

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

LAW COURT DOCKET No. WAS-25-276

STATE OF MAINE

Appellee

v.

NAKOMA POLCHES

Appellant

ON APPEAL from the Uniform Criminal Docket

Washington County, Maine

APPELLEE'S BRIEF

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Statement of the Case

The Appellant has raised two issues on appeal, both stemming from the remote testimony of [REDACTED], who was 10 years old at the time of trial, and 8 and 9 years old when she was assaulted by the Appellant. First, the Appellant argues that the trial court committed obvious error by permitting the remote testimony. Second, the Appellant argues that the trial court erred in applying *Maryland v. Craig*, 497 U.S. 836 (1990) when permitting [REDACTED] to testify remotely.

Statement of the Facts

In May of 2024, Tanya Brown filed a police report with the Indian Township Police Department regarding her daughter [REDACTED] (Tr. 69). Within a week, an interview was done with [REDACTED] at the Child Advocacy Center (CAC). In that interview, [REDACTED] disclosed that the person she called uncle Nakoma had engaged in sexual acts with her when she went to his residence.¹ Following this interview, the State sought and was granted an arrest warrant for Nakoma Polches for Gross Sexual Assault (A3). Polches was arrested on that warrant and had his initial appearance on June 24, 2024 (A4). Bail was set in the

¹ While the Appellant brings up the substance of the CAC interview in passing throughout their brief, the State does not see it necessary to detail the substance of that interview. It is the duty of the jury to determine the sufficiency of the evidence, and there is no assertion being made here that the evidence which they were presented was insufficient to make a finding beyond a reasonable doubt.

amount of \$50,000 cash. The case was set for trial on May 22, 2025. Prior to Trial, the State filed a motion in limine to allow the CAC interview to be introduced, which was granted without objection (Tr. 3). The State also filed a motion in limine seeking to allow [REDACTED] to testify remotely. On the morning of trial, the court heard argument on this motion and it was granted. The trial got underway, and following that trial, the jury found Nakoma Polches guilty of Gross Sexual Assault.

Statement of Argument

The State presented the direct testimony of [REDACTED] the named victim in the case, through the presentation of the CAC interview, without objection. The State also filed a motion to allow for the remote testimony of [REDACTED], pursuant to 15 M.R.S. § 1321, which was granted after hearing. The court did not improperly apply the statute because identity was not at issue in this case.

Even if this Court finds that identity was an issue in this case and therefore 15 M.R.S. § 1321 was improperly applied, the State asserts that the Appellant was not prejudiced by this, as the remote testimony would have been appropriate under *State v. Engroff*, 2025 ME 83, and its progeny.

The trial court did not err in determining that *Maryland v. Craig* permits the complainant to testify remotely under the circumstances of this case.

Argument

**I. The court did not commit obvious error by permitting [REDACTED]
to testify remotely pursuant to 15 M.R.S. § 1321.**

a. Statutory requirements.

The Legislature enacted 15 M.R.S. § 1321, An Act To Facilitate Children’s Testimony in Certain Sex Crime Cases, in 2021. This statute allows for the remote testimony of children under the age of 14 in “criminal proceedings concerning crimes under Title 17-A, chapter 11 or 12, in which the child is the alleged victim” 15 M.R.S. § 1321(1). There are 4 requirements that must be met for this statute to apply. These requirements include; the use of 2-way closed circuit television or other audiovisual means, testimony must occur at a recognized CAC with only a victim or witness advocate present in the room with the child; there must be an opportunity for real-time cross-examination of the child provided to the defendant’s attorney; and, the defendant must be able to observe the testimony of the child while the child is testifying and must be able to communicate with their attorney during the testimony. 15 M.R.S. § 1321 (2)(A)-(D). As the appellant has pointed out, the final subsection of the statute states that the section “does not apply if the defendant is an attorney pro se or if the positive identification of the defendant is required” 15 M.R.S. § 1321(3).

b. There was no error.

The trial court found that the State had met each of these requirements when granting the motion (Tr. 19-23). [REDACTED] testified via zoom from the CAC in Machias, only minutes from the courthouse. The only person present in the room with her was the Victim Witness Advocate.² Polches and his attorney were able to see and hear the testimony of [REDACTED] and were given the opportunity to cross-examine her.³

Throughout the course of her CAC interview, [REDACTED] repeatedly identifies Nakoma Polches, or Uncle Nakoma, as the person who sexually assaulted her. The Appellant pointed out that during the interview, the interviewer misstated the name of Polches as “Nakomis,” and asserted that this showed that there was an issue as to identity. The State does not argue that the non-native CAC interviewer mispronounced Nakoma Polches’s name.⁴ However, [REDACTED] never waivered in her pronunciation and therefore the State does not see merit in this argument of the Appellant. The lead investigator identified that the “Nakoma” that was being

² During hearing on the motion, counsel for Polches stated that they would prefer that the VWA being present in the room with [REDACTED] not be associated with the District Attorney’s Office (Tr. 20-21). However, they also acknowledged that this was permitted by the statute.

³ As requested by defense counsel (Tr. 23), Polches and his attorney were given the opportunity to be involved with the setting up of the technology for the remote testimony, including ensuring that they were satisfied with the layout of the room and the location of all parties.

⁴ At no point in time did Polches raise the issue of identity during trial, nor did he preserve any objection as to the mispronunciation of “Nakomis” by the interviewer. Given that this issue was not preserved, it must meet the requirements for obvious error. The State asserts that this is not even an error, rather a minor mispronunciation and therefore does not warrant any further discussion.

discussed was the defendant and pointed him out in the courtroom (Tr. 66).

████████'s Mother, Tanya Brown, also provided context for the fact that Polches was the same "Nakoma" that █████ identified in the CAC interview. There is no reasonable basis to assert that identity was an issue in this case based on the totality of the circumstances. Further, counsel for the Defendant never raised the issue of identity during the course of the evidentiary presentation or during closing. Therefore, the facts and circumstances are clear that identity was not at issue in this case, and therefore all of the requirements of 15 M.R.S. § 1321, including subsection 3, were met and there was no error in the application of that statute to this case.

Based on the fact that there was no error in the application of the Statute, there is no basis that was preserved on which this argument for appeal can be brought.

II. Any error that may be found does not meet all of the requirements

a. Obvious error elements

In *State v. Pabon*, 2011 ME 100, the Law Court adopted the four-part Burdick test when conducting obvious error review. *Id.* ¶ 29. "For an error or defect to be obvious for purposes of Rule 52(b), there must be (1) an error, (2) that is plain, and

(3) that affects substantial rights. If these conditions are met, we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.” *Id.*

b. Application of the *Burdick* test.

Assuming that the court finds that the trial court erred in allowing [REDACTED] to testify remotely pursuant to 15 M.R.S. § 1321, and that such error was plain, there are still two remaining prongs to the *Burdick* test that must be met to proceed on grounds of obvious error. Those prongs are not met in this case.

i. Substantial Rights are not affected

The Supreme Court of the United States held in *United States v. Olano*, 507 U.S. 725, that an error affects a defendant’s substantial rights if the error was sufficiently prejudicial to have affected the outcome of the case. Further, it is the responsibility of the party asserting such obvious error to show a reasonable probability that but for the error, the outcome would have been different. *United States v. Padilla*, 415 F.3d 211, 221-21 (1st Cir. 2005). The Appellant asserts that [REDACTED] being remote prejudiced Polches in that the strategy of the defense was to have [REDACTED] testify in person. It is further asserted by Appellant that “in person testimony can cause complainants to change their stories” (Appellants Brief, page

23), and that [REDACTED]'s mother testified that [REDACTED] would probably freeze up if she had to testify in the courtroom. (Tr. 18-19, 29). The State takes issue with this argument, as it implies that but for [REDACTED] not being traumatized, as her counselor testified she would be (Tr. 10), the outcome of this case would have been different. The State asserts that if anything, [REDACTED] being allowed to testify from the CAC allowed Polches the opportunity to cross examine the witness, as is his right under the confrontation clause, far beyond that which would have occurred had [REDACTED] been brought into the courtroom for trial. Polches was afforded every opportunity to confront his accuser in accordance with the statute and his rights afforded to him under the State and Federal constitutions, and the jury found him guilty.

The Appellant has not presented evidence sufficient to show a reasonable probability that requiring [REDACTED] to testify in the courtroom and not remotely from the CAC would have yielded a different outcome in this case.

**ii. Any error does not seriously affect the fairness and integrity or
public reputation of judicial proceedings**

Assuming the court finds that there was an error, that error was plain, and that it affects a substantial right, the State further asserts that such error does not seriously affect the fairness and integrity or public reputation of judicial proceedings. The core of the issues presented by the Appellant are those regarding

the Confrontation Clause. The Law Court recently held in *State v. Engroff*, 2025 ME 83, ¶ 58, that “like the Sixth Amendment . . . , the Maine Confrontation Clause does not prohibit the admission of out-of-court statements provided the declarant is available for cross-examination about them.” Further, the Law Court held in *State v. Herlihy*, that “the main and essential purpose of confrontation is to secure the opportunity of cross-examination; . . . although there is a secondary purpose, that having a witness present before the tribunal which is engaged in the trial of the case, this is merely desirable.” *Id.* at 313. The Appellant did not object to the admission of the CAC interview as the direct testimony of [REDACTED]. Further, the Appellant was given ample opportunity to cross examine [REDACTED] in front of the jury. Therefore, any error by the trial court in allowing [REDACTED] to testify remotely does not affect the fairness and integrity or public reputation of judicial proceedings.

III. The court did not err in concluding that *Maryland v. Craig* permitted [REDACTED] to testify remotely.

a. *Maryland v. Craig*

The Supreme Court decided *Maryland v. Craig* in 1990. That case dealt with the allowance of remote testimony by children in a sex case. However, this case

also was based on a Maryland Statute that required the court to make finding beyond that which are included in the Maine Statute. Specifically, to invoke the statute at issue in *Craig*, “the trial judge must determine the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” *Maryland v. Craig*, 497 U.S. 836, 843.

b. The court went far beyond what the statute requires when determining whether to allow remote testimony by a child under 14.

As previously described, the State filed a motion in limine to allow for [REDACTED] to testify remotely from the CAC. A hearing was held on this motion and the trial court found that all of the requirements of the statute were met. However, the court, citing its concerns with the potential Confrontation Clause consequences of the application of the statute, went further and made additional findings when allowing [REDACTED] to testify remotely (Tr. 26). The trial court relied on *Maryland v. Craig* and required the State to prove elements beyond those included in the statute, or under Maine law concerning the Confrontation Clause (see earlier discussion of *Engroff* and *Herlihy*). For purposes of allowing the remote testimony, the State called [REDACTED]’s counselor, Jessica Caraballo. Ms. Caraballo testified that she had been a counselor for [REDACTED] beginning in May of 2024, and through the course of their sessions, she diagnosed [REDACTED] with generalized anxiety disorder

(Tr. 8-9). Further, she testified that testifying in court would impact her mental health and increase her anxiety. (Tr. 12). The State also called [REDACTED]'s mother, Tanya Brown, who testified that [REDACTED] was so afraid of having to see Polches that she wet the bed the night before trial (Tr. 16). She further stated that she did not believe [REDACTED] testifying from the CAC would affect her ability to be truthful. Based on all of this, the trial court found that testifying at trial would "negatively impact her mental health and negatively impact her well being." (Tr. 27). As the sponsor of the bill that became 15 M.R.S. §1321 testified on May 12, 2021, "I recognize the rights of the defendant to confront their accuser, but we also must find a way to balance the emotional and physical well-being of the child who is testifying." *An Act to Facilitate Children's Testimony in Certain Sex Crime Cases: Hearing on L.D. 1612 Before the Joint Standing Committee on Judiciary, 130th Legis. 1st Special Session (2021)*(testimony of Representative Genevieve McDonald, Maine House District 134).

c. Any error was not prejudicial.

Should the Court find that the trial court applied *Craig* in error, the State argues that any such error was harmless. By applying *Craig*, the trial court provided more assurances that Polches's right to confrontation was being upheld than would have otherwise occurred without its application. Had the court relied solely on the statutory requirements, the additional information that [REDACTED] would

likely be unable to speak at trial would not have been taken in to account. The evidence presented at the hearing is clear that if [REDACTED] had been required to testify in person, Polches likely would have been given no opportunity at all for cross examination. There is no evidence to suggest that had the court not applied this case law, the outcome of the trial would have been different. Pursuant to M.R.U. Crim. P.52(a), “any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded.”

Conclusion

The State asserts that the trial court did not commit obvious error when it allowed [REDACTED] to testify remotely at trial, pursuant to 15 M.R.S. § 1321. This statute was applicable to this case, as identity was not at issue. Should the Court find that the statute was applied in error, and that the error was plain, the State further asserts that any such error did not affect the substantial rights of the defendant, as there is insufficient evidence to show a reasonable probability that the outcome of the case would be different. Further, the State argues that any error does not seriously affect the fairness and integrity or public reputation of judicial proceedings. Additionally, the Appellant has failed to show that the trial court improperly applied *Maryland v. Craig*, or that such error was prejudicial. There

was no prejudicial error committed in this trial and therefore the Judgment should be affirmed.

Respectfully Submitted,



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Certificate of Service

On this date, I have sent a PDF version of this brief to the Law Court and to opposing counsel at their email address as listed in their brief. I mailed ten paper copies of this brief to the Clerk of the Law Court, and I sent two copies to opposing counsel at the address shown on their brief.

Date: November 13 , 2025



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