

**STATE OF MAINE
WALDO, ss.**

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: Wal-25-77**

**ALLEN JAMES,
Appellant**

v.

**STATE OF MAINE,
Appellee**

ON APPEAL FROM THE WALDO COUNTY UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On January 25, 2024 the Waldo County Grand Jury returned a superseding indictment charging Allen James (“James”) with four counts of Aggravated Trafficking of Scheduled Drugs in violation of 17-A M.R.S. §1105-A(1)(B)(1) (2022), one count of Violation of Conditions of Release in violation of 15 M.R.S. §1092(1)(A) (2014), and one count of Conspiracy to Commit Aggravated Trafficking in Scheduled Drugs in violation of 17-A M.R.S. §151(1)(B) (2003). (A. 7, 44-46.) James was arraigned and pled not guilty on November 28, 2023. (A. 7.)

Jury selection occurred on October 10, 2024. (A. 10.) A jury trial began on October 30, 2024, and ended on November 4, 2024. (A. 10-11.) James pled guilty to count 3 on October 30, 2024. (T. Tr. 100 (October 30, 2024).) The court denied James’ Motion for Judgment of Acquittal on October 31, 2024. (A. 11.) On November 4, 2024, the jury found James guilty of counts 2 and 5. (A. 12.) The jury found James not guilty of count 4 and the court declared the jury deadlocked on counts 1 and 6. (A. 11.)

On February 14, 2025, the court merged count 2 with count 5 for sentencing and sentenced James to a \$400 fine and 30 years imprisonment, and a concurrent 6 months in jail on count 3. (A. 12-13, S. Tr. 22, 31 (Feb. 14,

2025).) The State dismissed counts 1 and 6 the same day. (A. 14.) James filed a timely notice of appeal on February 21, 2025. (Id.)

STATEMENT OF FACTS

James was the only source of illegal drugs sold at a residence on the Hatch Road in Jackson, and the money generated from the sale of those drugs went to him. (T. Tr. 145, 152, 164, (Oct. 31, 2024).)

At some point prior to April 4, 2023, Maine Drug Enforcement Agency (MDEA) Agent Walter Corey registered Dustin Hubbard as a Confidential Informant (CI). (T. Tr. 29 (Oct. 31, 2024).) Hubbard, a drug-addicted used car dealer who had been charged by police with drug trafficking in November 2022, decided to cooperate with MDEA to help himself out. (T. Tr. 47, 48, 51 (Oct. 30, 2024).) Hubbard was introduced to James by James' girlfriend Alivia Gordon's mother at Hubbard's dealership, and Hubbard learned that James could be a source of drugs for him. (Id. 52, 58.) James used the nickname "Bones." (Id. 53, T. Tr. 29, 138 (Oct. 31, 2024).)

On April 4, 2023, Hubbard and Corey met to attempt a controlled purchase of illegal drugs from James. (T. Tr. 29 (Oct. 31, 2024), T. Tr. 59 (Oct. 30, 2024).) Hubbard exchanged text messages with James and learned that James had illegal drugs available. (State's Ex. 1, T. Tr. 66 (Oct. 30, 2024).) Hubbard went to the Hatch Road house with the intent to purchase illegal

drugs, but during his first trip that day he was unable to purchase illegal drugs. (Id. 77.) While at the house during that first trip, Hubbard was present when Gordon called James. (Id. 79.) Over the phone, James acknowledged that Hubbard was there to buy drugs, but they did not have them at the time. (State's Ex. 6 at 7:21, State's Ex. 6a, p.2.) When Hubbard asked Adam Gray, another resident at the house, if there was another potential source of illegal drugs, Gray was afraid to call the other potential dealer because he didn't "want B to be mad at me." (Id. 80, State's Ex. 6 at 8:50, State's Ex. 6a, p. 3.)

After that first attempt, Hubbard and Corey met again the same day and called James on the phone. (Id. 80-81.) During that call, Hubbard asked if James had a "ball of hard" (slang for 3.5 grams of crack, or cocaine base), and James told Hubbard to "go get it" and "go see my girl." (Id. 83-84, State's Ex. 2 at 0:09-0:40, State's Ex. 2a.)

After that phone call, an undercover MDEA agent drove Hubbard back to the residence on Hatch Road. (Id. 169.) At the house Hubbard met Gordon, who gestured to him the amount of money she wanted for the drugs. (Id. 92-93.) Hubbard gave Gordon \$200 and Gordon gave him illegal drugs that he believed was crack cocaine. The substance was eventually tested at the Health and Environmental Testing Laboratory (HETL) and found to be 2.9760 grams of cocaine base. (Id. 95, T. Tr. 19 (Oct. 31, 2024), State's Ex. 8, 101.)

Hubbard met with Agent Corey to attempt a second controlled purchase of illegal drugs on April 25, 2024. (T. Tr. 102 (Oct. 30, 2024), T. Tr. 51 (Oct. 31, 2024).) Hubbard exchanged text messages with James prior to the controlled buy and, based on the responses Hubbard received, he believed that James had crack cocaine and methamphetamine available. (T. Tr. 105 (Oct. 30, 2024), State's Ex. 10.) Hubbard again wore an audio recording device and was driven to Hatch Road by an undercover agent. (Id. 108, 187-188.) At the house, Hubbard met with Gordon and exchanged \$200 for what Hubbard believed was methamphetamine, which eventually tested positive as 13.1689 grams of methamphetamine hydrochloride. (Id. 116-117, T. Tr. 21 (Oct. 31, 2024), State's Ex. 13, 102.)

On July 5, 2024, Agent Corey and Hubbard met to attempt a third controlled purchase of illegal drugs from James at the Hatch Road house. (Id. at 58.) Hubbard exchanged text messages with James, messages that led Hubbard to believe illegal drugs were available at the house. (Id. 58, T. Tr. 124 (Oct. 30, 2024), State's Ex. 16.) Hubbard, equipped with an audio and video recording device, was driven to the same residence by an undercover agent. (T. Tr. 125 (Oct. 20, 2025).) There, Hubbard provided cash to Adam Gray and received drugs in return. (Id. 129.) Those drugs tested positive as

12.9977 grams of methamphetamine hydrochloride. (T. Tr. 23, Oct. 31, 2024, State's Ex. 19, 103.)

Alivia Gordon, James's girlfriend, testified on behalf of the State. (Id. 131, 135.) She testified that she lived at the Hatch Road house with James, Adam Gray, and Nikki Moore. (Id. 138.) She obtained illegal drugs from James but did not know James himself to use illegal drugs. (Id. 140-141.) Gordon testified that she became involved in the selling or transacting of illegal drugs when James started leaving the residence frequently and needed someone to be responsible for the drugs and money in his absence. (Id. 143.) Gordon said James was the only source of the drugs coming into the house. (Id. 145, 152, 164.) Gordon's role, when James "wasn't there...would be the person to hand the drugs to Nikki and Adam so they could sell them." (Id. 144.) Gordon also admitted selling directly to buyers. (Id. 145.) Gordon testified that the money she received for selling drugs went "to Bones." (Id.) Gordon acknowledged that Agent Corey had seized her cellphone and that she talked with James about drug dealing on the phone and through Facebook messages. (Id. 72, 153, 154-163.)

Agent Corey obtained a search warrant for Gordon's phone. (Id. 75.) The State admitted numerous text messages between Gordon and James to prove James' total control over the drug trafficking operation. In one, Gordon

sought instruction from James about resupplying a person named Nikki. (State's Ex. 24.) Another demonstrated James' control over his drug inventory when Gordon was forced to defend herself from his allegations she was using, not selling drugs, when she texted him "...I'm not touching ur shit I'm recording everything I'm doing so you can see." (State's Ex. 28.) James issued an explicit order to Alivia not to tamper with his drugs, texting her "don't give or touch any of my work." (State's Ex. 41.) Further, Gordon sent James messages seeking advice on how to serve customers. (State's Ex. 54.) Gordon reminded James that she made money for him, texting him "every time I see you I have stacks for you." (State's Ex. 65.) During an argument between the two, James asked Gordon for an accounting of money and drug inventory, texting her "where my bread and work count that what we should be talking about...." (State's Ex 68.) James explicitly instructed Gordon to give icy (slang for methamphetamine) to people named N & A.¹ (State's Ex. 75.) James suggested that Gordon needed to stop using drugs and start working more effectively, telling her to "handle things not sittin g [sic] around stone" (stoned, slang for being under the influence of marijuana). (State's Ex. 84.) In a different message, James told Gordon to transfer money through CashApp, a

¹ It is reasonable inference based on the evidence that N&A are Nikki and Adam, the other two occupants of the home who were also selling drugs on behalf of James's operation.

money transfer app, texting her “I need u to put it all o n cash app so I can buy more shit.” (State’s Ex. 92.) Further corroborating evidence of Gordon’s testimony came from notes on her phone that detailed drug transactions and corroborated her assertion that she took measures to account for the drugs James supplied her. (State’s Exs. 21a-21i.) The record contains no shortage of additional evidence establishing that Gordon updated James about debts owed by customers or that she sought advice from James on the quantities of illegal drugs that she should sell customers. (State’s Exs. 22, 24, 27, 31-33, 36, 38, 39, 42, 44, 46, 50, 52, 54, 58-60, 63, 65-67, 69, 70, 72-76, 78-85, 87, 92, 93.)

Agent Corey also obtained a search warrant to search James’s Facebook account and received messages from Facebook responsive to his warrant. (T. Tr. 81 (Oct. 31, 2024).) These messages established that James was in firm control of the drug trafficking operation and was the person to whom people approached to obtain illegal drugs, complain about the quality of drugs previously obtained from him, and to establish new drug trafficking opportunities. (State’s Exs. 110-145.)

The court, over James’s objection, determined that accomplice liability had been generated by the evidence. (T. Tr. 6-7 (Oct. 30, 2024), T. Tr. 206 (Oct. 31, 2024).) The court instructed the jury on accomplice liability:

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 their 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 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 of the existence of those circumstances or believes that they exist. (T. Tr. 29-31 (Nov. 1, 2024), A. 74-75.)

The court then immediately instructed the jury on the elements of unlawful trafficking of scheduled drugs. (Id. 31-32.) The court instructed the jurors that statements made by the attorneys during openings and closings were not evidence, and at the end of the instructions, the court informed the jurors on how to request a re-reading of jury instructions in the event they could not agree on the meaning of the instructions. (Id. 21-22, 84-85.)

Following the jury's verdicts, the court sentenced James on February 14, 2025, having previously reviewed the sentencing memoranda of the parties and a presentence report from probation. (A. 12-13, S. Tr. 6 (Feb. 14, 2025).) The court, in setting its basic sentence, considered James' conduct on April 4, April 24, and over the range of time alleged by the State. (S. Tr. 22-25 (Feb. 14, 2025).) The court explicitly did not consider any conduct from July 5. (Id. 23.) The court set the basic sentence at 18 to 21 years. (Id. 25.)

STATEMENT OF THE ISSUES

- I. The court's accomplice liability instruction was accurate, and when taken in the overall context of the trial, properly instructed the jury.**
- II. The trial court committed no error in setting James' basic sentence.**

SUMMARY OF THE ARGUMENT

The trial court accurately instructed the jury that, if it chose to find accomplice liability, it must find that James was an accomplice of the person who committed the drug trafficking crimes that were the subject of the trial. James was the primary subject of the allegations, the trial was squarely focused on his conduct and did not allege that others committed crimes outside the trafficking organization run by James, and the State admitted focused and overwhelming evidence that James intended to promote or facilitate the crimes charged by superseding indictment. In the context of the evidence admitted at trial, the complete jury instructions, and the State's theory of the case that James was the leader of the drug trafficking organization, there was no error in the court's accomplice liability instruction.

At sentencing, the court properly applied the first step of the *Hewey* analysis when it considered the particular nature and seriousness of the drug trafficking offense alleged in count five of the superseding indictment. The

court's articulated consideration of the many people to which drugs were sold, the variety of the drugs sold, the dangerousness of the drugs sold to the community, that James took advantage of others to shield his conduct, and that James took responsibility for complaints about the quality of the drugs he sold all demonstrates that the court properly set the basic sentence and did not simply rely upon the number of crimes James committed.

ARGUMENT

I. The court's accomplice liability instruction was accurate, and when taken in the overall context of the trial, properly instructed the jury.²

The court's accomplice liability instruction accurately and adequately instructed the jury that, if it chose to use accomplice liability in finding James guilty, the jury must find that James was an accomplice of the person who committed the drug trafficking crimes that were the subject of the trial.

"If a single crime can be committed by multiple means, the jury need not be unanimous in finding which of those means supports its guilty verdict.

² James asserts that he was prejudiced by his claimed deficiency in the application of the accomplice liability law when the court denied his motion for judgment of acquittal. The court's ruling on the motion for judgment of acquittal clearly referred to the drug trafficking crimes alleged to have been committed by Gordon and Gray, citing "transactions on April 4th, April 25th, and July 5th" and that James "was certainly an actor that solicited others to traffick in Schedule W drugs on his behalf." (T. Tr. 204 (Oct. 31, 2024).) It is unambiguously clear that the court focused on only the drug trafficking crimes charged by the State, and not theoretical or uncharged other crimes, in its ruling.

Accomplice and principal liability are alternative means for the commission of a single crime.” *State v. Nguyen*, 2010 ME 14, ¶15, 989 A.2d 712. An “accomplice is guilty of the crime as if he acted as a principal, and a guilty verdict rendered on either theory is . . . indistinguishable and each is independently sufficient to support a conviction.” *Id.*

A person may be found guilty of committing a crime as an accomplice if, “with the intent of promoting or facilitating the commission of the crime, the person solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime.” 17-A M.R.S. § 57(3)(A) (2007). Further, such person can be an accomplice to “any crime the commission of which was a reasonably foreseeable consequence of the person's conduct.” *Id.*

“When a defendant raises on appeal a preserved challenge to jury instructions, 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. Nightingale*, 2023 ME 71, ¶21, 304 A.3d 264 (internal quotations omitted). Further, this court “review[s] the total effect created by all the instructions and the potential for juror misunderstanding.” *State v. Perkins*, 2019 ME 6, ¶14, 199 A.3d 1174 (internal quotations omitted). This court has declined to presume prejudice

in past cases where the appellee has not pointed to any prejudice associated with the accomplice liability instruction. *Nightingale*, 2023 ME 71, ¶24. This court only vacates judgments of conviction if the erroneous instructions resulted in prejudice. *State v. Anderson*, 2016 ME 183, ¶18, 152 A.3d 623 (internal quotations omitted).

a. The trial court’s limited reference to “a” crime, instead of “the” crime, did not create juror misunderstanding and was not prejudicial in the context of this case.

The court’s accomplice liability jury instruction was clear in that it accurately instructed the jury that, to invoke accomplice liability, they must have found that James was an accomplice of the person who committed the charged crimes of drug trafficking. When the challenged part of the accomplice liability instruction is reviewed within the context of the complete jury instructions, and not parsed for a single word in a single phrase, and when it is reviewed in consideration of the totality of the evidence admitted at trial and the State’s theory of the case, the error James asserts caused no prejudice and the instruction was accurate.

The State did not explicitly or solely rely upon an accomplice liability theory in this trial.³ To the contrary, James was the principal in the drug

³ The State hardly referred to accomplice liability in its addresses to the jurors, merely informing jurors of its availability as a theory once during the State’s opening statement and only very briefly

trafficking operation and the State treated him as such. The State's theory of the case, from opening statement through final argument, was that James was the undisputed chief executive of the operation – the person who supplied the drugs, received the money for drug sales, commanded his subordinates, and expected them to follow his instructions. The evidence proved James was in control, and the State argued that theory to the jury. The State focused on the trafficking counts alleged in the superseding indictment; no other type of criminal conduct was alleged, or even mentioned, at trial. With principal liability being the focus of the State's case, accomplice liability was at best an alternative theory.

James contends that the court's use of the phrase "a crime" once, at the beginning of the accomplice liability instruction, constitutes reversible error. (Blue Br. 21-22.) James seems to agree that if the court used the phrase "the crime" the instruction would have been correct. (Id.) The court did instruct jurors that they needed to find James guilty of being an accomplice to *the* crime immediately after referring to "a" crime, telling them:

An accomplice may be convicted on proof of a -- of **the commission of the crime**, and of their 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

referring to the court's instruction during closing argument. (T. Tr. 41 (Oct. 30, 2024), T. Tr. 38 (Nov. 1, 2024).)

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.
(T. Tr. 30 (Nov. 1, 2024), emphasis added.)

Because the evidence in the case was solely focused on the drug trafficking charges in the superseding indictment, because there was a complete absence of ancillary or uncharged crimes introduced during the trial, and because the court clearly referred to “the” crime in its instructions, there is no possible way the jury could have parsed the court’s instruction of “a” crime to have believed that it was finding James guilty for any crime other than the trafficking charges alleged by the State. In the context of this case the jury instruction was proper, and James fails to articulate any actual prejudice associated with the court’s instruction on accomplice liability.

James bases his argument on Washington state’s treatment of a similar accomplice liability law, where that state has acknowledged that “the” should more properly be substituted for “a” in a similar accomplice liability law. WA ST 9A.08.020(3) (2011), *State v. Carter*, 154 Wash.2d 71 (2005). Washington courts, however, do not issue blanket reversals if “a” is used instead of “the.”

In *State v. Carter*, a person was convicted of felony murder after planning and setting up a crime but not participating in the crime. *State v. Carter*, 154 Wash.2d 71, 73 (2005). Although the parties agreed and the court

acknowledged that referring to “a” crime was error, the court held that the error did not require a new trial because “the giving of an erroneous accomplice liability instruction may be found to be harmless even where it is clearly evident that the defendant was convicted as an accomplice based only on his or her knowledge of the crime charged.” *Id.* 76, 82. In the *Carter* case, the prosecution “focused exclusively” on the crimes charged and “evidence of other crimes was not emphasized to the jury. . . In sum, no argument was presented that accomplice liability could be based on Carter’s knowledge of any crime other than the two predicate felonies described in the charging document.” *Id.* 82-83.

Another Washington case cited by James, *State v. Zghair*, involved a conviction ultimately affirmed by the Washington Supreme Court after a lower appeals court overturned the jury verdict on this issue. *State v. Zghair*, 567 P.3d 1 (2025). *Zghair* involved a murder allegation where the state presented significant circumstantial evidence of Zghair’s involvement in the killing, as well as evidence that a second person could have been involved. *Id.* 3-5. Zghair’s conviction, the challenge of which was framed in a sufficiency of the evidence argument, was upheld because the state had proved that the defendant had “actual knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged,” specifically that

the “individual must have acted with knowledge that they were promoting or facilitating *the* crime for which they were eventually charged, not merely the knowledge that the principal intended to commit *a* crime.” *Id.* 6, 10 (emphasis in original).

Washington courts acknowledge the fact-specific analysis of the “the” versus “a” substitution and only overturn jury verdicts when evidence of uncharged conduct is admitted and when prosecutors refer to that evidence in their arguments to the jury. *State v. Jackson*, (2016) 192 Wash.App. 1072 (Ct. of App. of Washington, Div. 3). If the defendant acted with knowledge that he was promoting the crime for which that defendant was charged, the “the” vs. “a” substitution is not relevant. *State v. Trujillo* (2002) 112 Wash.App. 390, 49 P.3d 935, as amended, review denied 149 Wash.2d 1002, 70 P.3d 964.

Here, the State admitted focused and overwhelming evidence that James intended to promote or facilitate only the drug trafficking crimes charged in the superseding indictment – *the* crimes charged, not just any theoretical crime. The State further proved that James knew he was promoting the crime of drug trafficking. Therefore, when this court reviews the accomplice liability instruction in the overall context of the evidence admitted at trial, the complete jury instructions, and the State’s theory of the case that James was

the kingpin of the trafficking operation, it should find there was no error in the court's use of the word "a" instead of "the" and uphold the jury verdict.

b. The court's instruction that an accomplice can be guilty if he engages in any conduct, however slight, was a proper instruction that did not create prejudice.

This court reviews unpreserved objections to jury instructions for obvious error. *State v. Asante*, 2023 ME 24, ¶18, 294 A.3d 131. Obvious error is "a seriously prejudicial error tending to produce manifest injustice." *Id.* ¶19 (internal quotations omitted). Although James objected to the court's general inclusion of an accomplice liability instruction, James did not object to the court's delivery of the instruction to the jury that he now raises on appeal. Because James failed to object to the delivery of the instruction, his objection is not properly preserved. Therefore, this Court should review this claim for obvious error. When this Court reviews the jury instructions in context, considering the overall instructions and not just the one misread phrase standing alone, it must find that there is no manifest injustice.

James argues that the trial court's reference to any conduct, however slight, is inappropriate because it does not specifically refer to criminal conduct. (Blue Br. 26). This argument ignores the context of the entire trial, the charges, the evidence, and the jury instructions. Within the context of the

jury instructions, the court's reference to "the commission of the conduct" is clearly about criminal behavior. The full passage is as follows:

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.
(T. Tr. 30-31 (Nov. 1, 2024.)

When considered in the context of the greater accomplice liability instruction, and within the complete jury instructions, it is abundantly clear that "the commission of the conduct" refers to the criminal activity that is the subject of the trial. There is no possible way that jurors could have been confused by this passage.

James' argument relies on this Court agreeing that the jury seized on the word "conduct" that it heard once from the court, isolated that word from the greater accomplice liability instruction in which it was read and then ignored the accurate written instructions the jury had with it during its hours of deliberation. Such an interpretation would ignore the evidence and context of the entire trial. The State presented overwhelming evidence of James's criminal conduct as the leader of this drug trafficking enterprise, and the

entire focus of the case was on James as a drug trafficker. The jury could not have been distracted by this isolated misstatement of the court, spoken in passing, and the competent evidence in the record upholds the court's jury instruction.

The jury's possession in the deliberation room of the accurate instruction further mitigates any potential error made by the court in reading the instructions aloud. The jurors heard the court's oral instructions just once. They then were given a printed copy of the court's instructions, which they had in the jury room during deliberations. The printed instruction included the phrase "promotes or facilitates the commission of the crime," a phrase James concedes was proper. (A. 75, Blue Br. 26.) James asks this court to hold that the oral words are more impactful, but the State submits that the case he relies upon also supports the concept that "the clear intention of the presiding Justice" is persuasive. *State v. Bradley*, 414 A.2d 1236, 1241 (1980). Here, the trial court's crafting of written instructions, its substantially verbatim recitation of those instructions to the jury, and its submission of a copy of those written instructions into the jury deliberation room support the finding that it was the trial court's clear intention to instruct the jury using an accurate statement of law. The trial court's misstatement of one word, not

noticed by James at trial, does not create manifest injustice and does not necessitate a reversal of the jury verdict in this case.

II. The trial court committed no error in setting James' basic sentence.

The sentencing court correctly applied the *Hewey* analysis when it considered James's conduct in trafficking of drugs during the timeframe alleged by the State as part of its basic sentence analysis.

This Court developed a procedure, codified in 17-A M.R.S. §1602(1), instructing the sentencing court to follow a three-step process in determining the appropriate sentence for an offender, and the first step is to determine the basic period of incarceration by considering the particular nature and seriousness of the offense.⁴ *State v. Hewey*, 622 A.2d 1151 (Me. 1993), 17-A M.R.S. §1602. This Court reviews “the determination of the court’s basic sentence de novo for misapplication of principle.” *State v. Burns*, 2011 ME 92, ¶12, 26 A.3d 817, *State v. Plummer*, 2020 ME 143, ¶10, 243 A.3d 1184. A sentencing court “must demonstrate that the court objectively considered the nature and seriousness of the offense in determining the basic period of

⁴ James does not challenge the sentencing court’s application of the second (review of aggravating and mitigating factors to determine the maximum period of incarceration) and third (whether any portion of the sentence should be suspended and the offender placed on probation) steps of the *Hewey* analysis.

incarceration in order to provide a foundation on which to build an appropriate sentence.” *Burns*, 2011 ME 92, ¶16 (internal quotations omitted).

Here, the court merged count two with count five of the superseding indictment, which charged Aggravated Trafficking in Scheduled Drugs for the period from April 4, 2023, to August 27, 2023. The State admitted voluminous evidence that proved that on numerous occasions during that period James trafficked in drugs: James directed Hubbard to the Hatch Road residence to buy drugs there, James provided all of the drugs that were sold out of the residence, and James received the proceeds from those sales. The text and Facebook messages further proved that James trafficked in illegal drugs on many days during that timeframe. Because the jury found James guilty of count five, the entire range of dates initially alleged by the State and ultimately proven by the State was relevant to the court’s consideration in setting the basic sentence.

To make a guilty finding on count five, the jury was instructed that at minimum they must find James guilty of “at least” one incident. (T. Tr. 35 (Nov. 1, 2024).) This lowest-common-denominator unanimity instruction did not limit the jury to finding that James committed only one incidence of trafficking during the timeframe, and nothing prevented the jury from finding

that James trafficked in drugs on multiple occasions during the timeframe.⁵

Here, the court properly considered the entire scope of the conduct encompassed by Count 5 when setting the basic sentence.

James's case is distinguishable from *Downs*, where the defendant was sentenced on seventy-six counts of burglary and theft over the course of two years. *State v. Downs*, 2007 ME 41, ¶¶2-3, 916 A.2d 210. The *Downs* court clearly conflated steps one and two by considering the number of burglaries Downs committed (each apparently charged by a different count) and his criminal history in step one, without considering the nature of the burglaries. Here, the court emphasized the particular nature and seriousness of the offense when it considered the many people to which drugs were sold, the variety of the drugs sold, the dangerousness of the drugs sold to the community, that James took advantage of others to shield his conduct, and that James took responsibility for complaints about the quality of the drugs he sold. (S. Tr. 23-25 (Feb. 14, 2025).) Therefore, the court did not set the basic sentence based on the number of crimes James committed but instead based

⁵ James asserts that the court's decision not to instruct the jury on scheme or course of conduct language allowed the State to benefit at sentencing from the not guilty finding on count four and the hung jury on count one. (Blue Br. 29.) Scheme or course of conduct language, however, is not required. See *State v. Osborn*, 2023 ME 19, ¶¶26-31, 290 A.3d 558.

on a series of factors directly related to the particular nature and the seriousness of the offense as charged by the State.

The court's analysis of the basic sentence was appropriate, and James's sentence should be affirmed.

CONCLUSION

For the foregoing reasons, James's conviction and sentence should be affirmed.

Respectfully submitted,

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DATED: August 1, 2025

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CERTIFICATE OF SERVICE

I, Jeffrey Baroody, Assistant Attorney General, certify that I have emailed and mailed two copies of the foregoing “BRIEF OF THE APPELLEE” to James’s attorney of record, Rory McNamara, Esq.

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