MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. And-25-127

STATE OF MAINE v. TREVOR AVERILL

On Appeal from the Unified Criminal Docket (Androscoggin County)

Brief of Appellant
Trevor Averill

WALTER F. MCKEE
Attorney for Appellant
Maine Bar No. 7848
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
wmckee@mckeemorgan.com

KURT C. PETERSON
Attorney for Appellant
Maine Bar No. 6235
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
kpeterson@mckeemorgan.com

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STATEMENT OF FACTS

Back in 2020, Trevor Averill ("Averill") was working at the Poland Spring Distribution Center in Poland, Maine, when he met Michelle Morin Levesque ("Michelle"), who was working at a convenience store just down the road from where he worked. (Tr. VIII, p. 36.[1]) Averill and Michelle soon began a relationship and, after a couple of months, Michelle became pregnant. (Tr. I, p. 86.) At this point, Michelle was living with her mother, Sheila Doughty, but Michelle left her mother's home when she was approximately seven or eight months pregnant to move in with Averill. (Tr. I, p. 89-90.) Michelle's pregnancy was uneventful, but the two expecting parents were excited to meet their child (hereinafter referred to as "H.A."). (Tr. VII, p. 42-43.)

H.A. was born on May 1, 2020, after a smooth delivery where Averill was with Michelle the entire time. (Tr. VII, p. 42-43.) Michelle was in labor with H.A. for approximately 10 to 12 hours, and the new family stayed at the hospital after the child was born for several days. (Tr. VII, p. 41-47.) Afterwards, they returned to their home that the two new parents had already prepared for H.A.'s arrival. (Tr. VII, p. 42-43.)

[1] The jury trial transcripts are identified in this brief as follows: Tr. I is the first day of trial; Tr. II is the second day of trial; Tr. III is the third day of trial; Tr. IV is the fourth day of trial; Tr. V is the fifth day of trial; Tr. VI is the sixth day of trial; Tr. VII is the seventh day of trial; Tr. VIII is the eighth day of trial; Tr. IX is the ninth day of trial.

Averill and Michelle had strong familial support as it related to H.A., as both the paternal and maternal grandparents (and great-grandparents) cared for her on rotating weekends and/or at other various times. (Tr. VII, p. 54-55.) Michelle's mother explained that nothing seemed to be wrong with H.A. and that she had no difficulties feeding H.A. (Tr. I, p. 93-96.) Michelle's mother had H.A. overnight on June 7, 2020, and on the Fourth of July holiday weekend, and she saw nothing concerning. (Tr. I, p. 93-98.) H.A.'s paternal great-grandmother reported that she cared for H.A. a couple of times and, other than one occasion where H.A. "choke[d] a little bit" and made a "gurgle or whatever," there was similarly nothing concerning. (Tr. I, p. 112.)

Michelle reported that H.A. sometimes sounded raspy, gurgled when she breathed, had a hard time keeping food down, and would vomit frequently. (Tr. VII, p. 50-51.) She also explained that H.A. had some small bruising on her back and on her buttocks, but that it did not cause her to be alarmed. (Tr. VII, p. 51.) There was one incident that Michelle discussed, some weeks before the date in question, in this case, where she went to pick up lunch at the store and returned home to H.A. in Averill's arms, and Averill was frightened because he had dropped H.A.. (Tr. VII, p. 65-68, 70-71.) More specifically, Averill was getting up from a sofa and dropped H.A. at about waist height (a "short fall"). (Tr. IV, p. 160.) H.A. had a mark on her head and was fussy, so they called Averill's mother, who was in the healthcare

industry. (Tr. VII, p. 65-68.) Averills's mother examined H.A., and a discussion was had about the prospect of bringing H.A. to the hospital, but it was decided that this was unnecessary and that they would keep an eye on her. (Tr. VII, p. 65-69.)

On July 21, 2020, Averill's grandmother had rented a camp on Pleasant Pond in Sumner, Maine. (Tr. I, p. 115-116.) H.A. was acting normal: she was smiling at people, cooing, feeding normally, and was not visibly injured—everything seemed fine. (Tr. I, p. 115-116; *see* Def.'s Ex. 1.) At about 6:00 pm, Averill and Michelle left the camp and returned to their home with H.A. (Tr. I, p. 116-117.) With H.A. asleep downstairs in the living room of their home, Averill and Michelle stayed up until about 10:00 pm before they transferred H.A. upstairs and all three of them went to bed. (Tr. VII, p. 76-77.) Like most two-month-olds, H.A. awoke at approximately 12:30 am and started to "fuss," according to Michelle. (Tr. VII, p. 78-79.) Averill offered to get H.A. and Michelle heard Averill talking calmly to H.A., asking if she was hungry and telling H.A. they would go get some food as H.A. and Averill went downstairs. (Tr. VII, p. 78-80.) Averill was not visibly frustrated or acting in any way that gave Michelle concern until Averill called upstairs for Michelle after H.A. went limp and unresponsive. (Tr. VII, p. 88.)

Christopher Duval was a dispatcher with the Androscoggin County Sheriff's Office ("ACSO") in July 2020, and was working the night that H.A. went unresponsive. (Tr. I, p. 162-163.) Michelle called 911 and spoke with Mr. Duval:

she was frantic, and reported that her newborn was not breathing, was gasping, had a heartbeat, and really needed help. (Tr. I, p. 164.) In response to Mr. Duval's questions, Michelle reported that she was feeding and that she started to choke. (Tr. I, p. 162-164.) Dispatch obtained some more information but sent emergency medical technicians ("EMT") to Averill and Michelle's home. (Tr. I, p. 162-164.) Averill began performing CPR at the direction and instruction of dispatch. (Tr. I, p. 164; Tr. VII, p. 88.)

EMTs arrived on scene, as did law enforcement officers with the ACSO. When they arrived, very minimal breathing was occurring, but color was starting to return to H.A.'s body, demonstrating that she was receiving some oxygen. (Tr. I, p. 193-195.) As Michelle had explained to dispatch, Averill explained to law enforcement that arrived on scene that "he had been feeding the baby and he had brought her up to his shoulder area to burp her when he heard her make kind of a gagging sound and she went unconscious." (Tr. I, p. 174.) Averill reported to one ACSO officer, Victor "Vic" Barr, who first arrived on scene and was recording his response on his body-worn camera ("BWC"), that H.A. had been unconscious for about ten minutes. (Tr. I, p. 185.) Stephen Bennett, an EMT with Turner Rescue Department, reported that H.A. "had some white frothy sputum liquid in her mouth area [which was suctioned from the mouth area] and she threw up formula a couple of times." (Tr. I, p. 196-197. 203.) Norman Richardson—another EMT with

Buckfield Rescue—testified similarly. (Tr. I, p. 215.) H.A.'s heart was beating, and the emergency responders started an IV and intubated H.A. and transported her to Central Maine Medical Center ("CMMC"). (Tr. I, p. 178, 215.)

Dr. Joseph Anderson was working on July 22, 2020, in the early morning hours when H.A. was brought to the CMMC emergency room by ambulance. (Tr. I, p. 228.) It was almost immediately established that H.A. needed a higher level of care than what CMMC was able to offer. (Tr. I, p. 233.) Medical providers at CMMC were engaged in stabilizing care, which included x-ray imaging, which did not show any injuries, similar to their examination for external injuries. (Tr. I, p. 234, 253-255.) Further, there were no warning signs that there was increasing pressure on the brain—quite the opposite, as H.A.'s blood pressure was low. (Tr. I, p. 235.)

H.A. was transported via LifeFlight from CMMC to Maine Medical Center ("Maine Med"). (Tr. II, p. 18-20.) Daniel Horne, a nurse paramedic with LifeFlight of Maine, was dispatched at 2:11 am and noted that H.A. was unresponsive when he arrived at her bedside. (Tr. II, p. 25.) Mr. Horne did not see any visible trauma or external injuries to H.A., and her diaper was dry and clean. (Tr. II, p. 36-37.) H.A. flew to Maine Med, where she was cared for by Dr. Jessica Schaumberg, who learned that the child had a history of easily bruising and bleeding. (Tr. II, p. 51.) Michelle explained to Dr. Schaumberg that H.A. had been spitting up frequently,

and Averill explained that "he had woken up to give the baby a bottle, the baby was feeding from the bottle and started gagging then became unresponsive." (Tr. II, p. 51.) H.A. was still unresponsive and, within the first few hours of treatment, Dr. Schaumberg was "highly concerned for nonaccidental trauma" ("NAT"). (Tr. II, p. 56-58.)

Averill and Michelle followed H.A. by car and arrived at Maine Med, where they were both interviewed by law enforcement and an official with the Maine Department of Health and Human Services. ACSO Detective Troy Young's interview with Averill lasted for approximately 28 minutes. (Tr. IV, p. 97.) Detective Young was recorded on an audio recording device. (Tr. IV, p. 100.) Following this interview, detectives with the Maine State Police ("MSP") arrived, and Averill was interviewed a second time by these law enforcement officers. (Tr. IV, p. 100-101.) Michelle was also interviewed a second time by MSP detectives. (Tr. IV, p. 101.) After this second interview, Averill agreed to go to his house to do a "walk-through" with MSP detectives to demonstrate what happened on the evening of July 22, 2020. (Tr. V, p. 58-62.) When Averill arrived to do this walk-through, one MSP detective was already at his home, and he proceeded to do the walk-through demonstration.

Back at the hospital, medical providers at Maine Med continued to provide stabilizing treatment for H.A., and a more in-depth assessment of H.A. was

performed the following day on July 23, 2020. (Tr. II, p. 121-123.) Dr. Michael Zubrow testified that CAT scan imaging showed that H.A.'s brain had been deprived of oxygen and nutrients for a prolonged period of time and that they were dealing with a significant brain injury caused by hypoxia or a hypoxic ischemic event. (Tr. II, p. 126, 141-143.) Imaging also showed that H.A. had a *healing* posterior rib fracture, and ophthalmology reported that she had retinal hemorrhaging[2]. (Tr. II, p. 127, 135.) Additionally, H.A. suffered a skull fracture that showed some possible early healing signs and subdural hemorrhages. (Tr. II, p. 101, 140, 228, 234.)

With H.A.'s brain function worsening, medical providers advised Averill and Michelle that H.A. would not be able to breathe or eat on her own, that she would likely not have much interaction with the outside world, and that she would be technologically dependent in order to continue living. (Tr. III, p. 142.) After discussing this with medical providers at Maine Med, Averill and Michelle made the difficult decision that they would not want her to be technologically dependent, and they verbalized an understanding that H.A. would not be able to survive without this technology. (Tr. III, p. 142.) H.A. died on July 26, 2020, and an autopsy was conducted on July 28, 2020. (Tr. IV, p. 21.)

[2] Dr. Brooke Miller testified that retinal hemorrhage can be caused by a "laundry list of things," including diabetes, blood pressure, injury, and trauma, but that this was a "classic case" of NAT. (Tr. II, p. 177-178, 193-194.)

Over a year later, on September 8, 2021, Trevor Averill was indicted by the Androscoggin County Grand Jury with Depraved Indifference Murder, *see* 17-A M.R.S. § 201(1)(B), and Manslaughter, *see* 17-A M.R.S. § 203(1)(A). (A. 67-68.) The parties engaged in discovery and pre-trial motion practice, and both the State and the defense designated expert witnesses for trial. (A. 3-28.) A Motion to Suppress Statements and a Motion to Dismiss for Lack of Corpus Delicti[3] were filed by the defense. On January 27, 2023, a hearing on the Motion to Suppress Statements was held and taken under advisement. (A. 11-15.) The trial court (*J. Stewart*) denied the Motion to Suppress Statements by written decision issued on February 16, 2023. (A. 15.) Leading up to trial, the defense filed for a pretrial ruling on the admissibility of autopsy photographs of H.A., and a hearing was held on January 3, 2025, where the trial court (*J. Archer*) denied the defense's Motion in Limine and ruled in favor of the admissibility of these photographs. (A. 35-36, 69, 72.)

Following jury selection, a nine-day jury trial began on January 21, 2025, where the jury heard an incredible amount of expert testimony on the topic of AHT from both the State and the defense. On day six of trial, the State had rested its case in chief, and the defense moved for a judgment of acquittal, which was denied by

[3] There was not a pre-trial hearing on the Motion to Dismiss for Lack of Corpus Delicti; instead, adjudication of the motion was deferred until trial.

the trial court (*J. Archer*). (A. 43-53, 73-79; Tr. VI, p. 26-34.) The defense called three expert witnesses and Michelle, and the State called one rebuttal witness before the evidence came to a close on January 29, 2025, day seven of the trial. (Tr. VII.) On January 30, 2025, closing arguments were made to the jury, and the jury was instructed by the trial judge. (Tr. VIII.)

The following day, Friday, January 31, 2025, a little after 5:00 pm, the jury came back with its verdict, finding Trevor not guilty of Count I, Depraved Indifference Murder, and guilty of Count II, Manslaughter. (Tr. IX, p. 4.) On March 14, 2025, a sentencing hearing was held. (Sentencing Tr. 1.) Both the State and the defense had filed sentencing memoranda in connection with the trial court's sentencing, and, at the hearing, the trial court heard from Michelle's mother and father, a childhood friend of Trevor, Trevor's paternal grandmother, Trevor's mother, and Michelle. Following a brief recess, the trial court took to the bench and sentenced Trevor to 23 years to the Department of Corrections, with all but 18 years suspended, with 6 years of probation. (A. 29-34, 58-66.)

A timely notice of appeal and Application to Allow an Appeal of sentence was filed, and this Court granted leave to appeal the sentence on July 11, 2025. (A. 27.)

ISSUES PRESENTED FOR REVIEW

I. Evidentiary Rulings at Trial:

Whether the trial court erred in the admission of the following evidence: (a) autopsy photographs of H.A., (b) the BWC footage of emergency responders depicting H.A. receiving emergency medical treatment, and (c) H.A.'s non-acute healing rib-fracture and non-acute skull fracture that indisputably did not occur on July 22, 2020.

II. Motion for Judgment of Acquittal:

Whether the trial court committed reversible error in denying the defense's Motion for Judgment of Acquittal.

III. Prosecutorial Error During Closing Arguments:

Whether the trial court erred by not granting the defense's request for a mistrial due to prosecutorial error committed at closing argument.

V. Trial Court's Sentencing Analysis:

Whether the sentencing court erred in its sentencing analysis by punishing Trevor for exercising his right to a trial and remaining silent, relying on older injuries H.A. sustained that were not attributable to Trevor, and failing to give due regard to the sentencing factors and otherwise abusing its sentencing discretion.

ARGUMENT

I. THE TRIAL COURT MADE MULTIPLE ERRORS ON EVIDENTIARY ISSUES THAT REQUIRE A NEW TRIAL.

A. The trial court erred when it admitted autopsy photographs and BWC footage of H.A. over the objection of the defense.

"While a trial court's finding on relevance, sufficient foundation, or other prerequisites for admissibility are reviewed for clear error, the ultimate ruling on admissibility is reviewed for an abuse of discretion." Alexander, *Maine Appellate Practice*, § 419(b) at 267 (6th ed. 2022). This standard of review is similar to the standard articulated in a sufficiency of the evidence challenge:

> A "clear error" determination involves review of three issues. "A finding of fact is clearly erroneous when: (1) no competent evidence supporting the findings exists in the record; (2) the fact-finder clearly misapprehended the meaning of the evidence; or (3) the force and effect of the evidence, taken as a whole, rationally persuades us to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.

Alexander, *Maine Appellate Practice* § 416(b)(1) at 257 (6th ed. 2022) (quoting *Wells v. Powers,* 2005 ME 62, ¶ 2, 873 A.2d 361).

> Relevant evidence is evidence that has any tendency to make a fact more or less probable than it would be without the evidence; and . . . The fact is of consequence in determining the action. All facts which tend to prove or disprove the matter at issue or which constitute a link in the chain of circumstantial evidence with respect to the act charged are relevant.

Id. (citations and quotation marks omitted).

"[T]he ultimate prejudice versus probative effect determination to admit or exclude relevant evidence under M.R. Evid. 403 is reviewed for an abuse of discretion." *Id*. § 419(b) at 267. The same applies to a decision to admit or exclude evidence that is repetitive or may unduly waste time. *See id*. "Under Rule 403 of the Maine Rules of Evidence, a photograph is admissible if it truly and accurately depicts what it purports to represent, is relevant to some issue involved in the litigation, and its probative value is not outweighed by any tendency it may have toward unfair prejudice." *State v. Bickart,* 2009 ME 7, ¶ 36, 963 A.2d 183 (footnote omitted) (quotation marks omitted).

During the hearing on the Motion in Limine filed by the defense, a brief oral argument was held by the attorneys, and the trial court held as follows:

> As to States 3 and 4, I don't find the autopsy photographs to be gruesome. Even if I did, under Crocker, gruesomeness alone does not make photographs inadmissible. I don't think that the photographs —— at this juncture, subject to any sort of renewed objection at trial if the testimony indicates otherwise, I don't think the photographs are cumulative if they're intended to illustrate the expert's testimony. And under Crocker anyway -- and I don't recall the age of the case, but it's 435 A.2nd 58. The law court indicated that photographs such as this are not cumulative when they illustrate the expert's testimony and they're conveying relevant information to the jury in a much more complete and meaningful form than the stark, sterile, clinical words of a doctor and nurse could convey.
>
> And so under Crocker, I —— I'm denying the motion. I don't find them gruesome. And I also don't think that 403 impacts these —— the admissibility of these two photographs in a way that it necessitates exclusion. So I am allowing admission of the three photographs. I think that was it as far as the motions in limine go.

(A. 35-36; Mot. in Limine Hearing Tr., p. 19-20.) State's Exhibits 3 and 4, as well as State's Exhibits 6-20 and 63, were admitted and displayed to the jury in open court. (Tr. IV, p. 23-40.)

Although the trial court's reliance on this Court's 1981 decision in *State v. Crocker*, 435 A.2d 58 (Me. 1981) is reasonable, given that it is a similar challenge in a similar type of case, *it is not dispositive* to the trial court's M.R. Evid. 403 analysis. *See State v. Conner,* 434 A.2d 509, 512 (Me. 1981) ("The critical factor in this balancing test is the significance of the photograph in proving the State's case. Where the photograph has minimal significance, e.g., where it is probative only of uncontroverted facts, or where its value is merely cumulative of other less prejudicial evidence, then it is the responsibility of both the prosecutor and the trial court to examine closely those photographs that are arguable prejudicial; where the photograph has essential evidentiary value, then even a gruesome photograph may properly be admitted into evidence. . . . In making such a discretionary judgment on admissibility of a photograph, the trial court must strike a rationally justifiable balance between the evidentiary value of the depiction afforded by the photograph in the total circumstances of the trial, on the one hand, and its potential, on the other hand, to cause inflammatory prejudice because of the gruesome aspects of the depiction." (cleaned up)).

In this case, it was clearly and consistently established by expert testimony how H.A. died, and there was no real dispute about the nature of the injuries H.A. was diagnosed with. Like many Abusive Heat Trauma ("AHT") cases, this case boiled down to the issue of causation. The State's many experts consistently testified, in graphic and great detail, about the injuries that H.A. sustained. The autopsy photographs did not explain any unanswered questions, and they did not supplement testimony in any significantly probative way. Moreover, this is not a case where the only evidence was verbally given; there was a litany of medical reports and medical imaging that more than amply described H.A.'s injuries and supported what the experts testified about.

For example, one of the State's many experts, Mary Edwards-Brown, who is a neuroradiologist for children, testified with a PowerPoint presentation that contained some of the medical imaging of the injuries. (Tr. IV, p. 119-170.) Looking at one scan in particular, she explained to the jury:

> When I see this I get a feeling in the pit of my stomach because I know this brain is dying. It's either dead or dying. So this is a dead and dying brain because there is no good architecture. . . . This looks like a tragically acute injury.

(Tr. IV, p. 135-137.) This Court has recognized in *Crocker* that the "issue of child abuse is of course an emotion-laden one." *Crocker,* 435 A.2d at 74. As demonstrated in Dr. Brown's testimony, the numerous experts' testimony and the voluminous imaging presented to the jury were similarly emotionally charged,

making the need for repetitious evidence that tends to simply invoke the passions of the fact-finder unnecessary and unduly prejudicial under M.R. Evid. 403. *See State v. Nelson,* 891 S.E.2d 508, 513-515 (S.C. 2023).

Admitting the deceased child's autopsy photographs, on this record, was an abuse of discretion because its probative value was minimal given the cumulative evidence already before the jury and because it carried a highly undue prejudicial effect. After seeing these graphic and disturbing photographs of a deceased two-month-old, it is reasonable to believe that a jury would be inflamed to action; that they would want to assign blame to someone based on the photographs themselves and not on the evidence (or the lack thereof). Therefore, the trial court committed an abuse of discretion in allowing these photos to be introduced in evidence, published to the jury, and sent back to the jury room for their deliberations. For this reason alone, this conviction should be vacated and the case remanded for a new trial.

Next, the same is true for the admission, over the defense's objection, to the BWC footage of Officer Vic Barr. As it relates to that evidentiary objection, the trial court ruled on the first day of trial as follows:

> As – as I indicated during your conference yesterday, I am sustaining the objection to the video in part.
>
> The first part of the video I am overruling the objection. I agree that the video is prejudicial. Any time I think you see a baby being subjected to CPR, it is going to be somewhat prejudicial. But I don't find it to be

> unfairly prejudicial. And it doesn't outweigh the probative value in showing the crime scene, any admissions made by the defendant, the information that was given by both the defendant and the mother. In seeing the defendant's demeanor as well as observing how the baby presented at the time that the first responders came to the scene, all of that is highly relevant to the State's theory of the case. And I also think its probative of both innocence and guilt, depending on how a jury were to take away the defendant's demeanor and the comments.
>
> The second part of the video, however, I am sustaining the objection. That's the component that is in the ambulance. That portion does not have the defendant present so there's no statements or conduct by the defendant. I think the State can get to the same type of information that it seeks to elicit by asking questions. In their – – because I find there to be scant probative value, what little value there is outweighed by the unfair prejudice stemming from the likely emotional reaction watching the administration of CPR to the baby. So I think that's all consistent with how I ruled yesterday informally during our conference.

(A.37-42; Tr. I, p. 8-9.)

For similar reasons as the autopsy photographs, the BWC footage should not have been admitted. As the trial judge found, this BWC evidence was prejudicial to the defense. It would be hard to contend otherwise: life-saving efforts to an unresponsive two-month-old that appears "very gray and ashy" are likely to result in a deeply emotional reaction. (Tr. I, p. 172.) However, unlike the second part of the BWC video, the trial judge permitted the first part of the BWC footage over objection because it purportedly "show[ed] the crime scene," the statements made by Trevor, and Trevor's demeanor.

Contrary to the trial court's ruling, there was little to no probative value in the "crime scene," as reflected in later testimony showing that MSP detectives did not retrieve any "evidence" from the "crime scene":

> Q. And I think in one sense this case is a little different than I take it probably – I don't know if it's most, or at least a number of your cases, there's really – I meant this is a quote, unquote crime scene in the sense that you think a crime happened there, correct?
>
> A. Correct.
>
> Q. But there's – there's no, you know, bloody knife or a gun or fingerprint – there's really nothing like that that you were looking for at this scene, correct?
>
> A. That's correct.
>
> Q. You weren't looking for fingerprint evidence, you weren't looking for blood stains like on the carpet or anything like that?
>
> A. That's true.
>
> Q. DNA. DNA was not a factor in this case, correct?
>
> A. Correct.
>
> Q. And it fact it was a pretty – a pretty clean and well kept unit, wouldn't you agree, inside?
>
> . . . .
>
> A. Yes.
>
> . . . .
>
> Q. Yup. And so if you were just looking at that household and you knew nothing about this case, you wouldn't look at that and say a crime happened here –

A. Not necessarily.

Q. -- right?

A. Yes.

(Tr. V, p. 87-88.) Furthermore, this "crime scene" was already depicted in the MSP investigation; namely, in the recorded "walk-through" that detectives performed with Trevor, which was admitted in evidence. Next, any and all of Trevor's statements that were captured on BWC could similarly be testified to by patrol officer Vic Barr—and, in fact, Officer Barr did this. (Tr. I, p. 174-175.) Officer Barr similarly could (and did at one point, when testifying about Trevor retrieving his cat) testify about what Trevor and Michelle were doing when he and EMTs were performing their emergency response. (Tr. I, p. 179-180.)

Rule 403 serves as a guard against unfair prejudice, but, in this case, it did not serve its dedicated function. The admission of autopsy photographs and BWC footage created an undue tendency to move the jury to decide the case on an improper basis-- specifically, an emotional one. *See State v. Ardolino,* 1997 ME 141, ¶ 10, 697 A.2d 73. For the reasons stated above, this Court should vacate the conviction and remand this case for a new trial with appropriate instructions regarding the admission of this highly and unfairly prejudicial evidence at the subsequent trial.

B. *The trial court erred when it permitted experts to testify about an old, healing rib fracture and a non-acute skull fracture because they served no purpose other than to show propensity for abuse, notwithstanding the fact that it was undisputed that these injuries did not occur on July 22, 2020, when H.A. was in Trevor's care, and it was unknown when or how these injuries occurred.*

Practically every single one of the State's expert witnesses testified about the existence of a non-acute, healing posterior rib fracture and that it was consistent with NAT. (Tr. II, p. 64, 135.) This rib fracture was older, and the experts agreed that it did not occur on July 22, 2020, and one expert indicated that it was at least 10 to 14 days old. (Tr. II, p. 298.) Further, that same expert testified that a single rib fracture does not necessarily mean that the child was abused. (Tr. II, p. 298.) Simply put, the experts could not identify when the rib fracture occurred and who or what caused the rib fracture—but it had nothing to do with what occurred on July 22, 2020. (Tr. III, p. 35-37, 69.) Nonetheless, there was ample testimony about this rib fracture brought to the jury's attention, and multiple exhibits were admitted showing this fracture. (Tr. III, p. 86-99; State's Ex. 44-45, 66, 66A, 112.) Furthermore, the existence of a skull fracture was a highlight of the State's case in chief, but, similar to the rib fracture, it was in the process of healing, so it would be inconsistent with having occurred on July 22, 2020. (Tr. II, p. 48-50, Tr. IV, p. 64, Tr. VI, p. 158, 161-162, 207-208, 213.)

M.R. Evid. 404(b) provides that evidence of prior bad acts cannot be used to prove an accused's character in order to show that on a particular occasion the person

acted in accordance with that character. Evidence of prior bad acts is only admissible in limited circumstances, such as to "demonstrate motive, intent, identity, absence of mistake, or the relationship of the parties." *State v. Pratt,* 2015 ME 167, ¶ 24, 130 A.3d 381. Furthermore, as discussed in the other evidentiary challenges in this appeal, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the trier of fact. *See* M.R. Evid. 403.

There is a total lack of evidence about when these fractures occurred and how they occurred, let alone that they were caused by Trevor. Because no witness could identify the age of these injuries or the proximity of these fractures to the incident on July 22, 2020, the probative value of this evidence is minimal when compared to the severe prejudicial effect it had on Trevor. The admission of this evidence created a high degree of risk that the jury would engage in propensity reasoning evidence, and the danger of unfair prejudice, confusion of the issues, and misleading the jury should have resulted in the exclusion of this evidence. Because of this, the Court erred by permitting the State's experts to testify about these injuries.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL.

Pursuant to M.R.U. Crim. P. 29, "[t]he court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more crimes charged in the indictment . . . after the evidence on either side is closed if the

evidence is insufficient to sustain a conviction of such crime or crimes." When reviewing challenges to a trial court's denial of a motion for judgment of acquittal, this Court will "view the evidence in the light most favorable to the State to determine whether the fact-finder could rationally have found each element of the offense beyond a reasonable doubt." *State v. Edwards,* 2024 ME 55, ¶ 17, 320 A.3d 387. Of course, this Court will defer to the fact-finder on matters of credibility and the reasonable inferences that may be drawn from the competent record evidence: "Our review does not intrude on the jury's role to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id*. (alteration omitted) (quotation marks omitted).

It is beyond reproach that the absence of direct evidence is not "fatal to the prosecution" and that circumstantial evidence alone can be enough to support a criminal conviction. *State v. Williams,* 2024 ME 37, ¶ 39, 315 A.3d 714. This Court recently addressed in *Williams* that "[t]he facts surrounding cases of assault or abuse of a child by an adult often present similar records, where there is little direct evidence and the State's case must be built on circumstantial evidence." *Id.* ¶ 42. However, this record is not consistent with *Williams* or the cases relied upon in *Williams.*

The record in this case is replete with expert testimony expressing that their opinions were based on "suspicions" and "concerns" for NAT. The trial record

contains no evidence upon which a reasonable trier of fact could make the speculative leap required to associate the injuries H.A. presented with as being caused by Averill specifically. There was no admission by Averill or other evidence separate from the fact that H.A. went unresponsive shortly after he brought H.A. downstairs to feed and change her. The constitutional standard set forth by the United States Supreme Court in *Jackson v. Virginia,* 443 U.S. 307 (1979) requires more to prove that "the result would not have occurred but for the conduct of the defendant, operating either alone or concurrently with another cause." 17-A M.R.S. § 33(1).

Courts across the country have recognized that there is a "prominent controversy within he medical community regarding the reliability of SHS/AHT diagnosis." *See e.g., People v. Ackley,* 870 N.W.2d 858 (Mich. 2015); *see also Commonwealth v. Epps,* 53 N.E.3d 1247, 1260-1262 (Mass. 2016) (noting that there exists "substantial scientific and medical literature that recognized the possibility that accidental short falls can cause serious head injuries in young children of the type generally associated with shaken baby syndrome" and that the studies challenging the view that shaking alone can result in these kinds of injuries is "hotly contested in the relevant medical and scientific fields."); *Del Prete, v. Thompson,* 10 F.Supp.3d 907, 954-955 (N.D. Ill. 2014); *see generally Allison v. State,* 448 P.3d 266, 273-274 (Alaska 2019). Thus, a person accused with causing the death of their

child by a diagnosis of AHT must only be convicted of such a crime only when there is evidence separate from expert testimony that would allow a jury to find a causal link.

Simply put, the evidence supporting a conviction of Manslaughter on this record was insufficient to support a conviction because evidence of causation was merely speculative and could not be inferred on this record. As a result, the trial court erred by denying the defense's Motion for Judgment of Acquittal. (A. 43-53, 73-79.)

III. THE STATE COMMITTED PROSECUTORIAL ERROR DURING CLOSING ARGUMENTS AND THE TRIAL COURT'S DENIAL OF A MISTRIAL WAS ERROR AND REQUIRES A NEW TRIAL.

The accused in a criminal prosecution has the constitutional right to a fair trial with due process under the United States Constitution and the Constitution of the State of Maine. *See* U.S. Const. amend. XIV, § 1; Me. Const. art. I, § 6-A. "The role of a prosecutor in the courtroom is unique, serving as a "minister of justice" who is obligated "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *State v. Hanscom,* 2016 ME 184, ¶ 18, 152 A.3d 632 (quotation marks omitted). "As a representative of an impartial sovereign, the prosecutor is under a duty to ensure that a criminal defendant gets a fair trial, and this duty must far outweigh any desires to achieve a record of convictions." *State v. Collin*, 441 A.2d 693, 697 (Me. 1982). In other words,

"[p]rosecutors must walk a careful line to avoid overreaching, and [a]lthough permitted to strike hard blows, a prosecutor may not strike foul ones." *State v. Dolloff*, 2012 ME 130, ¶ 41, 58 A.3d 1032 (quotation marks omitted).

"A prosecutor may use wit, satire, invective and imaginative illustration in arguing the State's case and may present an analysis of the evidence in summation with vigor and zeal." *State v. Coleman,* 2019 ME 170, ¶ 16, 221 A.3d 932. "Prosecutors must 'walk a careful line' to avoid overreaching, and [a]lthough permitted to strike hard blows, a prosecutor may not strike foul ones." *Dolloff*, 2012 ME 130, ¶ 41, 58 A.3d 1032 (quotation marks omitted). The focus is not on the intentions of the prosecutor but on the actual message being communicated to jurors and whether it has violated the defendant's right to a fair trial. *See State v. White,* 2022 ME 54, ¶¶ 19-20, n. 9, 285 A.3d 262.

This Court has explained that "[a] lawyer should not state a personal opinion as to . . . the credibility of a witness." *State v. Hassan*, 2013 ME 98, ¶ 33, 82 A.3d 86 (citing M.R. Prof. Conduct 3.4(e) (quotation marks omitted)). "Determining what credence to give to the various witnesses is a matter within the *exclusive province* of the jury." *State v. Crocker*, 435 A.2d 58, 77 (Me. 1981). "A prosecutor may not use the authority or prestige of the prosecutor's office to shore up the credibility of a witness, sometimes called 'vouching.'" *State v. Fahnley,* 2015 ME 82, ¶ 40, 119 A.3d 727 (quotation marks omitted). Of course, a prosecutor may properly suggest

to the jury ways to analyze the credibility of witnesses when those arguments are "fairly based on facts in evidence." *See Hassan*, 2013 ME 98, ¶ 33, 82 A.3d 86 (quotation marks omitted). "It is improper, however, for a prosecutor to vouch for a witness by impart[ing] personal belief in a witness's veracity or impl[ying] that the jury should credit the prosecution's evidence simply because the government can be trusted." *State v. Williams*, 2012 ME 63, ¶ 46, 52 A.3d 911 (quotation marks omitted).

Here, the State's attorney similarly "[used] the authority or prestige of the prosecutor's office . . . to shore up the credibility of witness[es]" in this case. *See* Alexander, *Maine Appellate Practice* § 422A at 272 (6th ed. 2022). Specifically, the prosecutor argued:

> You heard again from many experts, from both the state and the defense. But when you heard from those experts, I implore you to look at them as whether they were providing excuses, that they were looking selectively or with blinders, or trying to suggest distraction from the information that's really important. The defendant has given a very implausible story about what happened to Harper and they hired experts to support that implausible story. That isn't reasonable doubt. It cannot overcome consistent medical evidence from treating doctors, consulting doctors, imaging, pathology, and the expert opinions of a pediatric neuroradiologist in a pediatric neurologist.
>
> Use your common sense.

(Tr. VIII, p. 82.)

Following the conclusion of the State's initial closing argument, defense counsel asked to approach and made a motion for a mistrial, based on the

prosecution's "improper argument about us hiring experts to come in and say basically what we want them to say. (A. 54-57.) And that her – basically her experts are much more credible, use common sense. (A. 54-57.) I think that's improper and I think it's contrary to what the law is." (A. 54-57.) The trial court explained that it did not think it crossed the line to the level of mistrial and issued the following curative instruction to the jury:

> Now, members of the jury, before I ask defense counsel to present closing argument, I just want to remind you that you as the jurors, it's your job to determine the credibility of any witness. Regardless of who calls that witness to testify, it's your job as a part of the analysis to determine credibility. Not the lawyers job, your job.

(A. 54-57.)

"A mistrial is intended to address circumstances in which the trial is unable to continue with a fair result and only a new trial will satisfy the interest of justice." *State v. Carrillo,* 2021 ME 18, ¶ 18, 248 A.3d 193 (quotation marks omitted). In determining whether to grant a mistrial, a trial court must decide whether it is "confident that the trial can proceed to a fair and just verdict in the context of the proceedings before it" and must "consider the totality of the circumstance, including the severity of the misconduct, the prosecutor's purpose in making the statement (i.e., whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions." *Id* (quotation marks omitted). A motion for mistrial is only granted in rare circumstances, such as

"exceptionally prejudicial circumstances or prosecutorial bad faith." *Id* (quotation marks omitted).

This case was one of those colloquially called "battles of the experts." There was a tremendous amount of expert testimony that was submitted to the jury, and there was a stark disagreement about what caused the injuries that H.A. succumbed to, making the jury's credibility determination of paramount importance. The prosecutor, cloaked in the authority and prestige of the Attorney General's office, invaded the province of the jury by conveying the personal belief that the defense experts were hired and, therefore, not credible. *See State v. Carmello,* 558 P.3d 439 (Ore. 2024) ("Vouching does not always consist of a direct statement . . . it can consist of subtler statements that convey the speaker's view of the person's credibility."); *Dolloff,* 2012 ME 130, ¶ 58, 58 A.3d 1032 (highlighting that "it [is the jury's] determination of the facts, not the opinion of the prosecutor, that matter[s]."). Injecting this personal opinion and implying that the defense experts could not be trusted because they were hired undermined the jury's role as the only decider of credibility and fact, and, similarly, undermines the jury's verdict in general.

Because this case hinged on the jury's credibility determination on the expert testimony presented, the curative instruction given by the trial court was insufficient to ensure Trevor's right to a fair trial. Therefore, this Court should vacate the underlying conviction and remand the matter for a new trial.

IV. THE SENTENCING COURT COMMITTED REVERSIBLE ERROR IN ITS SENTENCING ANALYSIS REQUIRING VACATUR OF THE SENTENCE.

17-A M.R.S. § 1602 provides the statutorily required 3-stop process in imposing Class A crimes:

> **A.** First, the court shall determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual.
>
> **B.** Second, the court shall determine the maximum term of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case. Relevant sentencing factors include, but are not limited to, the character of the individual, the individual's criminal history, the effect of the offense on the victim and the protection of the public interest.
>
> **C.** Third, the court shall determine what portion, if any, of the maximum term of imprisonment under paragraph B should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation or administrative release to accompany that suspension.

17-A M.R.S. § 1602(1)(A)-(C). This statutory framework is, of course, a codification of the *Hewey* analysis. The Legislature has further articulated the general purposes of sentencing criminal defendants:

> 1. **Prevent crime.** Prevent crime through the deterrent effect of sentences, the rehabilitation of persons and the restraint of individuals when required in the interest of public safety;
>
> 2. **Encourage restitution.** Encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;

3. **Minimize correctional experiences.** Minimize correctional experiences that serve to promote further criminality;

4. **Provide notice of nature of sentences that may be imposed.** Give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;

5. **Eliminate inequalities in sentences.** Eliminate inequalities in sentences that are unrelated to legitimate criminological goals;

6. **Encourage just individualization of sentences.** Encourage differentiation among persons with a view to a just individualization of sentences;

7. **Elicit cooperation of individuals through correctional programs.** Promote the development of correctional programs that elicit the cooperation of convicted individuals;

8. **Permit sentences based on factors of crime committed.** Permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:

   A. The age of the victim, particularly of a victim of an advanced age or of a young age who has a reduced ability to self-protect or who suffers more significant harm due to age;

   . . . .

   . . . .

9. **Recognize domestic violence and certified domestic violence intervention programs.** Recognize domestic violence as a serious crime against the individual and society and to recognize domestic violence intervention programs certified pursuant to Title 19-A, section 4116 as the most appropriate and effective community intervention in cases involving domestic violence.

17-A M.R.S. § 1501(1)-(9).

Pursuant to 15 M.R.S. § 2154, the Law Court's general objectives in reviewing the propriety of a sentence are, in part, are to provide for the correction of sentences imposed with "due regard for the sentencing factors set forth in this chapter," to correct "abuses of the sentencing power and by increasing the fairness of the sentencing process," and "to promote the development and application of criteria for sentencing which are both rational and just." 15 M.R.S. § 2154(1)(2), (4). This Court will consider the "propriety of the sentence, having regard to the nature of the offense, the character of the offender, the protection of the public interest, the effect of the offense on the victim and any other relevant sentencing factors recognized under law." 15 M.R.S. § 2155(1). Furthermore, this Court will consider "[t]he manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based." 15 M.R.S. § 2155(2).

This Court has explained that it "will review de novo for misapplication of principle the basic sentence imposed at the first step of the analysis, . . . review the maximum sentence and the final sentence determined at steps two and three for an abuse of discretion," and will "review the sentencing court's analysis at each step to determine whether [it] disregarded the relevant sentencing factors or abused its sentencing power." *See State v. Hansen,* 2020 ME 43, ¶ 27, 228 A.3d 1082 (quotation marks and citation omitted). "In determining whether the sentencing court disregarded the statutory sentencing factors, abused its sentencing power,

permitted a manifest and unwarranted inequality among sentences of comparable offenders, or acted irrationally or unjustly in fashioning a sentence, [this Court will] afford the trial court considerable discretion." *State v. Watson,* 2024 ME 24, ¶ 20, 319 A.3d 430. With that being said, "there are, nonetheless, limits that [this Court has] been entrusted to enforce in order to ensure that sentencing both systemically and in individual cases is proper, fair, and consistent with legislative purposes." *Id*. ¶ 25.

A. The sentencing judge improperly considered Trevor's decision to exercise his constitutional right to a jury trial.

When a defendant claims that his sentence is illegal, and the illegality appears plainly in the record, this Court will review the sentence directly. *See State v. Moore,* 2023 ME 18, ¶ 23, 290 A.3d 533. "A defendant's claim that his sentence has been increased because he has exercised his right to a trial goes to the legality of the sentence," and this Court will review *de novo* whether a constitutional violation has occurred. *See id.*

"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." *Id*. ¶ 24.

> There is a difference between increasing a defendant's sentence because the defendant chooses to exercise the right to trial ... and considering 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. A sentence based in part on an

> impermissible consideration is not made proper simply because the sentencing judge considered other permissible factors as well, and the quantitative role the impermissible factor played in such decision does not detract from the nature of the constitutional violation. It follows that simply exercising the right to trial can never be cited as an aggravating factor.

Id. ¶ 25 (cleaned up). "To be clear, any consideration of a defendant's failure to take responsibility as an aggravating factor must be based on affirmative evidence in the record to support that finding, ordinarily because the defendant testified at the trial or allocuted at the sentencing hearing." *State v. Ellis,* 2025 ME 56, ¶ 26, 339 A.3d 794. Moreover, "a defendant's sentence may not be increased, however, because he chose to forgo expressing remorse or taking responsibility at trial or sentencing." *See id*.

At the sentencing hearing in this case, a fair reading of the sentencing judge's remarks suggests that it was influenced by Trevor's decision to stand trial. Namely, the trial court reasoned:

> The defendant, too, is plainly sad for what happened to his child, but he has never taken responsibility for his actions. It's disturbing that the defendant claimed to medical personnel that Harper went limp by choking on formula, which medically could not have caused her injuries. This was a plain attempt to minimize the harm he inflicted and redirect the focus of inquiry. The defendant's failure to be truthful with medical personnel at the critical time when they were trying to save his child's life, reflects his true character. He put his own needs and desire to not be blamed for this horrific -- horrific event over his child's medical needs.

(A. 63-64.)

As this Court explained in *Moore,* it need not conclude that the sentencing court in fact relied upon an improper consideration like this, but "[a]ny doubt as to whether the defendant was punished for exercising his right to trial must be resolved in favor of the defendant." *Id*. ¶ 26. Because it reasonably appears from the record that the trial court relied in whole or in part upon Trevor's election to stand trial, the resulting sentence is invalid. *See id.* ¶¶ 26-27.

B. The sentencing judge improperly considered prior injuries to H.A.

In its analysis, the trial court found that "[a]t some point prior to the event causing her death, [H.A.] sustained bruising, a rib fracture, and bleeding under the tongue . . . which are sentinel injuries that are red flags for abuse." (A. 59-60.) As more fully described above in Section II(B) of this brief, there is no evidence that supports a finding that Trevor was the cause of these injuries. As the expert testimony demonstrated at trial, no witness could pinpoint when these injuries occurred, and, therefore, associating these injuries with affirmative conduct by Trevor is an abuse of sentencing discretion. *See* 15 M.R.S. § 2155(2) (noting that this Court will consider "[t]he manner in which the sentence was imposed, including *the sufficiency and accuracy of the information on which it was based*." (emphasis added)).

C. The sentencing judge abused its sentencing power in its consideration of the mitigating and aggravating factors in its sentencing analysis.

As the trial court found, Trevor has no significant criminal history. (A. 62-63.) The extent of his history involves one misdemeanor conviction for Unlawful Possession of Scheduled Drugs, which the trial court did not find impactful in its analysis. The trial court found that he was not a public safety risk at all. (A. 63.) Furthermore, his risk of recidivism was found by the trial court to be low "based on his described characteristics, the lack of a criminal record, his support network, and the fact that he did not violate his bail" for many years while waiting for trial. (A. 63.) Trevor had an army of support from friends and family at his sentencing hearing that described him in a highly positive manner. (*See generally* Sentencing Tr.; A. 62.)

Notwithstanding the immense mitigating factors presented at sentencing and the H.A.'s family's pleas for leniency, the trial court found that the impact of the victim's family was the "first and foremost" consideration. (A. 63.) The trial court explained that, not only has the family—most of whom spoke in support of Trevor at sentencing—been affected by H.A.'s tragic death, but Michelle will "soon lose [Trevor] to incarceration," and that Michelle and her mother's relationship has deteriorated. (A. 63.)

Contrary to the trial court's analysis, these were improper factors to consider in the trial court's sentencing analysis. Furthermore, it is not a reasonable use of discretion to apply as much weight to the "impact of the victim's family" as the trial

court did when the victim's family is actively telling the court not to impose such a heavy-handed level of incarceration. It is plainly inconsistent with the sentencing record for the trial court's "first and foremost" aggravating factor to be the impact on the victim's family when that family's impact and preferences are not consistent with the sentence being handed down. Certainly, a "laudable goal" of the sentencing analysis may be "considering the 'subjective effect on the victim' factor," *see State v. Servil,* 20205 ME 73, ¶ 14, --- A.3d ---, but the subjective effect of those individuals cannot be inconsistent with the record. Further, the trial court did not consider the legislative purpose of minimizing correctional experiences in its analysis, and it improperly considered that Trevor has "never taken responsibility for his actions"—as more fully briefed above. *See Ellis,* 2025 ME 56, ¶ 24, 339 A.3d 794 ("[S]imply exercising the right to trial can never be cited as an aggravating factor.").

Because the trial court did not give due regard to the mitigating circumstances, relied upon a sentencing factor that was inconsistent with the sentencing record, and otherwise relied upon other improper factors, this Court should vacate the trial court's sentence.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant, Trevor Averill, requests this Honorable Court to vacate the conviction and remand this matter with

instructions to grant Averill's Motion for Judgment of Acquittal, for a new trial, or for re-sentencing.

Date: 09/16/2025

/s/ Walter F. McKee
WALTER F. MCKEE
Attorney for Appellant
Maine Bar No. 7848
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
wmckee@mckeemorgan.com

/s/ Kurt C. Peterson
KURT C. PETERSON
Attorney for Appellant
Maine Bar No. 6235
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
kpeterson@mckeemorgan.com

CERTIFICATE OF SERVICE

I, Kurt C. Peterson, Attorney for the Appellant, Trevor Averill, hereby certify that this appellate brief was filed and that the service requirements were complied with by copying opposing counsel on the email filing with the Court, and, upon approval of the email filing will be provided the required number of copies of this appellate brief and appendix pursuant to the Maine Rules of Appellate Procedure.

Date: 09/16/2025

/s/ Kurt C. Peterson
KURT C. PETERSON
Attorney for Appellant
Maine Bar No. 6235
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294