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

LAW COURT DOCKET NO. Wal-25-77

STATE OF MAINE
Appellee

v.

ALLEN JAMES Jr.
Appellant

ON APPEAL from the Waldo County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

(I) The accomplice-liability jury instruction in this case replicated a fundamental misstatement of the elements of accomplice liability contained in Maine's preeminent jury-instruction manual. In fact, the court's instruction not only repeated the manual's error; it then committed the same error in a different context. As a result, the jury was misinstructed in both the *mens rea* and *actus rea* elements of accomplice liability in a manner detrimental to defendant.

The courts of another state with a materially indistinguishable accomplice-liability statute have caught and corrected this error. Maine courts must do so too, or else they will be perpetuating a misstatement of the legislature's law.

The errors are prejudicial. The court denied defendant's motion for judgment of acquittal based on an accomplice theory. The unique facts of this case – defendant was present for none of the controlled buys – buttress the conclusion that accomplice liability was central to the case. As there were numerous instances of both uncharged and others' criminal conduct that jurors might have mistakenly believed, given the court's erroneous instructions, to permit finding defendant guilty, the remedy is vacatur.

(II) Notwithstanding the fact that the jury likely did not find that defendant sold drugs on other than one instance, the court found that defendant engaged in multiple instances of trafficking. Its decision to base its basic sentence, in part, on that finding is a violation of case-law, and it is further improper given the State's affirmative choice to forgo jury findings

beyond a reasonable doubt about whether defendant trafficked more than on a single occasion.

STATEMENT OF THE CASE

Following a jury trial, defendant was acquitted of aggravated trafficking of drugs on July 5,[1] 17-A M.R.S. § 1105-A(1)(B)(1) (Count IV)[2] (Class A). The jury could not reach unanimous verdicts on two other counts: aggravated trafficking of drugs on April 4, 17-A M.R.S. § 1105(1)(B)(1) (Count I) (Class A), and conspiracy to commit aggravated trafficking of drugs between April 4 and August 27, 17-A M.R.S. § 1105(1)(B)(1) & 17-A M.R.S. § 151(1)(B) (Count VI) (Class A). Defendant was convicted by the jury of aggravated trafficking of drugs on April 25, 17-A M.R.S. § 1105-A(1)(B)(1) (Count II) (Class A), and aggravated trafficking between April 4 and August 27, 17-A M.R.S. § 1105-A(1)(B)(1) (Count V) (Class A). He pleaded guilty to violating a condition of release, 15 M.R.S. § 1092(1)(A) (Count III) (Class E). Thereafter, the Waldo County Unified Criminal Docket (Larson, J.) imposed a principal sentence of thirty years' prison "straight."

Defendant's timely direct appeal has been consolidated with his sentence appeal, for which the Sentence Review Panel granted leave to appeal to the full Court.

I. The State's case

As he does not press an argument that the State's evidence was legally insufficient, defendant discusses the State's case in a "balanced" and

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[1] Each of the dates relating to the charges refer to 2023.

[2] Throughout this brief, defendant refers to the counts *as indicted*, rather than those utilized at trial – which omitted Count III, to which defendant pleaded guilty.

"objective" manner. *See United States v. Rodriguez*, 115 F.4th 24, 33 n. 1 (1st Cir. 2024) (internal quotation marks omitted) (such is appropriate when no sufficiency-of-the-evidence argument is raised).

Defendant and his girlfriend, Alivia, shared a bedroom together at 195 Hatch Road in Jackson. (2Tr. 131, 135, 139). It wasn't their home; Nikki owned it, and Adam, her boyfriend, lived there too. (2Tr. 137-38). The home was a hub of drug-activity, according to the State. (*See* 2Tr. 143-44). Defendant provided drugs to Nikki and Adam, and, alongside Alivia, they sold drugs on defendant's behalf, particularly when he was absent from the house. (2Tr. 143-45, 151-150, 177). Defendant was regularly away from the house for days at a time, leaving Alivia in charge of drug-sales from the residence. (2Tr. 143-45, 179).

Dustin is a "confidential informant" for Maine Drug Enforcement Agency. (1Tr. 49-51). He was familiar with the Hatch Road home and its occupants. (1Tr. 55-56). Dustin testified at trial as part of a cooperation agreement with prosecutors. (1Tr. 49, 133-37). So did Alivia, who had turned State's witness in exchange for preferential treatment. (2Tr. 134-35).

A. April 4, 2023

Even though the jury could not reach a verdict on this count – Count I – defendant discusses it to contextualize the State's case.

At MDEA's behest, Dustin exchanged text-messages with whom he believed to be defendant. (1Tr. 59-65). Defendant responded that he did not have any "icy" but that he had "[h]ard." (SX 1). These terms refer to

methamphetamine and crack, respectively. (1Tr. 67-68). Dustin understood that he could obtain crack at the Hatch Road residence. (1Tr. 69).

An MDEA agent fitted Dustin with a recording device, and Dustin proceeded to Hatch Road. (1Tr. 69-70). At the residence, he spoke with Alivia, who told him that she did not have any methamphetamine. (SX 6 ca. 6:40). Nikki and Adam were also present. (1Tr. 78). After Alivia spoke with someone by phone – she and Dustin testified it was defendant, (1Tr. 79; 2Tr. 148) – she told Dustin that they would have methamphetamine later in the day. (SX 6 ca. 7:30). He left Hatch Road empty-handed. (1Tr. 77-78).

Later, Dustin made a recorded phone call to defendant. (1Tr. 81-83; SX 2). Dustin understood that he could return to Hatch Road to purchase a few grams of crack from Alivia. (1Tr. 83-84; SX 2). Dustin then exchanged texts with Alivia, who didn't know anything about the arrangement Dustin thought he had made with defendant. (1Tr. 85-86; SX 3). Dustin returned to Hatch Road. (1Tr. 86).

As memorialized in an audio-recording of Dustin's return visit, Dustin negotiated a price with Alivia; she hand-signaled that the crack cost $200. (1Tr. 92-93; SX 7 ca. 7:30). She then disappeared into a bedroom, returning minutes later with what a "certified seized-drug chemist" later testified was approximately 3 grams of a substance containing some amount of crack. (SX 7 ca. 10:00; 1Tr. 92-95; 2Tr. 7, 19, 44; SX 8, 101).

B. April 25, 2023

This incident forms the basis of Count II and, likely, Count V, both of which defendant was convicted by the jury.

Again at the direction of the MDEA agent, Dustin sought to purchase drugs from defendant. (1Tr. 102). Dustin texted defendant, asking whether he had any "icy" and "hard" – again, slang for methamphetamine and crack. (1Tr. 102-05; SX 10). Defendant responded, "Yes n yes." (SX 10). After he was equipped with a recording-device, Dustin returned to 195 Hatch Road. (1Tr. 107-08).

Once again, defendant was not there; only Alivia and Adam were. (1Tr. 112-13, 115; SX 10 ca. 6:00). Dustin and Alivia negotiated terms – *e.g.*, quantity and cost – distinct from those Dustin and defendant had discussed via text. (1Tr. 116; SX 10 ca. 6:45). He received what, according to later testimony, was about 13 grams of a substance containing some quantum of methamphetamine. (1Tr. 116-17; 2Tr. 20-21, 54; SXs 13, 102).

C. July 5, 2023

The jury acquitted defendant of this conduct, Count IV, yet, again, defendant discusses it for the sake of background.

On July 5, the MDEA agent directed Dustin to contact defendant about purchasing drugs. (1Tr. 121). Dustin texted defendant, "Hey. You around[?]." (SX 16). Defendant's sole communication was "Home." (1Tr. 123; SX 16). Understanding this to mean that drugs were available there, Dustin set out towards Hatch Road, befitted with an audio- and video-recording device. (1Tr. 123-25).

The recording depicts Dustin negotiating with Adam, who is yelling to Nikki in another room. (SX 18 ca. 7:30). Adam tells Dustin to call Alivia, who was not present, though he did not end up doing so. (SX 18 ca. 9:15).

Others are present in the background, "partaking in some sort of drug use." (1Tr. 128). Eventually Adam and Dustin settle on $250 for around a half-ounce of what a State's witness later identified as methamphetamine. (1Tr. 129; 2Tr. 22-23, 61-62; SXs 19, 103).

D. Other evidence

On August 27, MDEA seized from Alicia a notebook page containing numbers and letters that the lead investigator believed to be a tally of drug-quantities. (2Tr. 72-73; SX 20). They also seized her cellphone. (2Tr. 72). Within Alivia's phone's "notes page" were other figures apparently recording drug-sales. (2Tr. 76-77, 112-13, 117, 160; SX 21a - 21i).

The State introduced text-messages between Alivia and a phone number associated with defendant. (2Tr. 78; SXs 22-93). There were also Facebook messages to and from the account Alivia attributed to defendant. (2Tr. 66-70, 81, 162-63; SXs 110-45). Though the exhibits were made available to the jury, the State's presentation did not explore them. Instead, the prosecutor read and interpreted some of them during his closing argument. (*See* 3Tr. 47-61, 64-66).

In one such exchange, the prosecutor described as "particularly illustrative" of Alivia's relationship with defendant, Alivia complained that defendant left her "at home to do absolutely nothing expect [sic] watch ur work." (3Tr. 50-51; SX 26). The State contended that, taken as a whole, the messages indicated that defendant was directing and controlling the trafficking conducted by Alivia. (*See, e.g.*, 3Tr. 51-61).

II. The important role of accomplice liability

Just as trial began, the State announced that it would be seeking an accomplice jury-instruction. (A36; 1Tr. 6). Defense counsel seemed to object, but the transcriptionist could not tell from the audio.[3] (A37; 1Tr. 7). Later, on the second day of trial, the court noted it was going to give such an instruction over defendant's objection. (A39; 2Tr. 206) (Court: "I know you had objected, [defense counsel], but I think it's been generated by the evidence based upon the testimony, specifically [Alivia's].").

In fact, just prior to the court's ruling about the accomplice-liability instruction, it denied defendant's motion for judgment of acquittal, reasoning:

> Well, in examining the evidence in the light most favorable to the State, the Court can find that a reasonable jury could infer that the transactions on April 4th, April 25th, and July 5th were actions on the part of the defendant where **he was an accomplice in the trafficking**. Whether he was the – although he was not responsible for the hand-to-hand buys that took place those days, **he was certainly an actor that solicited others to traffic** in Schedule W drugs on his behalf.

(2Tr. 204) (emphasis added).

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[3] Including jury selection, the trial transcripts in this case contain a total of 181 instances of either "indiscernible" speech or "audio interference" preventing accurate transcription. *But see* M.R. U. Crim. P. 27(a); Me. Admin. Order JB-12-01, Recording of Trial Court Proceedings (Notwithstanding desire to achieve "efficiencies," court-recording processes "must always safeguard the quality of justice and of the resulting record.").

Indeed, the State seemed intent on advancing an accomplice theory, observing in its opening:

> And somebody can be found guilty, the State expects, of a crime if they're a principal or accomplice of it. That is, if they aided the defendant and helped the crime and but for their conduct, the crime couldn't have happened. Again, the judge will tell you about these instructions at the end of the trial.

(1Tr. 41). The State returned to this theory in closing, noting that while defendant was "the big guy," he's "got" Alivia, Nikki and Adam, whom he was directing to commit the *actus rei* of the offenses. (3Tr. 38).

For its part, the defense theory was that the State had only established that defendant "knows about drugs, knows where to get drugs, could potentially get drugs, potentially sold drugs." (3Tr. 74). Defense counsel acknowledged, "You heard my client's name all the time talk about drugs, talked to Alivia about drugs, talk about pricing." (3Tr. 76). But, she continued, the State never proved "that he ever actually trafficked" or that he "ever actually sold cocaine and fentanyl." (3Tr. 76). Merely "being around drugs, knowing about drugs, knowing what the price of drugs are" does not mean defendant was himself trafficking in them. (1Tr. 42).

The instructions given by the court include, in pertinent part:

> The second way in which a person may be guilty of a crime is as an accomplice to another person who actually commits the crime. A person may be found guilty of a crime as an accomplice if the State proves beyond a reasonable doubt that, having the intent of promoting or facilitating the commission of a crime, the person solicitates – I'm sorry, solicits or aids or agrees to aid or

attempts to aid another person who commits a crime in the planning or commission of the crime.

As previously stated, a person can be guilty of an offense as either a principal or an accomplice. A jury need not be unanimous on whether a person committed an offense charged as a principal or as an accomplice. They – they own – they must only be unanimous that the State has proven each and every element of the offense charged beyond a reasonable doubt, regardless of whether the person acted as either a principal or an accomplice. An accomplice may be convicted on proof of a – of the commission of the crime, and of the complicity therein through – though the person claimed to have committed – though the person claimed to have committed the crime, the principal, has not been prosecuted, convicted, or – or has been convicted of a different crime or degree of crime, or is not subject to criminal prosecution due to their age, or has some immunity to prosecution or conviction, or has been acquitted.

As you consider whether the State has proven any of the charges that has [sic] been brought against the defendant, you may consider evidence of his behavior before or after the crime on the question of responsibility for the crime charged. However, a person is not an accomplice to a crime solely because he or she learns of a crime after it occurred and does not report what he or she knows, nor does a person become an accomplice simply by being present at the scene of a crime. Furthermore, mere presence at the scene of the crime without more does not prove that a person is an accomplice to the crime. However, once a person's presence at a crime scene is proven, he may be guilty of the crime as an accomplice if he intentionally engaged in any conduct, however slight, or promotes or facilitates the commission of the conduct.

> With regard to accomplice, the definition of intentionally means a person acts intentionally with respect to the result of his conduct when it is his conscious object to cause such a result. A person acts intentionally with respect to attendant circumstances when he is aware that they exist.

(A59-A61; 3Tr. 29-31). The court provided written copies of parts of its jury instructions, which appear to have been with the jury during their deliberations. (3Tr. 27).

The jury returned general verdicts, as recited above. (4Tr. 30).

III. Sentencing

As the basis for its basic sentence, the court stated it would utilize the "conduct that went on for an ongoing period of time from April 4th, 2023 to August 23rd, 2023." (A22; STr. 22). This included the April 25 transaction, which was the basis for Count II. (A22; STr. 22). The court stated that such also counted "the April 4th, 2023 sale," even though the jury could not reach a verdict on that count (Count I). (A22-A23; STr. 22-23). It did *not* include the alleged July 5, 2023 transaction, of which the jury acquitted defendant. (A23; STr. 23). The basic-sentence conduct, however, also encompassed a five-month "period of time," including some unstated conduct "prior to April 4th of 2023." (A23; STr. 23). Defendant's "was significant conduct during that period of time," the court found. (A23; STr. 23).

In the court's view, this conduct warranted a basic sentence "in the upper end of the middle [sic] quadrant," for a range of between 18 and 21 years' prison. (A25; STr. 25). After weighing the mitigating and aggravating factors, the court determined that the latter were more significant than the

former, increasing defendant's sentence to the full 30-year maximum, none of which it suspended. (A25-A31; STr. 25-31). Observing that the convictions on Counts II and V perhaps stemmed from the same facts, and certainly from the same law, the court merged the two Class-A convictions, for sentencing purposes. (A22; STr. 22).

ISSUE PRESENTED FOR REVIEW

I. Do the court's accomplice-liability instructions constitute reversible error?

II. In setting a basic sentence, did the court improperly consider that defendant engaged in multiple instances of trafficking?

ARGUMENT

First Assignment of Error

I. The trial court's accomplice-liability instructions constitute reversible error.

A. Preservation and standard of review

From the existing record, it is unclear on what basis defense counsel objected to the accomplice-liability instruction. Following this Court's precedent, this fact might muddle the Court's choice of standard of review. If counsel's objection was the result of the concerns defendant presses below, this Court might vacate defendant's convictions if the erroneous instruction caused prejudice. *State v. Anderson*, 2016 ME 183, ¶ 18, 152 A.3d 623. On the other hand, if defendant objected on grounds other than those reviewed here, this Court's review would be for obvious error. *State v. Perry*, 2006 ME 76, ¶¶ 13-14, 899 A.2d 806.

Regardless of the ambiguity, defendant contends that the issue is preserved because of the important distinction between an *argument* and an *issue*. No less than the Supreme Court recognizes this distinction: Once a party has raised a "claim" below, on appeal, he "possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. Escondido*, 503 U.S. 519, 535 (1992). Parties, in other words, shall be deemed to have preserved objections – *i.e.*, "claims" or "issues" – even if different arguments than those made to the trial court in support of those objections are developed on appeal. *See United States v. Hamm*, 952 F.3d 728, 742-43 (6th

Cir. 2020) (even though the defendants' argument on appeal is "somewhat different" than that which they made below, because "they have been consistent about their objection" to a jury instruction, their claim on appeal is deemed to be preserved).

B. Analysis

There are constituent errors that undermined the accomplice-liability instruction given in our case. Defendant discusses them under two sub-headings, (1) those understating the State's burden vis-a-vis the *mens rea* and *actus rea* elements of accomplice liability, and (2) its misstatement of one particular manner in which the State might prove defendant was an accomplice.

1. An error in the *Maine Jury Instruction Manual* was replicated here – then repeated again in a similar manner.

Washington state has an accomplice-liability statute nearly identical to ours.[4] In Washington, the prosecution must prove that the would-be accomplice intends[5] to commit the principal crime – *i.e.*, "commit ***it***." Wash.

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[4] In relevant part, Wash. RCW 9A.08.020 provides for accomplice liability when, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she … [s]olicits, commands, encourages, or requests such other person to commit it, … or [a]ids or agrees to aid such other person in planning or committing it."

Both Maine's and Washington's are based on the same provision of the Model Penal Code – § 2.06(3)(a). *State v. Roberts*, 14 P.3d 713, 735 (Wash. 2000) ("identical to" comment); *State v. Goodall*, 407 A.2d 268, 278 (Me. 1979) ("based largely on").

[5] In fact, the Washington statute is less rigorous than ours. Whereas Wash. RCW 9A.09.020 requires proof of only a *knowing* state of mind, § 57(3)(A) requires proof of *intent*. *See* Alexander, *Maine Jury Instruction*

RCW 9A.09.020(3)(a) (emphasis added). Likewise, our statute requires an intent to commit the principal crime – *i.e.*, "committing ***the*** crime." 17-A M.R.S. § 57(3)(A) (emphasis added). Unlike those in Washington state, our courts, however, don't actually hold the State to that burden.

Whereas courts in Washington have recognized that it is error for a court to instruct that the prosecutor must merely prove intent to commit "***a*** crime," *e.g.*, *State v. Carter*, 109 P.3d 823, 825-26 (Wash. 2005), in Maine, our leading instructional manual erroneously and explicitly states that the intent-element is satisfied upon proof of "intent of promoting or facilitating the commission of ***a*** crime." Alexander, *Maine Jury Instruction Manual* § 6-32 (2024 ed.). Only Washington courts have so far recognized that, given this plain language (and the reasoning of the Model Penal Code), mistakes like that of the trial court and the *Manual* impose liability on defendants where none is provided for by law. *See Roberts*, 14 P.3d at 736.

Washington courts have carefully enforced this statutory requirement. "[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." *State v. Cronin*, 14 P.3d 752, 758 (Wash. 2000) (emphasis in original). "It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any* crime." *State v. Brown*,

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Manual § 6-31 (2024 ed.) ("For criminal liability to attach on this theory, the highest mental state, intentional action, must be proven."). Logically, then Maine courts must have even greater urgency than do those in Washington to scrupulously enforce adherence to the accomplice statute.

58 P.3d 889, 894 (Wash. 2002) (emphasis in original). This principle continues to lead to reversals, including one just weeks ago. *State v. Zghair*, 2025 Wash. LEXIS 207, * 38 (Wash. Apr. 17, 2025) ("[I]t is not sufficient for an accomplice to know the principal will commit *any* crime; the accomplice must have acted with knowledge they were promoting *the specific* crime for which they are eventually charged.") (emphasis added).

Reciting the language of the *Manual*, the trial court here required proof of only intent to commit "***a*** crime." (A59, A74; 3Tr. 29) (both oral and written instructions). With some irony, given its source, this violates the principle that "Any instruction on accomplice liability must avoid any suggestion that a conviction could be obtained by any lesser mental state [than intentionality]." *Manual*, *supra*, § 6-31; *see Perry*, 2006 ME 76, ¶¶ 23-25 (obvious error to omit intent element). Respectfully, it is past time for Maine courts to correct this misstatement of law.

If this Court does not do so, moreover, it will likely see the error spread to other contexts. Our case serves as an example: The instruction given in our case not only repeated the error in the *Manual*, it doubled-down on that error as to the conduct-element:

> The second way in which a person may be guilty of a crime is as an accomplice to another person who actually commits the crime. A person may be found guilty of a crime as an accomplice if the State proves beyond a reasonable doubt that, having the intent of promoting or facilitating the commission of ***a*** crime, the person solicitates – I'm sorry, solicits or aids or agrees to aid or attempts to aid another person who commits ***a*** crime in the planning or commission of the crime.

(A59-60, A74; 3Tr. 29-30) (both oral and written instructions). Whereas § 57(3)(A) restricts accomplice liability to only those crimes committed by a principal, the trial court's formulation has no limitation whatsoever. It permits accomplice liability to inhere for *any* crime – even for uncharged crimes. If an "accomplice" helps "another person who commits ***a*** crime," that is enough to satisfy the *actus reus* element, per the erroneous instruction.

The risks are not theoretical. Surely unintentionally but nonetheless unfortunately, the State gave jurors an odd definition of accomplice liability:

> And somebody can be found guilty, the State expects, of a crime if they're a principal or accomplice of it. That is, if they aided the defendant and helped the crime and but for their conduct, the crime couldn't have happened.

(1Tr. 41). Echoing the errors made by the court, the State's formulation requires zero proof of intent; it calls for strict liability.

Living in a drug-den, even one operated by one's girlfriend and friends, is different than participating in their trafficking, let alone intentionally so. The defense was predicated on the notion that, yes, many at 195 Hatch Road – Alivia, Nikki and Adam – trafficked in drugs on several different occasions. That is, they committed "***a*** crime" of which defendant was quite likely aware. Likewise, the court's instruction that the principal must merely commit "***a*** crime" – the defense was premised on the notion that those actors committed numerous crimes in which he was not involved nor even present.

During each of the controlled-buys, *others* – *i.e.*, Alivia or Adam and Nikki – negotiated what may have been *their own* drug-deals with Dustin. Indisputably, on other occasions, Alivia and Adam conducted *their own* deals with other than Dustin: Alivia negotiated a cocaine transaction with someone going by the moniker "Mumma Lisa." The State acknowledged, "We're not saying Alivia didn't deal drugs at all." (3Tr. 61). It "agree[d] that there is some discussion of Alivia and Lisa Lee exchanging drugs." (3Tr. 79). It noted defendant's contention that Adam "had his own supply" of methamphetamine and that he was "selling it to Dustin." (3Tr. 79). "Rick" and "Ron" were supplying drugs. (1Tr. 157). Others plainly unlawfully possessed drugs. (*See e.g.*, in the background of SX 18, when Dustin noted that others were "partaking in some sort of drug use."). Each of these constitutes "***a*** crime." Literally, per the court's instruction, the State satisfied the *mens rea* element of the accomplice statute if the jury determined that defendant intended to commit any of these crimes.

Per the court's erroneous instructions, the intent to promote or facilitate those crimes was untethered to the *actus reus* element the State was also obligated to prove. Notably, the jury might have felt that defendant intended to promote the charged incident on April 25 – *i.e.*, "***a*** crime" – yet also found that he did nothing – no *actus reus* – aiding or soliciting that crime. No matter: So long as they found he aided or solicited some other crime – "***a*** crime" – it could find defendant guilty of the April 25 crime, Count II. The court's instructions permitted jurors to pick and choose from different allegations – a *mens rea* from one, an *actus reus* from another – to

cobble together a conviction. In a case in which the jury plainly struggled to believe the State's evidence beyond a reasonable doubt, the patchwork verdicts they were authorized to reach presented an easy compromise.

The importance of accurate accomplice-liability instructions should not be understated. The court overruled defendant's motion for judgment of acquittal based on an accomplice theory. Importantly, both Class A convictions – for Counts II and V – may have been based on the same incident, as the court recognized. (A22; STr. 22: "Certainly, the jury may have looked at this and determined that because they found him guilty of the conduct on April 25th, 2023, they were required to find him guilty of the conduct between April 4th, 2023 and 8th – August 23rd, 2023 because obviously April 25th falls within that range."). Like a house of cards, both trafficking convictions likely flowed from an erroneous conception of the law.

Still, there is another problem with the accomplice-liability instruction.

2. The court materially misspoke about one way the State could prove accomplice liability.

Defendant, as the evidence clearly establishes, lived at 195 Hatch Road, even though he wasn't there for any of the controlled-buys. Apparently for this reason, the court decided to give an instruction about how proof of "presence" could lead to a conviction. However, it was materially defective:

> [O]nce a person's presence at a crime scene is proven, he may be guilty of the crime as an accomplice if he intentionally **engaged in any conduct, however slight, or promotes or facilitates the commission of the conduct**.

(A61; 3Tr. 31) (emphasis added).

Respectfully, what does it mean to have "engaged in any conduct, however slight"? "[A]ny conduct, however slight" make no reference at all to *criminal* conduct. A proper statement of this principle would have required such a nexus to criminal conduct: "engages in any conduct, however slight, that promotes or facilitates the commission of the crime." *Manual*, *supra*, §§ 6-31, 6-32. Defendant submits that this is particularly prejudicial in light of the error, discussed above, which already watered down the State's obligation to prove conduct helping the crime.

The next clause of the court's instruction – "or facilitates the commission of the conduct" – fares no better. What is "the conduct"? Seemingly, it refers back to the prior mention of "any conduct," which, as defendant has just discussed, makes no reference to criminal conduct.

At best, this portion of the instructions could have only confused jurors. At worst, it would have reiterated the already misstated conduct-element of § 57(3)(A).

Defendant acknowledges that the court's written instructions, which presumably remained with jurors as they deliberated, do not contain this inaccurate statement of law. (*See* A75). However, defendant contends that judge's oral words, spoken in court, are more impactful than written instructions which jurors may not have even read. Just as the oral pronouncement of a sentence trumps a written such pronouncement, *see State v. Bradley*, 414 A.2d 1236, 1241 (Me. 1980), so should those instructions spoken in the solemnity of a courtroom be presumed to be more powerful than those which jurors may not have ever viewed.

Second Assignment of Error

II. In setting a basic sentence, the court improperly considered that defendant engaged in multiple instances of trafficking.

A. Preservation and standard of review

When assessing a sentence appeal contending that a court's basic-sentence reasoning is improper, this Court reviews for "misapplication of principle." *State v. Downs*, 2007 ME 41, ¶ 7, 916 A.2d 210.

B. Analysis

The jury made no finding that defendant committed more than a singular act of drug-trafficking. Rather, the incident on April 25, 2023, as the court noted, might well have been the basis for the guilty-verdicts on both Counts II *and* Count V. (A22 STr. 22) "(Certainly, the jury may have looked at this and determined that because they found him guilty of the conduct on April 25th, 2023, they were required to find him guilty of the conduct between April 4th, 2023 and 8th – August 23rd, 2023 because obviously April 25th falls within that range."). Even though, on Count V, the State charged a "scheme or course of conduct,"[6] the jury was not instructed about

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[6] The course-of-conduct language was treated as surplusage, the court declining to instruct jurors in it because "it really serves no purpose." (*See* 2Tr. 206-11). Indeed, because defendant was charged with aggravated trafficking based on priors, *see* 17-A M.R.S. § 1105-A(1)(B)(1), the course-of-conduct provision, 17-A M.R.S. § 1106-A(1) the State additionally alleged served only to expand the body of evidence the State could present in circumvention of M.R. Evid. 404(b) and 403. (*See* 1Tr. 16-18).

Nonetheless, in defendant's *Supplemental Application for Leave to Appeal Sentence*, undersigned counsel erroneously asserted that the counts of conviction "were not charged under the trafficking-aggregation statute, 17-A M.R.S. § 1106-A(1)(A)." Counsel apologizes for this oversight, which,

that element. To the contrary, they were instructed that Count V could be proven by a lone incident, so long as they all agreed about that incident (plus priors, which were stipulated to). (A64-A65; 1Tr22; 3Tr. 34-35).

Yet, the judge clearly counted what it found to be the multiplicity of defendant's trafficking. It counted the "ongoing period of time from April 4th, 2023 to August 23, 2023"; the "conduct during that period of time"; how the "conduct went on for five months"; and that it continued "for a significant period of time." (A22-A25; STr. 22-25). Defendant contends that there are two problems with its doing so.

First and most fundamentally, controlling precedent establishes, "The fact that an offender has committed multiple offenses is to be considered in the second step." *Downs*, 2007 ME 41, ¶ 12. It is error for a sentencing court to consider "the number of crimes committed" at Step One; such may be counted at Step Two – as an aggravating factor. *Ibid*. While multiplicity "may be relevant" at Step One when such "bears on the degree of planning undertaken to commit the crime," *ibid*., that is not the case here. Rather, the court's findings indicate that its focus on defendant's multiplicity was based on its belief that defendant engaged in multiple transactions – *i.e.*, multiple instances of trafficking. The court therefore violated *Downs* and the principles it was meant to serve.

Second, the State had the opportunity to obtain verdicts or jury-findings establishing beyond a reasonable doubt that defendant engaged in

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defendant contends is anyway inconsequential, given that the jury never considered whether defendant engaged in a course-of-conduct.

multiple offenses. It tried but failed to prove transactions on April 4 and July 5. It concurred with the judge's decision not to instruct jurors to make any findings about a scheme or course of conduct, even though that's the theory on which it indicted defendant. (2Tr. 207-08). It might have requested special verdicts or findings but did not. It should not benefit from this combination of failures and tactical decisions. Yet, that is what happened: The Court was permitted to make its own findings about multiplicity at a preponderance standard after removing that very question from jurors' province (and at the beyond-a-reasonable-doubt standard) – under the notion that a jury-finding on the score was "surplusage." Regardless of the legality of such circumstances, it is improper to so erode the jury-trial right to a defendant's detriment.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions, and remand for proceedings not inconsistent with its mandate. Alternatively, it should remand for sentencing.

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CERTIFICATE OF FILING & SERVICE

I hereby certify that I caused a PDF-copy of this Brief to be sent to lawcourt.clerk@courts.maine.gov and jeffrey.baroody@maine.gov .

/s/ Rory A. McNamara