STATE OF MAINE
ANDROSCOGGIN, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: AND-25-127

STATE OF MAINE,
Appellee

v.

TREVOR AVERILL,
Appellant

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes & Rules **Page**

Other Authorities **Page**

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

Factual Background

On July 22, 2020, just after midnight, Trevor Averill (Averill) took his healthy, happy, two-month-old daughter Harper downstairs for a bottle and diaper change while Michelle, Harper's mother, remained upstairs in bed. (Trial Transcript 1 (1/21/25), 113-117, 127-135; Trial Transcript 7 (1/29/25), 74, 78-82 [T._, ___]). Averill was alone with Harper for roughly ten minutes when he suddenly called out to Michelle for help. (T.7, 85). Michelle rushed downstairs, saw that Harper was limp with no obvious external injuries. (T.7, 85-89). Averill told Michelle that while placing Harper on his shoulder to burp her, she made gagging noises, then went unconscious, and then stopped breathing. (T.1, 164-175). Michelle immediately called 911 and remained on the phone until first responders arrived. (T.7, 89; St. Exhibit 48 [St. Ex. ___]).

The emergency responders arrived in less than three minutes and, although they were advised that Averill was performing CPR, he in fact was not, having left Harper on a blanket atop a cushioned ottoman. (T.1, 167-168, 170-175). Despite the quick arrival of emergency responders, Harper was already cold to the touch, had no pulse, and "looked very gray and ashy" consistent with cardiac arrest. (T.1, 170-174, 186-192). They quickly moved Harper to the floor and began CPR. (T.1, 171-172). Averill provided an explanation for Harper's

unresponsiveness similar to the one that he had given to Michelle but added that Harper had already been unconscious for five to ten minutes. (T.1, 174-175).

As emergency responders worked on Harper inside the home, Averill wandered about, his tone and demeanor flat, despite the clearly dire circumstances of his infant daughter. (St. Ex. 55). As the ambulance left for Central Maine Medical Center (CMMC) with Harper and Michelle, Averill focused on corralling his cat back inside the house rather than immediately following the ambulance. (T.1, 179-180). Ultimately, and notwithstanding the valiant efforts of the emergency responders, LifeFlight, and staff at both CMCC and Maine Medical Center (MMC), Harper never regained consciousness or breathed again on her own. (T.1, 102-103; T.2 (1/22/25), 136-137; T.3 (1/23/25), 141-142).

Averill continually denied harming Harper and maintained that she only choked while being fed or burped before becoming unresponsive. (T.5 (1/27/25), 17-24, 59-62; St. Exs. 52-53). The evidence at trial, however, compelled the conclusion that Averill inflicted a devastating brain injury on Harper on the night of July 22, while she was in his exclusive care, that caused her to immediately stop breathing and led to her death.

Pediatric hospitalist Joseph Anderson admitted Harper to CMMC, but it was "quite clear kind of from the door that [she needed to get to MMC] as quickly as possible." (T.1, 226-229, 233). In Dr. Anderson's opinion, Averill's choking story was not "a great explanation for how sick" Harper presented because "rarely does [choking on formula] progress to not breathing." (T.1, 231, 236-240). Based on her presentation, the implausible explanation, and Harper's medical history as reported by Averill and Michelle providing no "other suggestion," Dr. Anderson concluded that an anoxic brain injury resulting from nonaccidental trauma (NAT) was the most likely diagnosis and explanation. (T.1, 241-243; St. Ex. 104). NAT is a "descriptor for trauma, meaning [a] physical injury that could be caused by a caregiver or by someone else," and encompasses the accepted American Pediatric diagnosis of abusive head trauma. (T.1, 243, 261-262). Additional testing and imaging at MMC, consultations, and post-mortem examinations revealed the true severity of Harper's injuries that could have only been inflicted by Averill.

Dr. Jessica Shaumburg accepted Harper's admission to MMC's Pediatric Intensive Care Unit. (T.2, 48). Averill and Michelle reported to Dr. Shaumburg and child abuse pediatrician Dr. Amanda Brownell that Harper had a history of bruising and bleeding easily; however, they never previously disclosed this information to Harper's primary physician or Dr. Anderson at the CMMC

Emergency Room. (T.1, 130-135; T.2, 50-51, 288-289; St. Exs. 97-99). Indeed, Harper's medical history showed no complications during her gestation period, no delivery problems, no injuries at birth, no known allergies or illness, no growth development issues, no medications, and no concerning family medical history. (T.1, 125-129). Further testing also ruled out cancer, infection, a brain tumor, a bleeding or clotting disorder, and other genetic disorders as possible causes of Harper's presentation. (T.2, 64-68, 134-135; T.3, 98-99). Based on the information available and a physical exam, Dr. Shaumburg was "highly concerned" that NAT resulting in neurological issues was the cause of Harper's presentation. (T.1, 45-48; St. Ex. 56A).

Harper's attending physicians consulted with MMC ophthalmologist Dr. Brooker Miller, who concluded that Harper's case was "one of the most severe retinal hemorrhage cases [she had] ever seen in an infant." (T.2, 170-184; St. Ex. 56D). Both of Harper's eyes had bleeding in all three layers of the retina that extended all the way out to the edges of her eyes. (T.2, 185-187). The blood in both of Harper's eyes was fresh, meaning recent, and so extensive throughout that Dr. Miller could not see Harper's optic nerves. (T.2, 184-185). "[N]ot only were [Harper's] eyes severely damaged but the pathway between the eyes and the brain was also severely damaged." (T.2, 191). Dr. Miller concluded that Harper's eyes presented "a very classic pattern [that is] instantly recognizable

… for [NAT]" and indicated that Harper's "head [had been] swung so intensively back and forth … repetitive[ly] causing her retinal blood vessels to bleed." (T.2, 189-190, 210-211).[1]

MMC radiologist, Kenneth Mendleson, reviewed Harper's CT scan and x-ray imaging which showed a fracture to the back of Harper's skull and a healing posterior rib fracture. (T.3, 75, 83-88; St. Exs. 44-45, 66, 101, 105-106). Dr. Mendleson concluded that the rib fracture was "extremely suspicious for child abuse." (T.3, 96). Harper's specific rib fracture is virtually unheard of in birth trauma, and "almost never see[n] in infants outside of child abuse" because it "takes a lot of force," usually by squeezing and pushing from the back, for this type of fracture to occur. (T.3, 94-96; St. Ex. 112).[2]

Averill later posited that the skull fracture likely occurred a month prior when he accidentally dropped Harper on her forehead from about waist height. (T.2, 286-288; T.6, 36-76). Dr. Mendleson testified, however, that in his 30 years

[1] Attending MMC pediatric critical care physician, Michael Zubrow, agreed that retinal hemorrhages are indicative of child abuse. (T.2, 133). Dr. Brownell testified that Harper's retinal hemorrhages "were [in] a highly specific pattern [that] really only happens with abusive head trauma [because doctors] don't see [them] in any other clinical finding," and that bleeding in all layers of the back of the eye "is really only seen [when a] child's head [is] moving back and forth at violent forces." (T.2, 257-259, 295-296). MMC pediatric neurologist Dr. Tiffani McDonough further testified that "[r]etinal hemorrhages are one of the most well-established types of hemorrhages in the brain that is associated with inflicted trauma" and that 71% of retinal hemorrhage cases are, in fact, associated with inflicted trauma. (T.5, 126; T.7 (1/29/25), 125).

[2] Although not a sufficient by itself to diagnose NAT, this fracture was considered by all the medical doctors as part of their overall NAT diagnosis. (T.2, 127-128, 135, 298; T.3, 105, 139-140; T.4, 128-129, 150).

of practicing medicine, he had never seen an impact to an infant's forehead cause a fracture only to the back of the skull (T.3, 100-104). Dr. Mendleson "did not think there was another plausible explanation for what [he] saw [in Harper's imaging] except child abuse." (T.3, 105). Dr. Brownell, consulting radiologist and former pediatric neuroradiologist Dr. Mary Edwards-Brown, and MMC pediatric neurologist Dr. Tiffani McDonough all agreed, concluding that Averill's story of a drop on Harper's forehead a month prior could not account for or cause the skull fracture. (T.2, 300-303; T.4, 160; T.5, 119-120).

Dr. Shaumburg reached a similar conclusion, finding that a brain injury was evident on Harper's CT scan because the imaging showed several areas of bleeding in the outside (subdural) and inside (subarachnoid) layers of the brain. (T.1, 61-66). Harper's CT scan also showed a loss of gray-white matter consistent with a lack of oxygen (hypoxic ischemia) to the brain from trauma and cardiac arrest. (*Id.*). Based on the CT scan and x-ray showing the posterior rib fracture, Dr. Shaumburg confirmed her NAT diagnosis because this imaging "pretty much ruled out everything else." (*Id.*).

Dr. McDonough and Dr. Edwards-Brown were consulted to determine the acuteness of Harper's brain injuries and resulting death. (T.4, 112-125; T.5, 107, 111). Dr. Edwards-Brown found that Harper's skull fracture, unlike her rib, was acute because it did not show signs of healing. (T.4, 128-129). She also

found that Harper's imaging showed acute and "extensive" bleeding in the thoracic and lumbar areas of her spine, and "a tragically acute" diffuse brain injury that effectively meant that "[Harper's] brain [was] dead." (T.4, 134-149). Dr. Edwards-Brown concluded that Harper sustained her spine and brain injuries close in time to her hospitalization, and that these injuries were "a rather clearcut example of [NAT]," because Harper's "constellation of abnormalities [were] such that [she could not] think of any other mechanism that would account for everything [she saw.]" (T.4, 126, 150).

Similarly, Dr. McDonough found that Harper's CT scan showed "multiple types of bleeding" in her brain, in a pattern most consistent with an impact injury, and that her skull fracture was acute and "related to" her brain bleeding." (T.5, 113-120). Several of the bridging veins in Harper's brain had been ruptured in a pattern consistent with blunt force trauma rather than infection or seizure. (T.3, 221-223; T.4 135-136; T.5, 127-129). Dr. McDonough found that Harper's MRI showed the "whole brain [had been] deprived of oxygen" and, most significantly, the parts of her brain critical to breathing and alertness had been deprived of "oxygen for a long period of time." (T.5, 120-123). The totality of Harper's brain injuries, which Dr. McDonough would not expect to see from choking, had "caused her to suddenly stop breathing," the lack of oxygen led to Harper entering cardiac arrest and then the "diffuse injury

to the brain." (T.5, 120-123, 130-131). Based on her findings, Dr. McDonough concluded that:

> Harper suffered a fatal inflicted trauma resulting in a catastrophic global anoxic brain injury related to forces of flexion and extension to the head and neck, which then resulted in injury to critical areas controlling her breathing and alertness. Because she stopped breathing her heart stopped and that led to this global anoxia, complete lack of oxygen to the brain, which then caused the brain to die. And that was the cause of her death. There were some associated findings of bleeding and fracture. But the cause of death was respiratory arrest and global hypoxic or anoxic injury." (T.5, 122).

Due to the severe extent of Harper's injuries, MMC physicians determined that there was almost no chance of survival and, even if she survived, Harper "was likely to be dependent on a ventilator, to never interact with the world, [and] to never feed herself." (T.2, 136-137). On July 25, 2020, three days after the infliction of these horrific injuries, Harper passed away. (T.1, 101-103).

On July 28, 2020, consulting pathologist and former Maine Chief Medical Examiner Dr. Margaret Greenwald performed an autopsy on Harper and consulted with Vermont Chief Medical Examiner Dr. Elizabeth Bundock. (T.3 203-211; T.4, 11-21). Dr. Greenwald found a lot of "unusual," acute bleeding, most often caused by trauma, in the lower thoracic area and extending into the lumbar and sacral areas of Harper's spine. (T.4, 39-40; St. Ex. 20). She also found that Harper's skull fracture was acute with associated acute hemorrhaging (T.4,

29-30, 37-39). Dr. Bundock determined that Harper had sustained a traumatic brain injury based on "numerous findings that are associated with trauma [including] subdural hemorrhages, a swollen brain, retinal hemorrhages, and subdural hemorrhages along the spinal cord." (T.3, 217). Based on her review of all the hospital reports and testing, Dr. Bundock's report, and her own examination, Dr. Greenwald determined that Harper's cause of death was due to traumatic head injuries inflicted during a "very sudden" event. (T.4, 48-49).

The effect of Harper's inflicted brain injuries was "nearly instant, if not instantaneous[ly]." (T.2, 308-309). Because there was no dispute that Harper was in Averill's sole care when she became symptomatic, the instantaneous effect of her injuries amply supported the conclusion that the only person who could have caused the "fatal inflicted trauma resulting in [Harper's] catastrophic [diffuse] brain injury" was Averill. (T.2, 308-309; T.3, 218, 223; T.4, 126, 173-174; T.5, 113-116, 127-131; T.7, 80-89).

Procedural Background

On September 8, 2021, the Androscoggin County Grand Jury returned an indictment charging Averill with one count of depraved indifference murder and one count of manslaughter.[3] *State of Maine v. Trevor Averill,* Superior Court,

[3] 17-A M.R.S. § 201(1)(B) (2020); 17-A M.R.S. § 203(1)(A), § 1604(7)(A), § 1804(3)(A) (2020).

Androscoggin County, Docket No. ANDCD-CR-2021-01947; (Appendix 3, 67-68 [A. __]). Averill entered not guilty pleas at his arraignment on September 10, 2021. (A. 3-4).

On January 3, 2025, a hearing was held on Averill's motion in limine seeking to exclude certain photographs of Harper. (A. 21-22, 69-72). Although Averill initially sought the exclusion of all hospital and autopsy photographs, at the motion hearing, Averill only challenged State's proposed exhibits 1, 3, and 4. (A. 35). The motion court entered an oral order denying Averill's motion, concluding that those proposed exhibits were not unfairly prejudicial under M.R. Evid. 403. (*Archer, J.*) (A. 35-36).

On January 16, 2025, a jury was selected for Averill's trial. (*Archer, J. presiding*) (A. 23). On January 21, 2025, before the jury began receiving evidence, Averill moved to exclude footage from a law enforcement body worn camera (BWC). (A. 23, 37-42). The trial court denied Averill's motion, concluding that the portion of the BWC that the State wanted to present was relevant and not unfairly prejudicial. (*Archer, J.*) (A. 41).

On January 27, 2025, after the State rested its case-in-chief, Averill filed a written motion for judgment of acquittal. (A. 24, 73-79; T.8, 155). On January 28, 2025, the trial court denied Averill's motion, ruling that:

Important to the connection of all of these injuries to [Averill] is

> the conclusion that Harper's injuries would have instantly affected her. The traumatic inflicted event would have immediately stopped her breathing. This was the upstream injury, as one expert described it. And [Averill] was the person with the child at the time of the triggering event." (A. 24, 43-53).

On January 29, 2025, Averill renewed his motion for judgment of acquittal which was denied. (T.7, 130-131). On January 30, 2025, after the State's closing argument, Averill moved for mistrial arguing improper witness vouching by the State. (A. 54-57). The trial court denied the motion and Averill acquiesced to the court's suggestion to issue a curative instruction. (A. 54-57). On January 31, 2025, the jury returned its verdict that Averill was not guilty of murder and guilty of manslaughter. (A. 25; T. 9, 4).

On March 14, 2025, the court adjudged Averill guilty as convicted. (*Archer, J.*) (A. 26-27). The court then imposed a sentence of 23 years to the Department of Corrections, with all but 18 years suspended, followed by a period of probation for a term of 6 years. (A. 26).

On March 20, 2025, Averill filed a notice of direct appeal pursuant to M.R. App. P. 2(a)(1) and 15 M.R.S. § 2115. *State of Maine v. Trevor Averill,* And-25-127; (A. 27). Averill also filed a separate application for leave to appeal his sentence pursuant to M.R. App. P. 20 and 15 M.R.S. § 2151. *State of Maine v. Trevor Averill,* SRP-25-128; (A. 25). On July 11, 2025, the Sentence Review Panel issued an order granting the application for leave to appeal sentence.

STATEMENT OF THE ISSUES

I. The trial court did not err in its evidentiary rulings, and any perceived error was harmless.

II. The evidence was sufficient to sustain Averill's manslaughter conviction.

III. The prosecutor did not err in her closing argument, and the trial court did not err by denying Averill's motion for mistrial.

IV. The sentencing court committed no obvious error in imposing Averill's sentence.

SUMMARY OF ARGUMENT

1. Averill waived his argument regarding the autopsy photographs. Alternatively, the trial court neither erred by admitting those photographs nor in its other evidentiary rulings. The autopsy photographs and footage from the BWC were relevant and probative of both causation and Averill's culpability. The prejudice inherent in every case involving a child dying as a result of abuse does not substantially outweigh the probative value of this evidence. Furthermore, the trial court did not obviously err by admitting evidence of Harper's fractures. This evidence was not only probative of causation and culpability, but Averill himself admitted expert testimony on the issue of the fractures. Thus, any perceived error in the trial court's evidentiary rulings was harmless.

2. The evidence is sufficient to sustain Averill's conviction for manslaughter. Simply because some evidence could have supported a different outcome, and some medical experts admitted a certain outcome was possible, does not render the overall evidence speculative. As demonstrated by the record, sufficient evidence was introduced to support the jury's conclusion that the injuries were inflicted, the effects were instantaneous, and the only person responsible of the injuries and resulting death was Averill.

3. The prosecutor did not engage in improper witness vouching in her closing argument. The evidence at trial supported the prosecutor's argument that Averill's explanation was implausible and unsupported. The evidence also supported the prosecutor's argument that Averill's experts were biased, especially because their opinions were in marked contrast to numerous other medical experts and treating physicians. Since the prosecutor did not engage in an improper closing argument, the trial court did not err by denying Averill's motion for mistrial on this basis. However, even if this Court concludes the prosecutor did err, when viewed in the overall context of the trial proceedings, any error was harmless.

4. The sentencing court did not obviously err at sentencing. The evidence that Harper had sustained prior injuries indicative of abuse was a proper, objective step one consideration. The sentencing court also did not improperly

weigh the subjective victim impact or fail to consider applicable sentencing factors. There is no requirement that a sentencing court weigh a factor according to any person's preference, and the sentencing court explicitly cited the sentencing factor which Averill now alleges the court failed to consider. Finally, the sentencing court did not consider Averill's decision to stand trial when imposing his sentence. The record is clear that the sentencing court's remarks were directed at Averill's lack of remorse which he affirmatively demonstrated through repeatedly providing a medically implausible explanation for his child's condition.

ARGUMENT

I. The trial court did not err in its evidentiary rulings, and any perceived error was harmless.

Averill first contends that the trial court erred by admitting autopsy photographs depicting some of Harper's injuries and a portion of the BWC in violation of M.R. Evid 403. (Blue Brief, 17-24 [Bl. Br. __]). The Law Court reviews the admission of evidence over M.R. Evid. 403 objections for an abuse of discretion. *State v. Thomas,* 2022 ME 27, ¶ 23, 274 A.3d 356. A trial court abuses its discretion if the court's evidentiary ruling "arises from a failure to apply principles of law applicable to the situation, resulting in prejudice." *Id.*

Relevant evidence may be excluded if it is unfairly prejudicial or cumulative. M.R. Evid. 403.[4] Unfair prejudice "means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contention." *State v. Ardolino,* 1997 ME 141, ¶ 10, 697 A.2d 73. "[T]he mere fact that an inference contrary to a defendant's contentions can be drawn from the [evidence] does not suffice to render the [evidence] unfairly prejudicial." *State v. Stack,* 441 A.2d 673, 676 (Me. 1982). The evidence must be so prejudicial that it creates a danger that the fact finder will "decide on an improper basis." *Ardolino,* 1997 ME at ¶ 10, 697 A.2d 73. However, "the danger of unfair prejudice must *substantially* outweigh the probative value of the evidence" for exclusion. *State v. Boobar,* 637 A.2d 1162, 1168 (Me. 1994) (emphasis original).

A. Averill waived his argument regarding the autopsy photographs, and said photographs were properly admitted as evidence to illustrate the medical examiner's testimony.

Averill did not challenge the admissibility of State's Exhibits 6-20 and 63 at the motion in limine hearing. (Motion Transcript (1/3/25), p. 5-7 [Mot. Tr. _]; A. 35-36). Although Averill "reserved the right to object to [those exhibits]" (Mot. Tr. 5), he did not object at trial and withdrew his objection to exhibits 3

[4] "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." M.R. Evid. 401.

and 4. (T.3, 173). Accordingly, this argument is waived because it is directly contrary to his position before the trial court, *State v. Wilcox,* 2023 ME 10, ¶ 9 n.4, 288 A.3d 1200, and the "affirmative withdrawal" of his prior objection also "amount[s] to waiver" precluding appellate review. *State v. Harding,* 2024 ME 67, ¶ 21, 322 A.3d 1175; *State v. Rega,* 2005 ME 5, ¶ 7, 863 A.2d 917.

Even if this Court determines that this argument is not waived, the autopsy photographs had essential evidentiary value. "[P]hotographs are admissible if they are (1) accurate depictions; (2) relevant; and (3) if their probative value is not outweighed by any tendency toward unfair prejudice." *State v. Allen,* 2006 ME 21, ¶ 10, 892 A.2d 456 (citation omitted). Although, "[a]ny case with allegations of child abuse evokes emotions … photographs of abused children [are nonetheless admissible] because [the Law Court] recognize[s] that their probative value can, in any given case, outweigh the danger of unfair prejudice." *Id.* at ¶ 17. In fact, "[the Law Court] ha[s] upheld the admissibility of a photograph of a [deceased] victim even when its probative value was minimal." *State v. Irving,* 2003 ME 31, ¶ 23, 818 A.2d 204 (citation omitted).[5]

[5] *See also* Field & Murray, *Maine Evidence,* § 403.2.1 at 119 (2007 ed.) (collecting cases from 1933-2003) ("A familiar area of controversy in criminal proceedings lies in the objection to the admission of gruesome photographs on the ground that their probative value is outweighed by their prejudicial effect. In every case that has gone to the Law Court, admission of such photographs has been upheld as within the trial judge's discretion … counsel should be aware that if the trial court is not persuaded,

The trial court specifically found that the photographs were neither gruesome,[6] nor cumulative because "they're intended to illustrate the [medical examiner's] testimony," and, quoting *State v. Crocker,* 435 A.2d 58 (Me. 1981) nearly verbatim, were "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." (A. 35-36); *Crocker,* 435 A.2d at 76 (Me. 1981).

Additionally, the autopsy photographs were not only critical to establishing causation but also "tended to help the jury to perform its task of assessing [Averill's] culpability." *Crocker,* 435 A.2d at 75 (Me. 1981). For example, Averill called experts to support his contention that his accidental, short drop of Harper onto her forehead caused the skull fracture to the back of her head, and that she had "a preexisting pathology in her head" which was "enough to tip the balance and result in her death" when she allegedly choked on formula on the night of July 22. (T.6, 36-39, 72, 95-96, 116, 160, 201-2014, 222-224). Conversely, the autopsy photographs illustrated why and how the

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the chance of reversal on appeal is remote unless palpable prejudice and total lack of relevance can be shown.").

[6] Even if the autopsy were "gruesome," the Law Court has acknowledged that "[w]ith respect to photographs of the victim's body taken after death … even a gruesome photo may be admitted depending upon its probative value when weighed against the danger of unfair prejudice." *Irving,* 2003 ME at ¶ 23, 818 A.2d 204; *see also State v. Lockhart,* 2003 ME 108, ¶ 46, 830 A.2d 433 ("A gruesome photograph of a victim's body may be admitted provided that its probative value outweighs the danger of unfair prejudice.").

medical examiner determined that Harper's skull fracture and brain bleeds were acute, that those injuries could not have been caused by an impact to her forehead, and that there was no evidence of any preexisting brain condition. (T.4, 28-32, 48-49, 82-83; St. Exs. 3-4, 6-20, 63).

Averill's assertion that the photographs were unfairly prejudicial is unpersuasive. The Law Court has repeatedly upheld the admission of similar photographs, under similar circumstances, to assist a medical examiner in explaining his or her testimony.[7] Furthermore, the medical reports and imaging were conducted pre-mortem for the purpose of identifying and potentially treating Harper's injuries. The autopsy photographs were part of Dr. Greenwald's post-mortem examination conducted for the purpose of determining Harper's "cause and manner of death." (T.4, 14-15). Pre-mortem, machine-generated imaging, conducted by physicians for the purpose of

[7] *State v. Michaud,* 2017 ME 170, ¶¶ 9-10, 168 A.3d 802 (no abuse of discretion in admitting "some evidence to illustrate the nature and extent of the injuries," despite Michaud's stipulation because probative of an element of the charged crime); *Allen,* 2006 ME at ¶ 10-17, 892 A.2d 456 (no abuse of discretion in admitting a full body photograph depicting a young child, with head bandage and medical apparatus, because relevant to charge and parental discipline defense; *Lockhart,* 2003 ME at ¶ 46, 830 A.2d 433; *State v. Conlogue,* 474 A.2d 167, 171 (Me. 1984) (admissibility of photograph of bruises covering a child's torso affirmed); *State v. Condon,* 468 A.2d 1348, 1350-1351 (Me.), cert. denied, 467 U.S. 1204 (1983) (photographs depicting the bodies admissible to clarify and to corroborate medical testimony and to assist jury in its determination of whether killings were depraved); *Crocker,* 435 A.2d at 75 (Me. 1981) (no abuse of discretion by admitting photographs of child victim because they illustrated medical testimony and were probative of guilt); *State v. Woodbury,* 403 A.2d 1166, 1169 (Me. 1979) (no abuse of discretion in admitting a photograph depicting gruesome head wounds of a victim because the photograph was used to illustrate the chief medical examiner's testimony; *State v. Conwell,* 392 A.2d 542, 544 (Me. 1978) (photographs depicting child's facial wounds admissible to illustrate testimony).

medical diagnosis and treatment does not, and cannot, meaningfully replace autopsy photographs in illustrating testimony pertaining to a post-mortem examination.

B. The footage from the body worn camera was not unfairly prejudicial.

Contrary to Averill's contention, the standard for excluding evidence is not mere "prejudic[e] to the defense." (Bl. Br. 22). Instead, the standard is *unfair* prejudice that "must *substantially* outweigh the probative value of the evidence." *Boobar,* 637 A.2d at 1168 (Me. 1994) (emphasis original). Like the autopsy photographs, the BWC had essential evidentiary value because it captured Harper's condition and Averill's statements and demeanor in the near immediate aftermath of his infliction of devastating injuries upon Harper. (T.1, 152-154; St. Ex. 55). This evidence was highly probative of Averill's state of mind and went to "both innocence and guilt, depending upon" the jury's factual conclusions. (A. 41). Thus, the "somewhat prejudicial" nature of seeing an infant receiving CPR does not substantially outweigh the BWC's probative value. (A. 41).

Averill contend that the first responder's BWC was unnecessary and unfairly prejudicial because the scene was already portrayed in a video "walk-through," recorded *many* hours after-the fact. (Bl. Br. 24). This contention is

without merit. The walk-through video fails to depict the scene and Harper's presentation as they appeared *at the time* the first responders arrived. Officer Barr's BWC further allowed the jury to directly evaluate Averill's unfiltered, real-time statements and demeanor, instead of relying on Officer. Barr's interpretation and memory five years later at trial. In essence, Averill wants this Court to conclude that the State should be denied the opportunity to "present its entire case," *Michaud,* 2017 ME at ¶ 9, 168 A.3d 802, simply because the jury could (and did) draw "an inference contrary to [his] contentions." *Stack,* 441 A.2d at 676 (Me. 1982). While causation was a significantly disputed issue at trial, so too was Averill's culpable mental state. The autopsy photographs and BWC were highly probative of both issues. Moreover, the fact that the jury acquitted Averill of murder demonstrates that they were not "inflamed to action" (Bl. Br. 21) by either the photographs or the BWC, and thus any perceived error in the court's rulings were harmless.

C. The trial court did not obviously err by admitting evidence of the rib and skull fractures.

Next, Averill contends that the trial court erred by admitting evidence of Harper's rib and skull fractures in violation of M.R. Evid. 404(b).[8] (Bl. Br. 25-

[8] M.R. Evid. 404(b) provides that: "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

26). Because Averill did not object to this evidence at trial, this Court will review for obvious error. *State v. Sexton,* 2017 ME 65, ¶ 36, 159 A.3d 335. "To demonstrate obvious error, [Averill] must show that there is (1) an error, (2) that is plain, and (3) that affects substantial rights." *Id.* (citation omitted). However, "[e]ven if these three conditions are met," vacatur requires the Law Court to also "conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *Id.* (citation omitted).

Here, Averill specifically stated he was not objecting to the rib fracture evidence. (T.1, 16-19). He also called three experts to testify about the skull fracture and related injuries. (T.6, 36-76, 91-93, 95-165, 180-182, 184-217, 237-238). Thus, the trial court committed no error in admitting this evidence, much less obvious error.

Even if Averill had objected, the fracture evidence was highly relevant and admissible. First, the majority of the medical experts relied on the presence of the rib fracture, and how that particular fracture related to Harper's entire condition, for their opinion that the only plausible medical explanation for Harper's condition was inflicted trauma: Dr. Shaumburg testified that a posterior rib fracture in conjunction with retinal hemorrhages suggested cause of injuries was NAT (T.2, 135); Dr. Zubrow testified that most common cause of this type of rib fracture in a two-month-old is NAT, and the presence of this rib

fracture with retinal hemorrhages is suggestive of NAT (T.2, 127-128, 135); Dr. Mendleson found no other "plausible explanation for Harper's fractures "except child abuse" (T.3, 105); Dr. Gregory stated that both fractures were considered as part of her diagnosis that Harper's "injuries were consistent with [NAT]" (T.3, 129-140); Dr. Brownell opined that "the likelihood [of Harper having] a non-abusive [rib] fracture in conjunction with all the other highly specific indicators, [is] pretty unlikely" (T.2, 298); Dr. Edwards-Brown stated that despite the rib fracture showing signs of healing, she was "convinced" that Harper's "constellation of abnormalities" were the result of NAT because "no other mechanism would account for everything." (T.4, 128-129, 150).

Second, the fracture evidence directly "contradicted [Averill's] version of the circumstances surrounding [Harper's] death." *Crocker,* 435 A.2d at 74 (Me. 1981). Dr. Brownell, Dr. Bundock, Dr. Edwards-Brown, and Dr. McDonough all agreed that Harper's skull fracture was inconsistent with Averill's report of an accidental drop on her forehead several weeks before her hospitalization. (T.2, 303-303; T.3, 227-233; T.4, 160; T.5, 119-120). This fracture was "acute," was located on the opposite side of the skull, and had related acute brain bleeding – all of which indicated the fracture occurred close in time to presentation at the emergency room. (T.3, 231; T.4 28-30, 128-129; St. Exs. 9-12; T.5, 119-120). Additionally, multiple experts opined that choking on formula (Averill's

explanation for why Harper stopped breathing) does not cause fractures, or any of Harper's other brain and spinal injuries. (T.1, 261-262; T.2, 307; T.4, 82-83).

Accordingly, given Averill's lack of objection and presentation of his own experts regarding the fractures, the trial court committed no error, let alone obvious error, by admitting this evidence.

II. The evidence was sufficient to sustain Averill's manslaughter conviction.

Averill contends that "the trial record contains no evidence upon which a reasonable trier of fact could make the speculative leap required to associate the injuries [Harper] presented as being caused by Averill specifically." (Bl. Br. 27-28). In fact, based on the testimony of the treating providers, the State's experts and Averill's own admissions, a rational jury would have ample evidence to conclude that the person who inflicted the fatal injury was the person who had sole custody and control of Harper at the onset of her symptoms. There is no dispute that that person was Averill.

"When the defendant claims that the evidence was insufficient to support a conviction, [the Law Court] review[s] the evidence in the light most favorable to the jury's verdict to determine if the factfinder, acting rationally, could find every element of the offense beyond a reasonable doubt." *Harding,* 2024 ME at ¶ 13, 322 A.3d 1175 (citation and alteration omitted).

"The short answer to [Averill's] argument is that when the evidence is sufficient to support different outcomes, it is the jury's role to evaluate the evidence." *Id.* at ¶ 16 (citation omitted). "The jury was free to reject any suggestion by [the expert's]" that Harper's catastrophic brain injury could have been attributable to other causes, "and to accept … that a traumatic brain injury occurred on [July 22, 2020] while [Harper] was in [Averill's] sole care." *Id.* That evidence included:

- Testimony and medical records showing that Harper was born with no injuries or delivery problems, and had no known allergies, illness, growth development issues, medications, or concerning family medical history; and cancer, infection, a brain tumor, and genetic disorders were ruled out as possible causes of Harper's presentation (T.1, 125-129; T.2, 64-68, 134-135, 289-290; T.3, 98-99);

- Testimony and medical records showing that Harper had "severe" retinal hemorrhages in both of her eyes, a healing posterior rib fracture "almost never see[n] in infants outside of child abuse," extensive and acute bleeding in her spinal column, and an acute fracture on the back of her skull with associated acute hemorrhaging (T.1, 262-263, T.2, 127-128, 184-187, 210-211, 227-231, 297-303; T.3, 86-88, 94-96; T.4, 28-30, 39-40, 128-129, 144-149; T.5, 125-126);

- Testimony and medical records showing that Harper had sustained an "inflicted" and "sudden injury to the critical structures of her brain," this inflicted injury caused the veins in her brain to rupture and bleed, her ruptured veins "caused her to suddenly stop breathing," and her sudden cessation in breathing lead to cardiac arrest and the deprivation of oxygen to her entire brain "for a long period of time" (T.3, 221-225; T.4, 135-137; T.5, 120-123, 127-131);

- Testimony and medical records showing that the prolonged lack of oxygen caused a significant and "very acute" diffuse brain injury, effectively meaning "[her] brain [was] dead" (T.3, 224-225; T.4, 136-137, 141-142; T.4, 120-123, 130-131);

- Testimony that Harper's skull fracture and brain injuries were inconsistent with Averill's forehead impact explanation because Harper would not have been acting normally afterwards (and Michelle testified that Harper in fact acted normally after), an impact to Harper's forehead would not cause a fracture on the *back* of her skull, and the fracture was both "acute" and "related to" acute bleeding in Harper's brain (T.2, 300-303, 309-310; T.3 100-104; T.4, 160; T.5 119-120, 125-126; T.7, 66-69; St. Exs. 9-12, 104-106);

- Testimony that Averill's choking explanation was implausible because mere choking does not cause an infant to completely stop breathing and does not explain any of Harper's extensive injuries (T.1, 236, 261-262; T.2, 307; T.4, 82-83);

- Testimony that the only medical explanation that could account for all of Harper's extensive injuries was acute, inflicted trauma from acceleration/deceleration or flexion/extension forces (T.1, 262-263; T.2, 127-128, 210-211, 257-260, 295-303; T.3, 94-96, 100-104, 218, 223, 233; T.4, 40, 48-49, 126, 146-147, 160, 173-174; T.5, 113-120, 125-131, 151); and finally,

- Because Harper's injuries were inflicted, she experienced the effects of these injuries "nearly instant, if not instantaneous[ly]," and she was in Averill's sole care when she became symptomatic, Averill was the person who caused Harper's "fatal inflicted trauma resulting in [her] catastrophic [diffuse] brain injury." (T.2, 308-309; T.3, 218, 223; T.4 126, 173-174; T.5, 113-116, 127-131; T.7, 80-89).

Simply because some of the experts qualified their testimony with words such as suspicious, concerned, most likely, or probable, does not render the

foregoing evidence speculative. As the Law Court recognized nearly 70 years ago:

> Capable medical witnesses are often reluctant to give categorical denial to the suggestion that, medically speaking, a particular thing is 'possible' or 'could happen'. Their obvious caution is prompted by their recognition of the yet unfilled gaps in medical knowledge. As expert witnesses, testifying with strict regard for truth and accuracy, they frequently speak with great positiveness and certainty only when the question relates to what is probable and likely. Such an answer they can base on their observation and experience. A jury is entirely justified in giving more weight to the probabilities as to the causation of traumatic injuries than they do to mere possibilities.

State v. Silva, 134 A.2d 628, 631 (Me. 1957), overruled on other grounds by *State v. Brewer,* 505 A.2d 774 (Me. 1985). In addition, their testimony must be evaluated in the context of other evidence presented at trial, including Averill's presentation when first responders arrived and his incredible explanation for the cause of Harper's loss of consciousness.

Accordingly, because "[i]t is the fact-finder's prerogative to resolve conflicting issues of fact [and credibility], and [b]ecause there is ample evidence in the record to support the jury's verdict, [this Court should] affirm the judgment." *Harding,* 2024 ME at ¶ 17, 322 A.3d 1175 (quotation marks and citation omitted).

III. The prosecutor did not err in her closing argument, and the trial court did not err by denying Averill's motion for mistrial.

Next, Averill contends that the trial court erred by denying his motion for mistrial based on, what he asserts, was improper witness vouching in the State's closing argument. (Bl. Br. 31-33). Because Averill objected at trial, "[the Law Court] review[s] the comments for harmless error and [will] affirm the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Nightingale,* 2023 ME 71, ¶ 27, 304 A.3d 264 (citation omitted).

A prosecutor arguing that it is "the jury's job to distinguish between fact and fiction does not constitute [improper witness] vouching." *State v. DesRosiers,* 2024 ME 77, ¶ 37, 327 A.3d 64 (internal citations omitted). "[A] prosecutor may [also] criticize a defendant's characterization of the evidence as implausible and unsupported." *Nightingale,* 2023 ME at ¶ 28, 304 A.3d 264; *see also State v. Cheney,* 2012 ME 119, ¶ 35, 55 A.3d 473 ("The State is free … to forcefully argue to the jury that the evidence does not support or is not consistent with the defendant's theory of the case."). Similarly, "[a] prosecutor commits no error by pointing out (if supported in the record) that an expert for the defense is being paid [because] [p]ayment can be a legitimate factor to explore for motive and bias." *Harding,* 2024 ME at ¶ 22, n. 9, 322 A.3d 1175.

Here, the prosecutor's statement that "[Averill] has given a very implausible story about what happened to Harper and [he] hired experts to support that implausible story" does not constitute error. (T.8, 82). This statement, "when put in context, highlighted [three of] the State's argument[s]." *Harding,* 2024 ME at ¶ 22, n. 9, 322 A.3d 1175. "[T]hat the treating medical professionals were on-site at the time of crisis and focused on treatment to save [Harper's] life, and had a better understanding of what actually happened and why" (*Id.*); that Averill's choking explanation as the cause of Harper's extensive injuries was medically implausible; and that the opinions of his experts – an impact to Harper's forehead caused a fracture only to the back of her skull, her injuries from this impact did not present symptoms until almost a month later, and that her "choking" triggered a preexisting condition – were also medically implausible. Arguing that Averill's theory was implausible and unsupported, especially when that characterization is amply supported by the evidence, is entirely appropriate and permissible.

Even if this Court concludes that this singular statement constitutes error, it was harmless. Just as in *Harding,* "the [trial] court mitigated any potential prejudice by instructing the jury that the opening statements of the attorneys and the closing arguments of the attorneys are not evidence." *Id.* at ¶ 22, n. 9; (T.1, 32, 34; T.8, 47). Following Averill's objection, the trial court gave

a curative instruction, reminding the jury that they alone "determine[d] the credibility of any witness. Regardless of who calls that witness to testify." (A. 57). Finally, the trial court also instructed the jury "that expert testimony is to be evaluated as is any other evidence." *Id.*; (T.8, 53-54).

Accordingly, because "[j]uries are presumed to have followed jury instructions, including curative instructions," *State v. Dolloff,* 2012 ME 130, ¶ 55, 58 A.3d 1032, and Averill has raised no issue regarding the jury instructions in this case, even if this single statement from the prosecutor was in error, it is highly probable that this statement did not affect the verdict.

IV. The sentencing court committed no obvious error in imposing Averill's sentence.

Finally, Averill challenges his sentence, arguing that the sentencing court improperly considered prior injuries to Harper, his exercise of his right to a jury trial, and the victim impact. (Bl. Br. 37-41). Because these claims are raised for the first time on appeal, the "standard of review is only for obvious error; accordingly, [the Law Court] will vacate his sentence only if the alleged impropriety is obvious and worked a manifest injustice on the defendant." *State v. Coleman,* 2024 ME 35, ¶ 24, 315 A.3d 698 (quotation marks and citation omitted).

The sentencing court did not err, much less obviously so, by considering Harper's prior injuries in step one of the sentencing process.[9] Averill has never claimed that this information is false; yet he wants this Court to find error merely because the State did not prove he caused the prior injuries beyond a reasonable doubt. (Bl. Br. 39). In fact, a sentencing court "is not limited to those facts found at trial." *State v. Rosario,* 2022 ME 46, ¶ 38, 280 A.3d 199. Instead, the only limitation on a sentencing court's "wide discretion" is that the information relied upon be "factually reliable and relevant." *Id.* Indeed, even at trial, "the State [does] not [have to] present direct evidence as to the defendant's exact actions." *State v. Brown,* 2017 ME 59, ¶ 9, 158 A.3d 501 (emphasis original).

Here, the sentencing court correctly recognized that Harper's prior injuries were "sentinel injuries that are red flags for abuse." (A. 60). These injuries are red flags because they are unexpected and more commonly seen in abused infants of Harper's age. (T.2, 254-255). Given that the court was imposing sentence for a conviction related to child abuse, Harper having

[9] In imposing sentence for a manslaughter conviction, 17-A M.R.S. § 1602(1) (2020) requires courts to follow a three-step process. In step one, the sentencing court "determine[s] a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual." 17-A M.R.S. § 1602(1)(A) (2020).

sustained previous injuries indicative of said abuse is an objective factor properly considered in step one of the sentencing process.

The sentencing court also did not obviously err in its weighing of the aggravating and mitigating factors in step two.[10] Averill first asserts that the sentencing court erred because it did not weigh the subjective victim impact in accordance with the "preferences" of his grandmother, mother, and Michelle (Bl. Br. 40; S. Tr. 21-29). However, sentencing courts are "afforded significant leeway in determining … the weight a factor is assigned." *State v. Ketcham,* 2024 ME 80, ¶ 35, 327 A.3d 1103 (citation omitted). This leeway stems from the recognition that in any case, especially one such as Averill's, "it can be challenging … to reconcile potentially disparate sentencing goals." *Id.* Thus, the Law Court has repeatedly declined to vacate sentences merely because a sentencing court disagreed with a defendant about the weight assigned a particular factor. *State v. De St. Croix,* 2020 ME 142, ¶ 16, 243 A.3d 880; *State v. Lord,* 2019 ME 82, ¶¶ 36-37, 208 A.3d 781; *State v. Schofield,* 2006 ME 101, ¶ 15, 904 A.2d 409; *State v. Shortsleeves,* 580 A.2d 145, 150-151 (Me. 1990).

[10] After setting the basic sentence in step one, a sentencing court then "determine[s] the maximum term of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case … includ[ing] … the effect of the offense on the victim." 17-A M.R.S. § 1602(1)(B) (2020).

Similarly, Averill's assertion that the sentencing court failed to consider the "purpose of minimizing correctional experiences in its analysis" is no more than a disagreement on the weight assigned this factor. (Bl. Br. 41). "Although a sentencing court is not required to consider or discuss every argument or factor the defendant raises" *Ketcham,* 2024 ME at ¶ 35, 327 A.3d 1103 (quotation marks and citation omitted), here, the sentencing court specifically articulated that not only had it "considered all of the relevant statutory sentencing goals," but that its consideration had "an emphasis [on] minimizing correctional experiences." (A. 65). Simply because the sentencing court concluded that other sentencing goals it articulated and considered either outweighed, or did not justify, the specific sentence requested by Averill does not constitute obvious error. (A. 64-66).

Lastly, Averill's assertion that the sentencing court considered his exercise of his right to a trial is meritless. (Bl. Br. 37-39). Merely because "[a]ny doubt as to whether the defendant was punished for exercising his right to trial must be resolved in favor of the defendant," does not allow a defendant to contort a sentencing court's remarks out of context to give the appearance of an illegality. *State v. Moore,* 2023 ME 18, ¶ 26, 290 A.3d 533. This Court has held that "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 trial or allocated at the sentencing hearing." *State v. Ellis,* 2025 ME 56, ¶ 26, 339 A.3d 794. No reasonable reading of the sentencing court's remarks supports the conclusion that the court "was influenced by" or even considered Averill's exercise of his right to trial when imposing sentence. (Bl. Br. 38).

The sentencing court made no reference to Averill's decision to go to trial; rather the record clearly demonstrates that the court's remarks were squarely directed at Averill's affirmative statements and conduct indicating a lack of remorse. *State v. Woodard,* 2025 ME 32, ¶¶ 24-26, 334 A.3d 667; *State v. Williams,* 2020 ME 128, ¶ 59, 241 A.3d 835; *State v. Coleman,* 2018 ME 41, ¶ 33, 181 A.3d 689; *State v. Hayden,* 2014 ME 31, ¶ 21, 86 A.3d 1221 (collectively, affirmative conduct and statements proper basis for finding lack of remorse and failure to take responsibility).

Averill affirmatively demonstrated his lack of remorse, not by going to trial, but by repeatedly giving a medically implausible explanation for Harper's injuries at the most crucial time – when medical personnel were trying to save his daughter's life. (A. 63-64). His sole reason for giving the implausible explanation was to benefit himself, "put[ting] his own needs and desires to not be blamed for this horrific – horrific event over his child's medical needs." (A. 64). It is difficult to imagine a scenario more glaring in its affirmative

demonstration of a lack of remorse than a father purposefully giving implausible information about his child's health as she lay dying in front of him.

Accordingly, the sentencing court did not obviously err in imposing Averill's sentence.

CONCLUSION

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

Respectfully submitted

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Dated: November 3, 2025

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CERTIFICATE OF SERVICE

I, Katie Sibley, Assistant Attorney General, certify that I have emailed a copy of the foregoing "BRIEF OF APPELLEE" to Averill's attorneys of record, Walter F. McKee, Esq. and Kurt C. Peterson, Esq.

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