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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

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

Though the State has presented them separately in its brief, the multiple errors identified by defendant should be considered cumulatively. After all, it is the "charge as a whole" that is subject to prejudice-analysis – not a divide-and-conquer approach such as the State's. *State v. Kilgore*, 2025 ME 81, ¶ 29, __ A.3d ____ (quotation marks omitted).

A. The errors

The errors can be grouped into two themes: (i) the conflation of "a" with "the," and (ii) the confounding instruction about "presence."

i. "A" is not the same as "the."

Certainly, "a" and "the" mean the same thing in Maine as they mean in Washington state, where mixing up the two is plainly erroneous. This Court should recognize as much. Frankly, it lacks the option of interpreting the plain statutory language in any other manner:

> A person is an accomplice of another person in the commission of a crime if … [w]ith 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). There isn't much room to argue that substituting one for the other isn't error.[1]

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[1] The State hopes to be saved by the court's explanation that an accomplice may be convicted of "the crime" even though the principal hasn't been convicted of, or prosecuted for, it. *See* Red Br. 18-19, citing A57, 3Tr.

> Nonetheless, the State presses on, contending that the trial court
>
> accurately instructed the jury that, if it chose to find accomplice liability, it must find that [defendant] was an accomplice of the person who committed **the drug trafficking crimes that were the subject of trial**.

Red Br. 14 (emphasis added). Defendant has highlighted the trouble-spot in the State's analysis.

First off, the court's language – "a crime" – does not limit the jury in the manner the State suggests. "A crime" could literally be any crime, and there was plenty of evidence of numerous uncharged crimes, some of which the State noted in its closing argument. *See* Blue Br. 24; 3Tr. 61, 79. That all overlaps with the more significant problem, problem number two: The court's error allowed the jury to pick and choose which incidents to cobble together to reach a patchwork verdict. Take a *mens rea* element from the April 4 incident or from the July 5 incident or from the April 25 incident and combine it with the *actus reus* element from any one of the three. Like getting a picky-eating child to choose from many options on a diverse menu rather than a sparse one with few choices, the court's error made it easier to get a skeptical jury to swallow the State's case – piece by piece. The court's instructions weren't supposed to allow that; they were quite plainly erroneous.

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30. But, in so informing the jury, the court was explaining what could happen, not instructing the jury what they must find it to happen. Anyway, it is a principle of construction (as well as common sense) that a more specific provision controls over a general one. *E.g.*, *Michalowski v. Bd. of Licensure*, 2012 ME 134, ¶ 23, 58 A.3d 1074.

ii. The messy "presence" instruction

Here, on one hand, State implicitly acknowledges error, by distinguishing the court's mistaken oral discussion of "presence" from its "accurate" written version. Red Br. 23. That is an appropriate distinction, from defendant's standpoint. It is utterly confusing to tell a jury,

> [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).

But the State hedges its bets: "There is no possible way that jurors could have been confused by this passage." Red Br. 23. For one, the passage is facially untrue, and no matter how convoluted the law, we expect jurors to follow it. But the error is worse when considered in light of the court's "a"-as-opposed-to-"the" mistake. Defendant, the instruction says, can be convicted if he's present (recall, he resided at the drug-house) and "intentionally engaged in ***any*** conduct." Echoing the "a"/"the" error, this again literally required no proof an *actus reus* tethered to the crime of conviction. Nor does it require jurors to find a nexus between the crime of conviction and § 57(3)(A)'s *mens rea* element.[2] The "presence" mistake thus reiterated the "a"/"the" error.

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[2] Though the "presence" instruction might require proof of "intentional" "conduct," that merely means conduct that is more than knowing, reckless or negligent. The *mens rea* element, as stated in this erroneous instruction, does not modify – as it must – the *criminal nature* of the conduct. *See* 17-A M.R.S. § 57(3)(A) (requiring proof of "the intent of promoting or facilitating the commission of **the crime.**") (emphasis added).

Defendant acknowledges that the court's written instructions do not repeat the "presence" error. Nonetheless, there is reason to doubt the State's comfort in the fact that the jury possessed written instructions while deliberating. Who's to say they ever read them? *Cf. State v. Christian*, 2018 Md. App. LEXIS 987 * 17, 2018 WL 5306987, * 7 (Md. Ct. Spec. App. 2018), *vacated on other grounds by* 208 A.3d 423 (Md. 2018) ("The State contends that the written jury instructions that were apparently provided to the jury did not contain the same error as the oral jury instructions, and cured any defect that may have existed. But we have been directed to nothing in the record that would confirm that the jurors ever consulted the written instructions, let alone that the jurors took note of the correct statements on this point of law."). Even if they did, a judge's spoken word, voiced solemnly in court, should take precedence.

B. Taken together, the instructional errors are not harmless.

The harmlessness analysis here has a couple key components. The first is easy to address. Notwithstanding the State's confident, repeat assertions that its evidence was "overwhelming," Red Br. 14, 21, 23, the jury did not think so. It acquitted defendant of a count. It hung on others. The State's case was not so powerful as to forestall a determination that the instructional errors were harmful.

More case-specific factors also point to prejudice. The court's short M.R. U. Crim. P. 29 analysis focused on the notion that defendant was an accomplice. 2Tr. 204. That indicates that the impartial judge felt that the

evidence of accomplice liability was "certainly," *id.*, stronger than that for principal liability.[3] Even were the State's preferred theory of its case to trump the interpretations of neutral fact-finders – and it doesn't[4] – the State itself welcomed verdicts based on accomplice liability. 1Tr. 41. And the State itself reinforced the instructional error, defining for jurors accomplice liability in a way that completely disregarded its duty to prove an attendant *mens rea*. 1Tr. 41. Don't forget, too, that defendant acknowledged his presence amongst, and friendship with, the individuals who were recorded on audio and video actually undertaking the crimes. Per the court's "presence" instruction, there wasn't much else to prove.

Finally, both Class A offenses are implicated. Count II alleged a transaction on April 25. And Count V embodied trafficking during the same timeframe, such that everyone agreed with the court's observation that

> 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.

A22; STr. 22. This is to say, because jurors may well have convicted defendant of the April 25 incident as a result of the court's erroneous

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[3] The State misreads defendant's contention about the relevance of this analysis. Defendant does not assign error to the court's Rule 29 analysis. *But see* Red Br. 15 n. 2. Rather, he has discussed it in the Blue Brief (at 13) and again here to illustrate how an impartial fact-finder viewed the State's evidence.

[4] Evaluation of the need for a particular jury instruction requires "examining the totality of the trial evidence — not just the evidence on which the State or the defendant seemed most focused…." *Hodgdon v. State*, 2021 ME 22, ¶ 14 n. 5, 249 A.3d 132.

instruction allowing them to cobble together such a verdict, Count V must be vacated, too. It was a house-of-cards, felled by the erroneous instructions.

Second Assignment of Error

II. The court erred in setting a basic sentence.

On Counts V and VI, the State charged defendant with trafficking pursuant to a "scheme or course of conduct." A46; *see* 17-A M.R.S. 1106-A. But it did not press such a theory at trial, stating it was "happy with" the court's ruling that the jury would not be instructed about the scheme-or-course-of-conduct" element. A39-A41. The court said such was mere "surplusage." 2Tr. 206-11.

Turns out, though, it was not "surplusage." Rather, the court instead took it upon itself – at a preponderance standard – to find that defendant committed a course of conduct. *See* A22-A25 ("ongoing period of time"; "went on for five months"; "significant period of time"). The court acknowledged that the jury did not necessarily make comparable findings. A22 (court recognizes that both Class A convictions could be premised on singular incident on April 25). It took the prerogative for itself.

How was defendant on notice of the need to disprove a theory that the State and court agreed at trial was "surplusage"? Is "the manner in which [this] sentence was imposed," 15 M.R.S. § 2155(2), in accordance with our notions of fairness? Is it in accord with conceptions of burdens of proof, the presumption of innocence, or the right to have a jury decide your fate? Or is it a way for a judge to take an element of the offense away from the jury and base a sentence instead on its own finding about that element?

Whether such practices are permitted by law is besides the point. On this sentence appeal, this Court asks whether a practice is appropriate.

Defendant contends that it is not appropriate to impose a sentence based on a theory of indictment which has since been eschewed as surplusage.

Coming at the issue from another angle, *State v. Downs*, 2007 ME 41, ¶ 12, 916 A.2d 210 also suggests error. *Downs* forbids consideration of "the number of crimes" committed at Step One. *Ibid.* Yet, that is just what is contemplated by a "scheme or course of conduct" – multiple separate offenses. There is no principled difference between forbidding counting the multiplicity of offenses during a "crime spree," *id.* ¶ 6, and multiple instances of trafficking pursuant to a "course of conduct." Why would the former be disallowed yet the latter be permissible?

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.

August 22, 2025

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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 .

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