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

LAW COURT DOCKET NO. Ken-25-169, SRP-25-190

STATE OF MAINE
Appellee

v.

PETER CAYOUETTE
Appellant

ON APPEAL from the Kennebec County Unified Criminal Docket

APPELLANT'S BRIEF

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Statement of the Case

At defendant's first trial, the jury was unable to reach a verdict and the Kennebec County Unified Criminal Docket (Lipez, J., presiding), declared a hung jury. (First Trial Tr. 331-33).[1] Following an eleven-month interregnum and a second three-day trial (Mitchell, J., presiding), a jury found defendant guilty of three counts of unlawful sexual contact, 17-A M.R.S. § 255-A(1)(E-1) (Class B and C), and one count of gross sexual assault, 17-A M.R.S. § 253(1)(B) (Class A). (A: 18, 53-54). Defendant was principally sentenced to 20 years' prison followed by five years of supervised release. (A: 18).

I. The State's case

A. Count 1: The painting incident

Defendant was engaged to A.K.'s mother. (2Tr. 8). In the summer before A.K. began sixth grade, defendant bought a new house, and he invited A.K. and her mother to move-in with him. (2Tr. 9-10). A.K. and defendant went to the property so that A.K. could paint her new bedroom. (2Tr. 12-13). According to the State, Count 1 of the indictment pertained

[1] "1Tr." refers to the first volume of transcripts for the second trial; "2Tr." refers to the second volume, etc. "A" refers to the Appendix. Transcripts from the first trial are labeled "First Trial Tr."

to a specific occurrence of unlawful sexual contact which occurred while A.K. and defendant were house-painting. (1Tr. 62, 2Tr. 133-34). A.K. testified that she was standing on a chair and painting when defendant touched her "private area" over her underwear. (1Tr. 116-17).

B. Counts 2 and 4: Unlawful sexual contact

According to the State, the two remaining counts of unlawful sexual contact concerned such conduct that occurred "almost every day" when A.K. was under twelve years-old (Count 2) and under fourteen years-old (Count 4). (1Tr. 63; 2Tr. 134-135).[2]

A.K. was interviewed at the Child Advocacy Center ("CAC"). After describing the episode when she went to paint the house, A.K. told the CAC interviewer: "He started to do the same thing to every night…or in

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[2] This Court permitted this charging practice in *State v. Reynolds*, 2018 ME 124, ¶ 23, 193 A.3d 168, when it held that "the State is not required to present specific evidence of separate and discrete incidents of abuse for the jury to convict…so long as the jury is properly instructed on specific unanimity." *But see Valentine v. Konteh*, 395 F.3d 626, 634-37 (6th Cir. 2005) (vacating 38 counts of child rape and penetration because, *inter alia*, jury unanimity is no panacea and offers no double jeopardy protection when only the jurors themselves know the discrete factual basis for their verdict). Given State's theory of the case and the absence of a special verdict form, the precise facts that undergird defendant's convictions on Counts 2 and 4 are known only to the jurors and appear nowhere in the record.

the morning…. He would do the same thing; he would force his hands all over my body. (State's Exh. 1 at 16:00-25). She added that in the mornings, she would "wake up and his hands were in my pants, like every morning." (*Id.* at 17:15-17:30). When asked to describe "the last time it happened," A.K. said: "It was like the same thing every day." (*Id.* at 21:15-21:25). A.K. told the CAC interviewer that "more than once," meaning "a few times," while sitting on the living room couch, defendant grabbed her shoulders, pulled down his pants, and made her touch his penis with her hand. (*Id.* at 27:30-30:45; 31:30-31:35). At night, while in A.K.'s bedroom, "he'd make [A.K.] do the same thing…like the same exact thing." (*Id.* at 31:45-32:05).

At the second trial, A.K. testified that beginning when she was eleven, defendant made her touch his genitals with her hand "[e]very morning and every night except on the occasion that [she] was on [her] menstrual cycle," (1Tr. 114, 118-19), and that "sometimes" he would touch A.K.'s genitals, (1Tr. 119). This behavior started when A.K. was eleven, stopped for some unknown duration, and stopped permanently after A.K.'s fourteenth birthday, (1Tr. 111, 114, 121-23).

C. Count 3: Gross sexual assault

As with Counts 2 and 4, the State relied on generalized testimony about repeat occurrences of gross sexual assault. *See Reynolds*, 2018 ME 124, ¶ 20 ("specific evidence of particular incidents of sexual abuse is not required"); *see also* n 2, *infra*.

A.K. told the CAC interviewer: "He made me use my mouth sometimes, too." (State's Exh. 1 at 34:45-50). When the interviewer asked A.K. to talk about "the first time that happened," A.K. said: "It was like the same situation…with the couch, but except with my mouth." (*Id.* at 34:55-35:00). A.K. added: "The couch is where I remember having to use my mouth the most." (*Id.* at 36:50). When pressed for more detail, A.K. said that there was never a time when something different happened. (*Id.* at 36:53).

At the second trial, A.K. testified that defendant "regularly" made her touch his genitals with her mouth.[3]

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[3] During summation, the prosecutor argued, equally devoid of detail: "Gross Sexual Assault, Count 3, that's based upon…the testimony of [A.K], the CAC interview of [A.K.]. You could also read into it from the 2018 messages from [A.K.] to C[redacted]. The defendant had her perform oral sex on him regularly, consistently, frequently, repeatedly all throughout this time frame, right." (2Tr. 135).

D. The remainder of the State's case

The remainder of the State's proof consisted of evidence that A.K. disclosed defendant's abuse to others. In 2018, A.K. told someone named C[redacted]: "I nearly get raped every night except when I am on my period." (State's Exh. 3; 1Tr. 131-32). In 2020, A.K. told her friends L[redacted] and A[redacted]: "in my fourteen years of living I have dealt with a year of child sex abuse since I was eleven…." (State's Exh. 6; 1Tr. 132-34; 2Tr. 51-53). Separately, A.K. told L[redacted] that defendant "offered her money to let [him]." (2Tr. 51).

In 2020, A.K. told her mother about defendant's abuse via text message. (State's Exh. 4; 2Tr. 15). A.K. wrote, in pertinent part:

> [H]e started touching me all over in places I didn't want him to. I said no. I kicked him and tried to push him away. It didn't work. He kept pushing himself on me. That was one of the many times I was sexually abused. Every morning and night he would touch me or make me touch him.

(State's Exh. 4; 2Tr. 19-20).

A.K. had a picture of one of her classmates' genitalia on her cell phone. (1Tr. 120, 162). Defendant was aware of the picture. (1Tr. 120). A.K. testified: "[defendant] told me that if I told my mom about what he

had been doing to me that he would tell my mom about the picture he had found." (1Tr. 120).

II. The defense case

Through cross examination, defendant pointed out that A.K.'s version of events changed over time.[4] For example:

- A.K. told the CAC interviewer that defendant made her watch porn a "couple times." (State's Exh. 1 at 7:15-7:50; 10:35-10:55; 1Tr. 142). At the first and second trials, A.K. testified that defendant only showed her porn on one occasion. (First Trial Tr. 69; 1Tr. 115). A.K. agreed that "both those things can't be true." (1Tr. 142).

- A.K. told the CAC interviewer that sexual touching occurred on the couch and in her bedroom. (State's Exh. 1 at 17:50-17:55; 33:20-33:25). During the first trial, A.K. testified that defendant only ever touched her inappropriately in her bedroom, and no place else. (First Trial Tr. 79; 1Tr. 207-8). At the second trial, A.K. testified that defendant touched her vagina "regularly" and the locations within the house would

[4] A.K. was interviewed at the Child Advocacy Center; she was interviewed by a police detective; she testified at the first trial; she was interviewed by the prosecutor before the second trial; and she testified at the second trial.

change. (1Tr. 202). When asked about the differences, A.K. agreed that "both those things can't be true," (1Tr. 208), and she testified that she "misinterpreted" the question asked at the first trial "as like location of my body rather than actual physical room." (1Tr. 203, 212).[5]

- A.K. told the CAC interviewer that on the day they went to the house to paint, she was on laying down on the couch and "he just forced himself on me," (*Id.* at 11:40-12:40; 14:40), and he touched her underneath her clothes on her "boobs" and he "was trying to put his fingers inside of me." (*Id.* at 13:25-35; 14:50-15:15).

At the second trial, A.K. testified that while painting in her bedroom, "I was standing on a chair to reach higher up when I was painting…and he had reached underneath the shorts coming from like standing right next to me reaching up at a higher angle and touching me over my underwear. (1Tr. 116; *see also* State's Exh. 7 at 7:45-9:00). A.K. acknowledged these discrepancies. (1Tr. 163-65).

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[5] A.K.'s testimony at the first trial was: "Q: And would [defendant's inappropriate touching] always be in your bedroom or would it sometimes be in other locations? A: It was always in my bedroom. Q: Did he ever touch you anywhere else? A: No." (First Trial Tr. 79).

- A.K. told the prosecutor during trial preparation that she once performed oral sex on defendant while her mother was in the same room sleeping on the living room couch. (1Tr. 155-56). At the second trial, A.K. testified that on this particular occasion, she touched defendant's genitals with her hand and not her mouth. (1Tr. 118-19). A.K. agreed that both versions of that event "can't be true," and she testified: "I must have misremembered when I was talking to the prosecutor." (1Tr. 156-57).

- Regarding an incident on the morning before A.K. attended a babysitting course, A.K. told the CAC interviewer that defendant touched her "boobs" underneath her shirt. (State's Exh. 1 at 19:25-19:30; 1Tr. 165-66). A.K. told a police detective that she woke up and defendant had his hands "somewhere" on her; defendant's hand was "probably like resting on [her] thigh" over her clothes. (State's Exh. 7 at 14:40-15:55; 1Tr. 166). At the first trial, A.K. testified on direct examination that defendant "attempted to put his hands under my clothes to touch me," (First Trial Tr. 75; 1Tr. 166); she testified on cross-examination that defendant put his hand over her clothes, and "[i]t wasn't an attempt, he did do it," (First Trial Tr. 90-91), and he touched her vagina over clothing, (First Trial Tr.

92; 1Tr. 166). At the second trial, A.K. testified: "I had woken up that morning and his hands were underneath my shirt…and I asked him to stop, I pushed he hand away…. (1Tr. 122). A.K. agreed that "[t]hose all can't be true," and she said that the truth was, defendant touched her "underneath my shirt" and that was it, and she was "sure." (1Tr. 167-68).

The defense also emphasized that during the time in question, the household was acrimonious. A.K. "struggled with her [biological] dad not being in her life," and was angry when defendant said that her father could not stay at their house, (2Tr. 36-37; 83, 87); she was bullied at school, (2Tr. 34, 84-85); she seemed resentful of defendant's relationship with his own daughter, (2Tr. 83-84); she accused defendant of being racist and having "white privilege," and she was upset when defendant made her remove a Black Lives Matter flag from her bedroom, (1Tr. 173-75; 2Tr. 34-35, 85-86). A.K.'s mother agreed that there was "tension" in the home. (1Tr. 35-39).

Defendant denied ever touching A.K. inappropriately. (2Tr. 92-93). Additional facts are developed within each assignment of error.

Questions Presented

1. Did Justice Mitchell err by reversing Justice Lipez's ruling and admitting evidence previously excluded as a sanction for the State's discovery violation?

2. Did the trial court violate a panoply of defendant's federal constitutional rights when it found, as aggravating sentencing factors, *inter alia*, that defendant failed to take responsibility, forced A.K. to question her own reality, and was dishonest at trial?

3. Must this Court vacate defendant's conviction on Count 4 either for want of jurisdiction or for legally insufficient proof?

Argument Summary

1. Justice Lipez excluded A.K.'s Snapchat message with C[redacted] to sanction the State for its admitted discovery violation. Justice Lipez denied a continuance as an additional sanction because she reasoned, correctly, that further defense investigation would not have uncovered any admissible evidence. Justice Mitchell reversed Justice Lipez's ruling, believing that in the time between the first and second trials, defendant had a sufficient opportunity to investigate C[redacted]'s whereabouts. Justice Mitchell's reasoning was legally wrong (investigation would not have led to the discovery of admissible evidence) and it had no basis in fact (whether diligent investigation could have revealed C[redacted]'s whereabouts nearly seven years after the Snapchat message was generated, was entirely speculative). Consequently, the State's discovery violation, concerning a piece of evidence that the State admitted was essential to its case, was unpunished at the second trial. This is the anthesis of fairness.

2. In plain contravention of the unconstitutional conditions doctrine, the trial court clearly erred by punishing defendant for exercising his right to remain silent at sentencing, his right to

confrontation at trial, and his right to demand a trial at which he protested his innocence.

3. A.K.'s testimony that defendant placed his hand underneath her shirt on the morning before she was scheduled to attend a babysitting course could not form the basis for a conviction on Count 4 because (a) as a matter of law, it fails to establish the offense of unlawful sexual contact and (b) because the State conceded that this occurrence did not form the basis for the grand jury's charge. When the jurors asked the court whether this incident could form the basis for a conviction on Count 4, the trial court erred by failing to instruct them clearly and definitively that it could not.

Argument

First Assignment of Error

The trial court erred by imposing no sanction whatsoever for the State's conceded discovery violation, resulting in the admission of "significant" evidence for the State.

I. Preservation and standard of review

A. Preservation

1. A.K.'s testimony about a Snapchat message

Over defendant's objection, on direct examination, A.K. gave phenomenally prejudicial testimony about a Snapchat message between her and someone named C[redacted]. A.K. told C[redacted], "I nearly get raped every night except when I am on my period." (State's Exh. 3; 1Tr. 131-32). When C[redacted] urged A.K. to tell someone, A.K. responded, "I'll end up homeless and I can't." (*Id.*). Throughout, defendant refers to this as the "Snapchat evidence."[6]

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[6] The State also introduced Snapchat messages between A.K. and two of her friends from the year 2020. *See* State's Exhibit 6; 2Tr. 44, 53. This assignment of error concerns Snapchat messages between A.K. and C[redacted] in 2018.

According to the prosecutor, the admissibility of this testimony was "an incredibly significant issue in this case." (A: 28). He was right. The prosecutor mentioned the message with C[redacted] repeatedly in summation, and the first question the jurors asked during deliberations was: "What was the date of the Snapchat message to C[redacted]?" (A: 87).

2. Justice Lipez's ruling before the first trial

The State failed to produce this Snapchat evidence until after jury selection in the first trial, in obvious violation of its discovery obligations, and the State conceded as much. (A: 22, 25). The State volunteered that a proper sanction "would be we can't use it in our case in chief." (A: 22; *see also* A: 23-24).

In addition to that, defendant proposed a continuance so that he could "try to interview [C[redacted]]" because "[A.K.] is out there making statements somebody considers to be sexually inappropriate…" (A: 23; *see also* A: 22 (describing the redacted portions of the message); A: 25 (acknowledging the reasons for defendant's request)). Defendant proffered that interviewing C[redacted], and learning more about the full context of her conversation with A.K. was "very relevant to [A.K.'s] character and her credibility." (A: 23-24).

As a sanction, Justice Lipez prohibited the State from using the Snapchat evidence either in its case-in-chief or in rebuttal. (A: 25). Justice Lipez rejected defendant's additional request for a continuance, reasoning – correctly – that the additional investigation defendant wanted to conduct would have been futile. Justice Lipez explained that any further investigation as described by the defense could only lead to inadmissible impeachment evidence about A.K.'s sexual history. (A: 25).[7]

3. Justice Mitchell reversed Justice Lipez

Before the second trial, the State moved to admit the Snapchat evidence, Justice Lipez's previous ruling notwithstanding. (A: 28). Justice Mitchell allowed it. (2Tr. 44-45).

Two points provide necessary context. *First*, the Snapchat message was made in 2018; defendant was charged in 2020; the message was provided to the defense in 2024; defendant's second trial occurred in 2025. (A. 32). By that time, the Snapchat message was nearly seven years old.

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[7] Defendant's request for a continuance and the court's reasoning is best understood by considering the sensitive, redacted portions of the full message. The complete Snapchat exchange is available to this Court. Defendant refers this Court to Appendix page 25 and, in an abundance of caution, limits further discussion here.

The State offered no justification for its discovery violation, which is why Justice Lipez sanctioned the State in the first place. (A: 22-23, 31).[8]

Second, the State said that "C[redacted]" was the older sister of one of A.K.'s friends and that she moved out of state. (A: 31). The State admitted that even before the first trial, it had no additional information about who "C[redacted]" was or where she lived. (A: 31). The State did not know "C[redacted]'s" last name. (A: 23).[9]

Nevertheless, Justice Mitchell reasoned that by the time of the second trial, defendant was no longer surprised by the Snapchat evidence. (A: 29). He also found that defendant no longer suffered any prejudice because the eleven months between the first and second trials afforded defendant opportunity to investigate further and find C[redacted], (A: 31, 33), notwithstanding Justice Lipez's clear and correct ruling that further investigation would not have turned-up any admissible evidence.

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[8] When pressed on the issue of timing, the prosecutor demurred: "I said [to Detective Ferreira], when did you get these? He said, I am not really sure, that sort of thing. I assume that – I will leave it there." (A: 22-23).

[9] *See* A: 23 (Prosecutor: "In our meeting with [A.K.] the only information she could give me is she thinks her last name is McMahon.").

The legal premise for Justice Mitchell's reasoning was wrong. Justice Mitchell confused the State's concession and Justice Lipez's ruling that the Snapchat evidence should be excluded because it violated the rules of discovery, with Justice Lipez's decision to deny defendant's request for a continuance. Justice Mitchell said:

> The reason, as I understand it…that you were prejudiced [is] because you did not have an opportunity to investigate that matter, it would not have been fair to you to force you to go forward and deal with this evidence at trial when you had not been given a fair opportunity to investigate it.
>
> * * * * *
>
> I think that one of the fundamental reasons why you were prejudiced [by the discovery of the Snapchat messages before the first trial] was because you had these for such a short time and had not had an opportunity to do anything with them….

(A: 31, 33). Justice Lipez's reasoning was the opposite of what Justice Mitchell understood.

Defendant objected. He explained that even if he wanted to investigate – despite Justice Lipez's ruling – his ability to do so now was utterly impaired. The factual premise of Justice Mitchell's ruling was wrong, too, as defendant explained:

> No, because the problem is, it wasn't given, there was too much time that had elapsed and so the identity of this person and her whereabouts became completely unknown and

> untraceable at the time of the first trial. That scenario doesn't get better with the passage of time.
>
> * * * * *
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> It is not just about unfair surprise, it is about prejudice to the defense, and you hold on to this for over two years….
>
> * * * * *
>
> It is all speculative…. [T]he more spoiled the information is, the harder is becomes, but this is all speculative. The point is is that there are rules for a reason…. [T]o think that where you get a second trial you get to cleanse yourself of all prior sanctions I don't think that's a rule. Prejudice is the same because prejudice is the same as it was right before the first trial because they held on to it for two years.
>
> * * * * *
>
> In 2024 my situation doesn't get better with time, it gets worse.

(A: 31, 32, 33).

Justice Mitchell never explained why he believed further investigation, seven years post, would uncover both C[redacted]'s whereabouts *and* admissible evidence.

Defendant renewed his objection to the Snapchat message during the trial for the reasons discussed *supra*, and the court overruled it. (1Tr. 125-26).

B. Standard of review

This court will "review for an abuse of discretion a trial court's sanction for a discovery violation." *State v. Reed-Hansen*, 2019 ME 58, ¶ 17, 207 A.3d 191. As the First Circuit has instructed:

> Abuse of discretion is not a monolithic standard of review. Under this rubric, we afford de novo review to the district court's interpretation and application of law, assay the court's factfinding for clear error, and evaluate its judgment calls for abuse of discretion.

United States v. Santana-Avilés, 120 F.4th 7, 11 (1st Cir. 2024) (internal citations and quotations omitted; cleaned up).

II. Legal framework

Generally, when faced with a discovery violation, "the trial judge has broad discretion in choosing the form of sanction to impose, if at all." *State v. Mylon*, 462 A.2d 1184, 1186 (Me. 1983). A "trial court cannot, however, permit a discovery violation to deprive a defendant of a fair trial." *State v. Poulin*, 2016 ME 110, ¶ 27, 144 A.3d 574. When, as here, "a defendant contends that a discovery violation and the court's response to it violated his or her right to a fair trial, we review the trial court's procedural rulings to determine whether the process struck a balance

between competing concerns that was fundamentally fair." *Id.* at ¶ 28 (internal quotation omitted).

The First Circuit has explained:

> In evaluating whether a specific sanction is appropriate in a given case, we take into account a multiplicity of pertinent factors, including the history of the litigation, the proponent's need for the challenged evidence, the justification (if any) for the late disclosure, and the opponent's ability to overcome its adverse effects, including surprise and prejudice.

Samaan v. St. Joseph Hosp., 670 F.3d 21, 36-37 (1st Cir. 2012) (internal citations and quotations omitted).

III. Application

By its own admission, the State neglected its discovery obligations regarding "an incredibly significant" piece of evidence. (A: 28). Justice Mitchell erred by overruling Justice Lipez and imposing no sanction whatsoever.

The First Circuit's criteria helpfully guide the analysis. *First*, the history of the litigation militates strongly in favor of excluding the Snapchat evidence. Justice Lipez excluded that evidence, and she did so for good reason. The State conceded that the evidence should be excluded. Defendant was entitled to rely on the State's concession and

Justice Lipez's ruling as law of the case in preparation for the second trial. *See Grant v. City of Saco*, 436 A.2d 403, 405 (Me. 1981) ("The doctrine of 'law of the case' rests on the sound policy that in the interest of finality and intra court comity a Superior Court justice should not, in subsequent proceedings involving the same case, overrule or reconsider the decision of another justice.").

Perhaps more importantly, Justice Mitchell's ruling erroneously implied that further investigation *would* have uncovered admissible impeachment evidence. Not only was that assumption contrary to Justice Lipez's ruling and legally wrong, reversing Justice Lipez's legal conclusion and springing this new evidentiary supposition on the defense on the first day of the second trial certainly qualifies as a surprise of the court's own making. Justice Mitchell's unfounded belief that an investigation would have uncovered useful, admissible defense evidence, and then faulting defendant for failing to undertake that investigation, turned Justice Lipez's ruling on its head. Respectfully, it is unclear whether Justice Mitchell read the Snapchat message in its entirety.

Second, the State needed the Snapchat evidence because the remainder of its case was weak, as evidenced by the first hung jury.

Corroborating evidence was scant and A.K.'s testimony changed drastically. According to the State, the Snapchat evidence was essential to bolster A.K.'s credibility. The State told the jurors: "[T]he fundamental question that you are going to have to answer is, do you believe [A.K.]? (1Tr. 65-66; *see also* 2Tr. 135-36). The State repeatedly argued in summation that the Snapchat evidence was proof of A.K.'s credibility. (2Tr. 136, 141, 143, 146-47, 176, 180-81, 182).[10]

None of this militates in favor of admitting the Snapchat evidence. The State's discovery obligation would be altogether meaningless if it could skirt the rules and withhold evidence that was "incredibly significant" to its case with impunity. Such a ruling only encourages the State to withhold "incredibly significant" evidence in the future.

Third, the State offered no good justification for its late disclosure, which again, is why Justice Lipez's sanction was eminently reasonable. Before it sought to profit from breaking the rules, the State laudably

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[10] *See also* A: 55 (Before the second trial, the State argued that it needed the Snapchat message because "the central issue is the credibility of the victim" and "the State's and Defendant's case [*sic*] rises and falls on the credibility of the victim….").

conceded error and volunteered that the Snapchat evidence should be excluded from its case-in-chief – and rightly so.

Fourth, as defendant explained, and as commonsense suggests, defendant's ability to investigate and find C[redacted] did not improve in the months between the first and second trials. By that point, C[redacted] had already been in the wind for years. Justice Mitchell's conjecture about the type of investigation that was possible was wholly unsupported.

Justice Mitchell's decision not to impose any sanction whatsoever plainly undermined defendant's right to a fair trial. This windfall ruling not only allowed the State to introduced evidence that was "incredibly significant" to its case; the Snapchat evidence was also exceedingly prejudicial. The Snapchat message was excluded from the first trial, and it resulted in a hung jury; when the Snapchat message was admitted in the second trial, defendant was convicted. The message was a central feature of the State's summation, and the jurors specifically asked about the Snapchat message during deliberations.

Solicitude to the rules of discovery and respect for defendant's right to due process require vacatur of all charges and a remand for further proceedings.

Second Assignment of Error

Several of the trial court's aggravating sentencing factors offend the Fifth, Sixth and Fourteenth Amendments to the federal constitution.

I. Preservation and standard of review

A. Preservation

Defendant testified at trial, but he remained silent at sentencing. The court found as aggravating factors: (a) "the impact on the victim," which the court deemed the "most serious aggravating factor," (A: 37-38); (b) that defendant "blackmailed" the victim by threatening to disclose a photograph if she told anyone about the situation, (A: 38); and the fact that defendant abused A.K.'s trust, (A: 38). In addition to these, however, the court erroneously also found the following aggravating factors:

> Other aggravating factors the Court takes into account are **the failure…on the part of [defendant] to – to show remorse or take responsibility in this instance**, his abuse of [A.K.'s] trust in this case, his abuse of…the trust that [A.K.'s mother] had placed, in this case, I think, relates to the abuse of trust of the victim. And that's why I mention it. I want to say that the evidence at trial showed that [defendant] had, to some extent, threatened [A.K.] with consequences if she disclosed this. There was evidence at trial that he had blackmailed her, for lack of a better term, with respect to a photograph, and had threatened to disclose the situation to anyone else. I think that's an aggravating circumstance.

> And I do think ***also*** **the fact that [defendant], I believe, was dishonest at trial**, that he…he certainly had absolutely every right to have a trial, and we should all defend his right to have had that trial. But I do think I am entitled to take into account the fact that I do believe **he made up a false narrative at trial about how this happened**. And he caused – I believe **he caused further damages to [A.K.] by saying that she was lying**. I think that **he put her in a position where she may have been forced to question her own reality**, to some extent, which I find to be an aggravating factor in this case.

(A: 38). Defendant assigns error to the each of the aggravating factors that appear in boldface type.

The court found that the aggravating factors outweighed the mitigating factors, and it added five years' imprisonment to the basic sentence. (A: 38).

B. Standard of review

Defendant failed to object so this Court's review is for obvious error. *State v. Pabon*, 2011 ME 100, ¶ 25, 28 A.3d 1147.

II. Legal framework

Applicable through the Fourteenth Amendment, the Fifth Amendment guarantees a defendant's right to remain silent at sentencing. *Mitchell v. United States*, 526 U.S. 314, 316-17 (1999). The

Sixth Amendment guarantees a defendant's right to a jury trial and to cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right…in exchange for a discretionary benefit…." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 594 (1925).

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)); *see also Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (a defendant cannot be punished for exercising the right to remain silent); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (a defendant cannot be punished for exercising his right to appeal); *State v. Glover*, 2014 ME 49, ¶ 13, 89 A.3d 1077 ("The value of constitutional privileges is largely destroyed if persons can be penalized for relying on

them.") (quoting *Gruenwald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring)).

III. Application

A. Defendant failed to "show remorse or take responsibility."

The trial court upbraided defendant for failing to "show remorse or take responsibility" at sentencing. Doing that violated plainly defendant's constitutional right to remain silent, which he retained at sentencing even though he testified at trial.

It does not matter why a defendant exercises his constitutional rights, but judges (and prosecutors) must know that there are sound reasons why a defendant would not "show remorse" or "take responsibility" at sentencing. *For one thing*, a criminal defendant can simultaneously be guilty as a matter of law, and innocent as a matter of fact. *See Herrera v. Collins*, 506 U.S. 390, 398 (1993) (recognizing the difference). Research suggests that many such persons exist. *See e.g. United States v. Quinones*, 313 F.3d 49, 63-65 (2d Cir. 2002) (collecting evidence that innocent people have been executed).

For another, no competent defense attorney would permit a client who maintained innocence at trial and intended to appeal to "show

remorse" or "take responsibility" at sentencing. *See e.g. United States v. Rogala*, 1992 U.S. App. LEXIS 27824, **8-9 (6th Cir. 1992) ("[g]iven petitioner's desire to maintain his innocence and seek an appeal, trial counsel's advice to maintain innocence on the presentence report was the only reasonable course of action" and it "constitutes valid trial strategy.").

On top of that, respectfully, stakeholders would do well to recognize their limited ability to accurately perceive the internal thoughts and feelings of others. At least one federal judge has wisely urged humility:

> Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt. To allow the government to highlight an offender's "lack of remorse" undermines those safeguards.

United States v. Davis, 912 F. Supp. 938, 946 (E.D.La. 1996); *see also United States v. Grayson*, 438 U.S. 41, 51 (1978) (quoting *United States v. Hendrix*, 505 F.2d 1322, 1236 (2d Cir. 1974)) ("The effort to appraise 'character' is, to be sure, a perilous one, and not necessarily an enterprise for which judges are notably equipped by prior training.").

In *State v. Coleman*, 2024 ME 35, ¶ 26, 315 A.3d 698, this Court held: "We agree with other courts that have held that *choosing to allocute* constituted a limited Fifth Amendment waiver, and that the lack of remorse expressed *in allocution* may be considered as a factor in sentencing." (Emphasis added).

Unlike in *Coleman*, however, or any of the cases that *Coleman* collects for support, here, defendant did *not* choose to allocute. Rather, defendant permissibly exercised his right to remain silent at sentencing. *See Mitchell*, 526 U.S. at 326 (even defendants who plead guilty retain the right to remain silent at sentencing). By the trial court's logic, defendant failed to "show remorse or take responsibility" because he remained silent – either that, or because he exercised his right to a jury trial, which defendant discusses *infra*.[11] The unconstitutional condition doctrine forbids punishing a defendant who permissibly exercises his right to remain silent at sentencing.

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[11] *See* A: 67 (The State suggested that the court find as an aggravating factor that defendant failed to take responsibility by invoking his constitutional right to a trial. The State argued: *"To date*, the Defendant has not shown even the faintest hint of remorse for his actions."). Defendant explains the problems with such reasoning *infra* in subpart C.

B. Defendant "put [A.K.] in a position where she may have been forced to question her own reality."

The Sixth Amendment right to confrontation "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The "primary interest" is "the right of cross examination." *Douglas*, 380 U.S. at 418. The "main and essential purpose of confrontation" is "the direct and personal putting of questions and obtaining immediate answers." *Davis*, 415 U.S. at 315-16 (internal quotation omitted). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316.

"[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.* discredit, the witness." *Id.* Indeed, the central function of cross-examination is to elicit a basis on which the jurors could conclude that the witness is "less likely than the average trustworthy citizen to be truthful in his testimony." *Id.* Cross-examination is intended to be a "crucible" for arriving at the truth. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

A sentencing court clearly errs in violation of the unconstitutional conditions doctrine when it punishes a defendant who, through counsel, employs the right to cross-examination precisely as it was intended. The trial court plainly erred when it punished defendant for putting A.K. "in a position where she may have been forced to question her own reality." (A: 38). If the exercise of a defendant's right to cross-examination results in disapprobation at sentencing, then that defendant's constitutional rights are violated, and the ability of every other criminal defendant to exercise their right to confrontation will be impermissibly chilled, as well.

C. Defendant was "dishonest at trial," he "made up a false narrative of how this happened," and he accused A.K. of "lying."

"It is black-letter law that an accused cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to a trial." *State v. Moore*, 2023 ME 18, ¶ 24, 290 A.3d 533; *see United States v. Devine*, 934 F.2d 1325, 1338 (5th Cir. 1991) (same); *see also United States v. Saunders*, 973 F.2d 1354, 1362 (7th Cir. 1992) ("It is well established under the so-called unconstitutional conditions doctrine that a defendant may not be subjected to more severe punishment for exercising his or her constitutional right to stand trial.");

United States v. Frost, 914 F.2d 756, 774 (6th Cir. 1990) ("[I]t is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty and go to trial, no matter how overwhelming the evidence of his guilt.") (quoting *United States v. Derrick*, 519 F.3d 1, 3 (6th Cir. 1975)).

A trial court may permissibly consider a defendant's "conduct at trial and information learned at trial, along with other factors, in determining the genuineness of a defendant's claim of personal reform and contrition." *Moore*, 2023 ME 18, at ¶ 25 (quoting *State v. Grindle*, 2008 ME 38, ¶ 19, 942 A.2d 673); *Grayson*, 438 U.S. at 53 ("[I]t is proper…to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision.").

But the trial court failed to identify anything specific about defendant's trial testimony that drew its ire. This lack of specificity leaves the strong impression that in the trial court's view, defendant's protestations of innocence were tantamount to being "dishonest at trial" and making up "a false narrative" and accusing "A.K. of lying." (A: 38). If there is another explanation for the court's reasoning, it does not

appear on this record. Without any clarity as to how, exactly, the trial court imagined defendant perjured himself, Justice Stewart's concerns in *Grayson* draw to the fore:

> [T]here has been no determination that [the defendant's] testimony was false. This [defendant] was given a greater sentence than he would otherwise have received…solely because a single judge *thought* that he had not testified truthfully. In essence, the Court today holds that *whenever* a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence. Such a sentence is nothing more or less than a penalty imposed on the defendant's exercise of his constitutional and statutory rights to plead not guilty and to testify on his own behalf.

Grayson, 438 U.S. at 55-56 (Stewart, J., dissenting) (emphasis original).

Obviously, the jury's guilty verdict alone does not prove perjury. As the Fourth Circuit has admonished:

> [S]entencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. …. Judges must constantly bear in mind that neither they nor jurors are infallible. **A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation**.

United States v. Moore, 484 F.2d 1284, 1287-88 (4th Cir. 1973) (emphasis added); *see also Hendrix*, 505 F.2d at 1236-37 (Observing that "trial judges generally are…sophisticated and experienced enough to know that the convicted defendant who took the stand is not *ipso facto* a perjurer," and holding, "we share the Fourth Circuit's view that evidence of false testimony should be bypassed for sentencing purposes and left to the United States Attorney for possible prosecution."); [12] *Commonwealth v. Coleman*, 461 N.E.2d 157, 163-64 (Mass. 1984) ("[A] summary and unreviewable finding of perjury by a trial judge denies a defendant a fair and impartial determination of an appropriate sentence. Perjury, when proved after indictment and trial, is subject to appropriate punishment under our General Laws.") (internal citation omitted); *but see State v. Hemminger*, 2022 ME 32, ¶¶ 23-24, 276 A.3d 33 (Maine judges may aggravate punishment based on a judicial determination of "untruthful testimony" even while failing to make "independent perjury findings.").

[12] *But see* A: 68-69 (State's Sentencing Memorandum: "In light of the jury's verdict, the Defendant was dishonest on the stand and lied to the jury in an attempt to avoid accountability for his crimes.").

D. Resentencing is required to preserve the public perception of fair sentencing.

Any doubt about what the trial court meant clearly redounds in favor of resenting. In *Moore*, this Court remanded for resentencing because "the sentencing court was – *or might have been* —influenced by Moore's decision to stand trial." *Moore*, 2023 ME 18, at ¶ 27 (emphasis added). This Court explained:

> It is sufficient to render a sentence invalid if it reasonably appears from the record that the trial court relied in whole or in part upon the defendant's election to stand trial. We need not conclude that the sentencing court in fact relied upon any improper consideration. **Any doubt as to whether the defendant was punished for exercising his right to trial must be resolved in favor of the defendant**.

Id. at ¶ 26 (cleaned up); *see also State v. Ellis*, 2025 ME 56, ¶ 29, __ A.3d __ (June 26, 2025) (same); *State v. Chase*, 2023 ME 32, ¶ 32, 294 A.3d 154 (same).

Even just one of these errors – say, the trial court's decision to treat as an aggravating factor the fact that defendant remained silent at sentencing – is sufficient to vacate the judgment and remand for resentencing. "A sentence based in part on an impermissible consideration is not made proper simply because the sentencing judge

considered other permissible factors as well." *Moore*, 2023 ME 18, at ¶ 25 (cleaned up) (quoting *Commonwealth v. Bethea*, 379 A.2d 102, 106 (Pa. 1977)). "[T]he quantitative role the impermissible factor played in such decision does not detract from the nature of the constitutional violation." *Id.* at ¶ 25 (quoting *State v. Farnham*, 479 A.2d 887, 895 n. 4 (Me. 1984) (Glassman, J., concurring in part and dissenting in part)).

Fidelity to the unconstitutional conditions doctrine; respect for the difficult, but constitutionally-permissible, decisions that criminal defendants make throughout the course of trial and sentencing proceedings; acknowledgement that the trial court's comments, if approved by this Court, will have a chilling effect on future defendants' exercise of their constitutional rights; and this Court's paramount duty to promote not only fairness, but the perception of fairness, *see generally Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"), demand vacatur of defendant's sentence.

Third Assignment of Error

Defendant's conviction and sentence on Count 4 is legally infirm.

I. Preservation and standard of review

A. Preservation

This assignment of error pertains to testimony about an incident tangentially related to a babysitting course. Throughout, defendant refers to this as the "babysitting incident."

1. A.K.'s testimony about the babysitting incident

A.K. testified that on the morning she was supposed to attend a babysitting course, defendant put his hands underneath her shirt. She never specified where on her body, if anywhere, defendant touched her:

> I had woken up that morning and his hands were underneath my shirt, and that morning he was supposed to drive me to a babysitter's course I was taking in Augusta and I had asked him to stop, I pushed his hand away and he said, what if I pay you, what if I give you 300, 400, 500, he kept listing numbers. I said, no, I don't want you to touch me, and then he left the room eventually.

(1Tr. 122; *see also* Tr. 168). A.K. reiterated on cross-examination that defendant touched her "underneath my shirt." (1Tr. 167). "Is that it?" defense counsel asked. (1Tr. 167). "Yes," A.K. responded, and said she was "sure." (1Tr. 168). This happened on February 20, 2019. (Tr. 122;

State's Exh. 2). Count 4 charged unlawful sexual contact occurring in the year 2018. (A. 54).

2. Defendant's motion for judgment of acquittal regarding the babysitting incident

After the State rested its case-in-chief, defendant moved for a judgment of acquittal. (A: 41). He argued that "to the extent that the allegations of unlawful sexual conduct…include the allegation of the morning of the babysitting incident, there hasn't been a crime that's been alleged here." (A: 42).

The State responded by saying that "[t]he babysitting course is not the basis of any charge in the indictment, that incident isn't the basis of it." (A: 42). The State added, again referring to the babysitting incident: "In no way is the State asserting that there was a crime that was committed or that's charged in the indictment on that date." (A: 42). Later, the State reiterated: "So, again, the babysitting course, there is no assertion by the State in this trial or in the last trial that that was the basis of any of the charges." (A: 42). After this concession, the trial court denied the motion for judgment of acquittal. (A: 43).

During its rebuttal closing argument, the State told the jurors that the babysitting incident did not form the basis for any of the charges in the indictment:

> [Defense counsel] [t]alked about the babysitting class, things happening before that. Look at the indictment, not the basis of any charges. All right. It is never saying anything related to that babysitting class was a crime that we charged.

(2Tr. 179).

3. Jury notes about the babysitting incident and the trial court's instructions

During deliberations, the jurors sent a series of notes relating to the babysitting incident. One such note asked for "transcripts from the pretrial hearing where [A.K.] may have mentioned an instance of oral sex on the day of the babysitting course." (A: 46, 88). Defendant proposed: "We can short circuit and tell them, because [the State] and I both know there was never an instance…where oral sex was mentioned the morning of babysitting." (A: 47).

The trial court eschewed that answer because it did not "want to get into characterizing evidence for them." (A: 47). Instead, the court told the jurors: "Physical transcripts from the pre-trial hearing are not

available. Portions of those transcripts were read into the record as evidence by counsel with some of the witnesses." (A: 48, 88).

Later, the jury sent a note which asked: "Does Count 4 include a crime that may have been committed on February 20, 2019?" (A: 91). On that date, A.K. was scheduled to take the babysitting course. (1Tr. 122).

Clearly the jurors were locked-on to the babysitting incident. The trial court refused to "unduly suggest to [the jurors] that they have to restrict their finding to something that happened between [the dates alleged in the indictment], that is not the law." (A: 50). The court instructed the jurors: "I refer you to the instructions for Count 4 which begins at page 15." (A: 50, 91). The pertinent portions of that instruction were:

> In order to convict [defendant], you must all agree beyond a reasonable doubt that he committed the crime of unlawful sexual contact on at least one specific occasion before January 14, 2020, the alleged victim's 14th birthday.
>
> * * * * *
>
> Although the indictment alleges [defendant] committed the unlawful sexual contact on or between January 1, 2018 and December 30, 2018, the State need not prove the specific date of the offense as long as it convinces you beyond a reasonable date that:

> One, the crime was committed before the alleged victim's 14th birthday.
>
> And two, the crime occurred sometime within the dates suggested by the evidence the State has presented.

(A: 82).

B. Standard of review

1. The trial court's jury instructions.

This Court reviews the propriety of jury instructions de novo. *See e.g. State v. Hansley*, 2019 ME 35, ¶ 8, 203 A.3d 827 ("[W]e review jury instructions in their entirety to determine whether they presented the relevant issues to the jury fairly, accurately, and adequately, and we will vacate the court's judgment only if the erroneous instruction resulted in prejudice.") (internal quotation omitted).

2. The trial court's failure to grant a motion for judgment of acquittal

"[N]o matter what standard of review we apply, if the evidence is not sufficient to allow a fact-finder to rationally find the defendant's guilt beyond a reasonable doubt, then the resulting conviction cannot be deemed free of reversible error." *State v. Kendall*, 2016 ME 147, ¶ 13, 148 A.3d 1230.

3. The trial court's lack of jurisdiction to enter a conviction based on the babysitting incident.

Jurisdictional issues cannot be waived. *State v. Liberty*, 2004 ME 88, ¶ 7, 853 A.2d 760 (the issue of the trial court's jurisdiction may be raised at any time during the pendency of the proceeding); *State v. Scott*, 317 A.2d 3, 5 (Me. 1974) ("Jurisdictional questions are always open to judicial scrutiny."). Whether the trial court had jurisdiction is a question of law, which this Court will review de novo. *See generally State v. Sloboda*, 2020 ME 103, ¶ 4, 237 A.3d 848 ("We review de novo the trial court's subject matter jurisdiction….").

4. Cumulative error

This Court will "review allegations of multiple errors cumulatively and in context to determine whether the defendant received an unfair trial that deprived him or her of due process." *State v. Williams*, 2024 ME 37, ¶ 45, 315 A.3d 714 (cleaned up). Whether a defendant's right to due process has been violated is a question of law that this Court will review de novo. *See generally State v. Williamson*, 2017 ME 108, ¶ 21, 163 A.3d 127 ("We review the alleged due process violation de novo.").

II. Legal framework

A. Trial judges have an affirmative duty to appropriately channel the jury's decision-making

The law requires trial judges to channel the jury's judgment in certain circumstances. *One*, the Supreme Court has described trial judges as "gatekeepers" of evidence, imbued with the authority to "prevent the jury from learning" certain information. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). After evidence is admitted, a trial judge's instructions may restrict the jury's use of admitted evidence to a permissible purpose. *See generally State v. Hunt*, 2023 ME 26, ¶ 54, 293 A.3d 423 (approving of the trial court's "repeated limiting instructions" which directed the jury to "a permissible purpose of the evidence"); *see also State v. Goodrich*, 432 A.2d 413, 419 (Me. 1981) (finding reversible error where, *inter alia*, the trial court failed to immediately give adequate curative instructions).

Two, a trial court must grant a motion for judgment of acquittal and altogether remove a charge of criminal activity from the jury's consideration to protect criminal defendants against a conviction grounded on insufficient evidence or otherwise in violation of the law. *Jackson v. Virginia*, 443 U.S. 307, 320-21 (1979) (discussing

insufficiency-of-the-evidence); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931) (a general verdict may not rest on an invalid legal theory of guilty).

Three, a trial judge has the obligation to correctly instruct jurors as to permissible – and impermissible – factual and legal grounds for finding a defendant guilty. *See generally Carter v. Kentucky*, 450 U.S. 288, 301-02 (1981) (Observing that a jury cannot be "left to roam at large with only its untutored instincts to guide it;" "[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.").

B. In Maine, no judge has jurisdiction over a felony charge not returned by the grand jury.

Article I, section 7, of the Maine Constitution codifies the grand jury requirement for felony charges. It provides: "No person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury…." An "infamous crime" is a crime that "can be punished by confinement of one year or more." *Opinion of Justices*, 338 A.2d 802, 808 (1975).

An indictment confers jurisdiction on a trial court to enter judgment. *See State v. Black*, 294 A.2d 440, 440 (Me. 1972) (per curiam)

("The matter being jurisdictional, we have examined the two indictments and find them legally sufficient to confer jurisdiction upon the court which rendered judgment."); *Scott*, 317 A.2d at 5 ("A criminal complaint lacking any of the essential elements of the crime intended to be charged cannot confer jurisdiction upon the court to try an accused and no lawful sentence can be imposed thereunder."); *cf. also State v. True*, 330 A.2d 787, 790 (Me. 1975) ("An indictment returned by a grand jury which has acted without authority gives the court no jurisdiction and cannot be cured by waiver.").

III. Application

When the jurors asked whether the babysitting incident could form the basis for a verdict on Count 4, the trial court erred by failing to clearly and definitively say that it could not.

First, Count 4 charged unlawful sexual contact. The babysitting incident could not support a verdict on Count 4 because there was no evidence of sexual contact. As defendant correctly argued in support of his motion for judgment of acquittal, A.K. testified that defendant put his hand underneath her shirt, but A.K. never testified that defendant's hand touched any specific part of her body. *See* 17-A M.R.S. § 251(D)

(sexual contact means, *inter alia*, "touching of the genitals or anus, directly or through clothing"). The State at least tacitly acknowledged as much, choosing not to charge this incident or pursue it at trial as evidence sufficient to prove Count 4.

Second, a verdict on Count 4 based on the babysitting incident was defective for want of jurisdiction. The State conceded that the grand jury did not return an indictment on Count 4 based on the babysitting incident. *See* A: 42 (Prosecutor: "The babysitting course is not the basis of any charge in the indictment."); *see also* A: 42 (Prosecutor: "So, again, the babysitting course, there is no assertion by the State in this trial…that that was the basis of any of the charges."). Because the grand jury's charge on Count 4 did not include the babysitting incident, the trial court lacked jurisdiction to enter a conviction on Count 4 on those facts.

Testimony about the babysitting incident was seemingly admitted as other-acts evidence under Rule 404(b). M. R. Evid. 404(b). But without a limiting instruction, the jurors had no clue what use to make of it during deliberations – as their notes make plain. When it became clear that a limiting instruction was necessary in response to the juror's questions, the trial court should have told the jurors that the babysitting

incident could be considered for permissible Rule 404(b) purposes, only. Maine judges are reluctant to comment on the evidence,[13] but limiting instructions are a textbook example of when a comment on the evidence is both appropriate and necessary.

The trial court's incremental errors, which culminated in its failure to clearly and definitively instruct the jurors not to consider the babysitting incident as a basis for its verdict on Count 4, demand vacatur. Given the jury's notes, this Court has no assurance that Count 4 was grounded on something other than the babysitting incident, and the instructions that the court gave only made things worse. In response to the jury's question about the babysitting incident, the court said they were not required to confine the verdict to proof that fell within the dates alleged in the indictment, ignoring the State's concession, ignoring the jurisdictional defects, and ignoring the insufficiency-of-evidence. The conviction and sentence on Count 4 cannot stand.

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[13] *Compare Quercia v. United States*, 289 U.S. 466, 469 (1933) (federal judges may comment on the evidence by drawing the jury's attention to the parts of it that the court thinks are important); *Bute v. Illinois*, 333 U.S. 640, 650 n. 4 (1948) ("One long recognized difference between the trial procedure in federal courts and that in many state courts is the far greater freedom that is allowed to a federal court…to comment upon the evidence when submitting a case to a jury.").

Conclusion

Defendant respectfully requests the relief identified within each assignment of error.

Respectfully submitted,
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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.

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-25-169, SRP-25-190

State of Maine

v.

Peter Cayouette

Certificate of Word Count

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Dated: August 8, 2025

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