court in accordance with my closing instructions and these further instructions. If, after further deliberations, you still believe that you cannot reach a verdict, you should advise me of that in writing. I'm going to send you back again and ask you to -- to deliberate further and communicate with the Court when you're ready to do so. TT1, pp. 236-238.

Following this instruction, the jury was subsequently sent back to deliberate at 7:04 p.m. with an opportunity to have brief access to their phones to contact family due to the lateness of the hour. TT1, p. 240-242.

At 7:44 p.m., the Court reconvened with counsel to discuss yet another note ("Note 5"). This note read, "Can we have the full court's transcript of the Officer Hodge testimony." TT1, p. 242. Discussion ensued about how to respond to this note, and the Court suggested it was going to entertain the request to play back Officer Hodge's entire testimony (about an hour long), but that the jury would be sent home for the evening. TT1, pp. 243-244. Defendant objected to sending the jury home because they did not ask to be sent home. TT1, pp. 244-45. Defendant further objected to playing back the lengthiest witness's testimony in its entirety without first requiring the jury to rely on their collective memory and having them specify which parts of the testimony they were interested in hearing. TT1, pp. 242, 244. Over Defendant's objections, the Court elected to play back Officer Hodge's entire testimony in the morning. TT1, pp. 247-248.

The jury was brought back into the courtroom at 7:53 p.m. to receive their evening adjournment instructions. At that time, the court officer handed the Court yet another note ("Note 6"). At that point, the foreperson of the jury spoke up in open court and interrupted the transmission of Note #6 to the Court. TT1, p. 248. There ensued a short colloquy in the courtroom between the Court and the foreperson about

whether the Court should accept this note. *Id*. In essence, the Court asked, "did you intend for this note to be passed in or no?" The foreperson responded, "not till we got an answer to the last one." *Id.* The Court then returned Note #6 unopened to the foreperson. *Id*, TT2, pp. 3-4. In its evening instructions before sending the jury home, the Court made the following comment regarding the length of deliberations: "So my thinking on it is if we were to play it for you right now, you're—I'm going to send you back in that jury box about 9:00, okay, not having had dinner. This is already a marathon for you guys, and I don't want to do that to you, okay?" TT1, p. 249. The Court then proceeded to give routine instructions before dismissing the jury for the evening at 8 p.m.

The following morning, the Court had a lengthy discussion with counsel about Note #6 and how to proceed with the playback of Officer Hodge's testimony. TT2, pp. 4-14. Over the objection of Defendant, the Court elected to the following procedure: bring the jury in and playback Officer Hodge's testimony; then inquire of the jury as to whether they still had Note #6 (and take possession if they had it); then give them an instruction regarding further communication with the Court; send the jury back to deliberate; while the jury was deliberating, then delve into the contents of Note #6, and take testimony from the court officer to make a record of the sequence of events surrounding the transmittal of Note #6 to the Court. The Defendant argued that nothing should happen (i.e. no playback and no deliberations) before first ascertaining the

contents of Note #6. Defendant specifically cautioned the Court about proceeding further with deliberations if Note #6 referenced another impasse in the jury's ability to reach unanimity. TT2, p. 8.

The jury was brought in at 9:30 a.m. TT2, p. 14. Prior to playing back Officer Hodge's testimony, the Court asked the foreperson in open court whether he still had Note #6. TT2, p. 15. The foreman informed the Court he did not. *Id*. The Court then proceeded to playback the entire testimony of Officer Hodge. TT2, pp. 15. Following the playback, the Court gave this instruction:

> Before I send you back, I am going to read to you one further instruction. This is a repeat of an instruction that we had, and it has to do with communication between you and the Court, okay? So please pay attention. And this is the -- this is the instruction. If during your deliberations you want to communicate with me, you should send a note signed by your foreman through one of the court officers. No member of the jury should ever attempt to communicate with me by any way except a signed writing, and I will not communicate with any member of the jury about issues in the case, except in writing or orally here in open court. Also, please understand that our court officers and staff cannot communicate with you about the merits of the case or the issues you are deciding. Finally, remember that you must not tell anyone, not even me, how you stand individually or collectively on the question of guilt or innocence until after you have reached a unanimous verdict or until you are otherwise discharged. TT2, pp. 15-16.

Then, prior to sending the jury back to deliberate, the Court had a sidebar with counsel to discuss whether the Court should tell the jury to hold off on deliberating until the Court could have a discussion with counsel regarding Note #6. TT2, p. 16-19. Defendant repeated his objection to the entire procedure. TT2, pp. 18-19. Ultimately, the Court sent the jury back to resume deliberations at 10:31 a.m. TT2, p. 19.

While the jury resumed deliberations after having heard a playback of Officer Hodge's entire testimony, the Court set out to determine the content and circumstances surrounding Note #6. Court Officer Lindsey Lovering was sworn and provided testimony concerning Note #6. Officer Lovering testified that, while preparing to bring the jury back into the courtroom after the submission of Note #5, she was advised by a member of the jury that there was another note. TT2, p. 21. She could not recall whether it was the foreman. *Id*. The note was slid towards her by a member of the jury. *Id*. She grabbed it from the table. *Id*. She glanced at it because it was open. *Id*. She carried the note to the courtroom. *Id*. On the way to the courtroom, she had no further communication with any of the jurors. TT2, p. 22, 27. Once in the courtroom, she brought Note #6 to the bench and slid it towards the judge. *Id*. She recalled that the note said something along the lines of, "We are deadlocked. We cannot go any further" or words to that effect. TT2, pp. 22-23. Officer Lovering further testified that she was surprised to hear the foreman speak up in the courtroom because there had been no discussion with her about Note #6 after a member of the jury gave it to her.

TT2, p. 27.

Following Officer Lovering's testimony about the circumstances of Note #6, the Court began to discuss the situation with counsel. TT2, p. 28. The Court made it clear that, despite Officer Lovering's testimony, the Court was "not going to inquire at this point with the jurors and with the foreperson about what [Note #6] said. So [the] Court's position is [Note #6] should not have been accepted." TT2, p. 29. During this discussion, the court officer brought out another note (Note #7). Before addressing Note #7, Defendant argued the following:

> [T]here's no such thing as contingent notes in trials. So there's a procedure for the jury to communicate with the Court. That procedure is they're to write a note, and they're to give it to the court officer. That was done. There was no objection made out back. Court officer testified there was no contemporaneous conversation at all with some member of the jury in the room, with other members of the jury indicating that there was a note.
>
> So the communication was made per the Court's instructions. The Court should have accepted it. It should have been accepted. I wasn't jumping up and down with the jury in the room about this because I thought it was not an appropriate time to make that objection, which is why I made it this morning, but it should have been accepted because it was communicated in the way that all notes are supposed to be communicated.
>
> When they get in here and it gets qualified by one person, albeit the foreperson, that's just not the way the jury is supposed to

communicate with the Court. And the -- just because it's the foreperson, his voice doesn't speak louder than the others, and there's a process that they have to go through to compose these notes. And we have to assume that the jurors all have an input on what notes come out of that room and go to the Court. So the fact that we got in here and 1 out of the 12 tries to put conditions on whether the Court should accept it or not, I don't think that's appropriate. It had already been transmitted to the Court in the normal course, so it should have been accepted.

And by the way, they -- they said -- they said we're deadlocked and something to the effect of no further -- can't remember what -- I can't remember what the court officer's testimony was, but something about no further deliberations. You know, that indicates that -- that indicates an impasse. And you know, they decided to come to that conclusion on their own regardless of whether or not -- regardless of whether or not there was going to be a further read back.

So I think that just highlights the -- and it highlights the -- the problem of doing the read back, again, prior to considering that further determination because, again, you're into this area now of undue pressure or coercion on the jury to -- to reach a verdict. TT2, pp. 30-32.

Acknowledging that Defendant had preserved his objections, the Court indicated that it was treating Note #6 "was not delivered in the usual course, that it was not intended to be delivered as a note given all the circumstances." TT2, p. 32.

Finally, the Court took up Note #7 which had been brought out during the discussion concerning Note #6. Note #7 read, "We have reached a unanimous

decision." TT2, p. 32. The Court then proceeded to take the verdict, which was guilty. Id. All jurors agreed on the subsequent poll. TT2, pp. 34-36. Defendant objected to the way in which the polling was conducted. *Id.*

ISSUES PRESENTED FOR REVIEW

I. Whether The Trial Court Improperly Admitted HGN Testimony that Quantified Defendant's BAC at the Time of Operation.

II. Whether The Trial Court's Post-Deadlock Jury Instructions were Impermissibly Coercive and Whether the Court Failed to Take Steps to Ascertain Whether the Jury was Genuinely Deadlocked.

ARGUMENT

I. The Trial Court Abused its Discretion in Allowing Officer Hodge to Quantify Her HGN Observations.

This Court reviews a trial court's ruling on the admissibility of lay witness testimony pursuant to M.R. Evid. 701 for an abuse of discretion. *State v. Robinson*, 2015 ME 77, ¶ 21, 118 A.3d 242 (citing *State v. Patton*, 2012 ME 101, ¶ 20, 50 A.3d 544). During direct examination of Officer Hodge, she testified that her observations of nystagmus in Defendant's eyes meant that "*they're over the legal limit* and they're impaired and should not be driving." TT1, p. 46, lines 6-7 (Emphasis added). Defendant objected to this testimony, directing the trial court to this Court's decision in *State v. Taylor*, 1997 ME 81, 694 A.2d 907. TT1, pp. 46-49. While reserving ruling on the matter, the trial court ultimately overruled the objection, essentially

saying that Defendant was construing *Taylor* too broadly and that it did not prohibit this type of testimony. TT1, pp. 162-166.

In *Taylor*, this Court determined that "the results of an HGN test are admissible only as evidence supporting probable cause to arrest without a warrant or as circumstantial evidence of intoxication. The HGN test *may not be used by an officer to quantify a particular blood alcohol level in an individual case*." *Taylor*, 987 ME 81, ¶ 13 (Emphasis added). The offending testimony at issue in *Taylor* in part involved an officer's statement that "four clues of intoxication resulted in a 77 percent probability that the subject has a blood alcohol level in excess of .10%." *Id* at ¶ 14. The Court in *Taylor* explained: "Although [the officer] did not exactly quantify Taylor's blood alcohol level to any specific number, he improperly testified to evidence which lacked scientific basis." The *Taylor* Court also cited to *State v. Ruthardt*, 680 A.2d 349, 362-63 (Del. Super. Ct. 1996) for the proposition that the mere estimate by an officer that blood alcohol level exceeded .10% would be error.

In the present case, it is immaterial whether Officer Hodge said her observations meant Defendant was "over the limit" or "over an .08." The phrase, "over the legal limit" has a numerical meaning, not only in the common understanding of average persons but also as specifically defined by the Court in its jury instructions. To say that someone is "over the legal limit" is the same as saying that someone is over a .08%. It is not a general reference to "impairment" as the

trial court believed, but a reference to a quantitative amount that lacks scientific basis. In the same way that the courts have determined that an officer cannot testify that certain clues on HGN equate to a Defendant having a BAC over a .10, it is equally improper allow an officer to testify that certain observed clues on HGN equate to a BAC "over the legal limit." To hold otherwise would essentially undermine the logic of *Taylor* and other related cases entirely, allowing the State to skirt the well-established limits of HGN testimony that have been in place for almost 30 years.

The admission of Officer Hodge's testimony was not harmless. An error is harmless "if it is highly probable that the error did not affect the jury's verdict." *Id.* (quoting *State v. Phillipo*, 623 A.2d 1265, 1268 (Me. 1993)). "Whether the erroneously admitted testimony is highly prejudicial or important to the State's proof is relevant to the harmless error analysis because prejudicial effect and relative importance both bear directly on the potential for the error to influence the verdict." *State v. Judkins*, 2024 ME 45, ¶ 24, 319 A.3d 443. (citing *Harper v. Kelly*, 916 F.2d 54, 57-58 (2d Cir. 1990) (vacating a conviction because the improperly admitted evidence was key to the prosecution's case)). "Two indicators that erroneously admitted evidence may have influenced the verdict are that the prosecutor's closing argument emphasizes the evidence and that the jury asks to review the evidence during its deliberations." *Id.* at ¶ 26.

In the instant case—because impairment evidence was at a relative equipoise—a major focus of the trial was discussing whether Defendant's BAC at the time of operation could be determined from the evidence presented. Two police officers and the State's chemist all testified that they could not opine on Defendant's BAC at the time of driving. The chemist in particular stated she would need additional information in order to render such an opinion. The only uncontested evidence[1] of what Defendant's BAC was at the time of driving was Officer Hodge's HGN testimony that she said meant Defendant was "over the limit." This was the only contemporaneous evidence relative to driving offered by the State as to what Defendant's BAC was in this case. Not only did the prosecutor repeat this information in her closing, TT1, p. 170, but a reasonable interpretation of the jury's notes 2, 4, and 5 suggests that Hodge's testimony played a significant role in influencing the jury verdict. Particularly where the jury had indicated in Note #4 ("The information that is necessary to achieve a unanimous decision is not in evidence….") an inability to reach unanimity due to missing evidence, and then reached a verdict after having heard Hodge's testimony again, it is clear that the testimony was both highly prejudicial to Defendant's case as well as crucially

[1] Although the State tried to suggest that Defendant's statement to Officer Hodge that his second drink was around 11pm—which according to Ms. Pease would have made his alcohol level higher at the time of driving than at the time his test—Defendant testified that the second drink was consumed over a period of time and not all at once. The timing of consumption, according to Ms. Pease, if occurring closer to the time of operation, would make the alcohol level lower at the time of driving because he would still be absorbing alcohol.

important for establishing a BAC at the time of operation for the State's case. *See Id*.

II. The Trial Court's Post-Deadlock Communications with the Jury were Impermissibly Coercive and Procedurally Flawed in Such a Way that Deliberations Continued when the Jury was Potentially Genuinely Deadlocked.

This Court reviews jury instructions "as a whole for prejudicial error, to ensure that the instructions informed the jury correctly and fairly." *State v. Gantnier*, 2008 ME 40, ¶ 13, 942 A.2d1191 (citing *State v. Gauthier*, 2007 ME 156, P14, 939 A.2d 77, 81; *State v. Martin*, 2007 ME 23, P5, 916 A.2d 961, 964). The appellate review considers "the effect of the instructions as a whole and the potential for juror misunderstanding." *Id*. (citing *Gauthier*, 2007 ME 156, P14, 939 A.2d at 81). This court has also observed that, "an erroneous instruction to a potentially deadlocked jury cuts to the heart of the criminal process and any convictions secured following such instructions are highly suspect." *State v. Weidul*, 628 A.2d 135, 136.

At 6:30 p.m. on the first day of trial, the Court reconvened to discuss jury Note #4. This post-deadlock note read, "The information that is necessary to achieve a unanimous decision is not in evidence. We are deadlocked. The jury is at an 8, 4 split. This split has not changed by one single vote in two hours and 20 minutes." TT1, p. 215. As has been laid in the statement of facts, Note #4 was not the first reported deadlock. Note #2 first reported a deadlock at 5:32 pm. Defendant does

not argue on appeal that the Court's response to Notes #1 through #3 were inappropriate.

Although the Court adopted some of Defendant's requested instructions in response to Note #4 (presumption of innocence, burden of proof), the court *sua sponte* chose to also re-instruct the jury in this post-deadlock situation as to the elements of the law on OUI. The Defendant objected to the OUI instruction (which had already been referenced twice). The Court also declined to instruct the jury that it could not engage in speculation about evidence or witnesses that weren't presented at trial, and declined to fashion any sort of instruction that would have reminded the jury that the Defendant in a criminal case is not required to present any evidence.

Although it is permissible for a court to extend an offer to the jury to read back testimony or to offer to repeat instructions in conjunction with the deadlock instruction, *State v. Braddick*, 2002 ME 63, PP6-7, 794 A.2d 641, 643, it is Defendant's position that it is not appropriate for the trial court to *sua sponte* decide which portions of testimony or which legal instructions should be repeated in conjunction with a post-deadlock instruction absent any request from the jury on these issues. To do so, as the trial court did here, runs the inherent danger that the court is placing undue emphasis on certain portions of the case, or certain legal points, that might be coercive or signal to the jury what they should be focusing on. Particularly where, as here, the Note #4 suggests that the jury believed something

was missing in order for them to reach unanimity, the response of the trial court to focus their attention on one discrete aspect of the overall law of the case was coercive. *See State v. Gantnier*, 2008 ME 40, ¶ 17, 942 A.2d 1191 ("What is required is that the jury receive the appropriate instruction before it begins deliberating, that it receive the ABA STANDARDS instruction when it first identifies a possible deadlock, and that *any additional instructions are noncoercive* and are framed in such a way that the jury understands that a deadlock is not unacceptable to the court. If substantial time passes between reinstructions to a potentially deadlocked jury, a court should reassert the ABA admonition") (Emphasis added). The trial court's response to Note #4 alone warrants vacating the conviction in this case.

In response to Note #5, the trial court gave the following instruction to the jury after the playback of Officer Hodge's entire trial testimony:

> Before I send you back, I am going to read to you one further instruction. This is a repeat of an instruction that we had, and it has to do with communication between you and the Court, okay? So please pay attention. And this is the -- this is the instruction. If during your deliberations you want to communicate with me, you should send a note signed by your foreman through one of the court officers. No member of the jury should ever attempt to communicate with me by any way except a signed writing, and I will not communicate with any member of the jury about issues in the case, except in writing or orally here in

> open court. Also, please understand that our court officers and staff cannot communicate with you about the merits of the case or the issues you are deciding. Finally, remember that you must not tell anyone, not even me, how you stand individually or collectively on the question of guilt or innocence until after you have reached a unanimous verdict or until you are otherwise discharged. TT2, pp. 15-16.

The last section of this instruction fails to mention that there is any alternative other than reaching a unanimous verdict. It did not instruct them that continued deadlock was not unacceptable to the Court. It did not remind them to not surrender an honest belief as to the weight or effect of evidence solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. Defendant maintains that these deficiencies are additionally compounded by other past references to time by the court ("you can't stay here" when the lights went out; "This is already a marathon for you guys") which, at the time, seemed innocent, but contributed to the overall tone of the case. Absent repetition of the cautionary language contained in the preferred deadlock instruction, these follow-up instructions were likewise in error. *Cf. State v. Gantnier*, 2008 ME 40, ¶ 16, 942 A.2d 1191.

Finally, and perhaps most importantly, the trial court's handling of Note #6 did not afford Defendant the opportunity to voice any objection to the process or move for a mistrial prior to (1) the playback of Officer Hodge's testimony; (2) the trial court's instruction (discussed above) following Note #5; or (3) the jury's

continued deliberations after a reported third deadlock. Although the trial court determined that it was not the intent of the jury to submit Note #6, Defendant respectfully suggests that that determination was incorrect. The description of the transmittal of Note #6 by the court officer was entirely in line with the court's preliminary instructions to the jury on how written communications were to occur during deliberations. Further, it is not uncommon for juries to submit notes in rapid succession, sometimes even before the court can respond to a previous note. If Note #6 had indicated that the jury had reached a verdict in the case, that would have effectively rendered Note #5 moot. In that circumstance, the trial court would not have proceeded with a playback of testimony in response to Note #5. Likewise, where Note #6 indicated a continued impasse in deliberations (for third time), that communication—where it was transmitted to the Court in accordance with the stated procedure—should have been immediately addressed by the court prior to any other procedure. The trial court should have taken steps to determine whether the jury was genuinely at an impasse, or whether further deliberations or instructions might be helpful to the jury in reaching a verdict prior to further readbacks or further deliberations. It was improper for the trial court to have engaged in a colloquy with one juror—regardless if it was the foreman—and allow that sole juror to veto or put conditions on the transmittal of Note #6 because that may not have represented the jury's intent in giving Note #6 to the court officer to begin with. It was improper for

the trial court to have sent the jury out to deliberate again following the playback when a note had been submitted indicating yet another deadlock situation. These actions, individually and cumulatively, regarding the handling and responses to Notes #4, #5, and #6 "constituted highly prejudicial error tending to produce manifest injustice" in this case. *State v. Weidul*, 628 A.2d 135, 137 (citing *State v. Quint*, 448 A.2d 1353, 1355 (Me. 1982) (quoting *State v. Mahaney*, 437 A.2d 613, 618-19 (Me. 1981)).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court to vacate the Appellant's conviction and remand the case for further proceedings.

Dated this 23rd day of January, 2025.

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CERTIFICATE OF SERVICE

This brief was served on opposing counsel as required by Rule 1E of the Maine Rules of Appellate Procedure.

Dated this 23rd day of January, 2025.

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