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KENNEBEC, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. KEN-23-198

STATE OF MAINE,

APPELLEE

V.

DYLAN KETCHAM,

APPELLANT

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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Factual Background

On January 25, 2020, between 12:30 a.m. and 1:00 a.m., Dylan Ketcham, age 21, shot Jordan Johnson, age 22, in the forehead and then attacked Caleb Trudeau, age 21, with a machete, nearly severing his hands from his arms. Ketcham, Trudeau and Johnson had all been friends, with Ketcham and Trudeau's relationship going as far back as kindergarten. (Trial transcript ("T."), 1/24/23 at 169-170, 201-202). In the hours leading up to the confrontation, Ketcham and Johnson had been engaged in an escalating dispute and planned to meet to settle it. (*Id.* at 172-173). In preparation for the meeting, Ketcham had armed himself. He had stolen his sister's 25 auto Bauer semi-automatic pistol a few days before the confrontation; used her stolen credit card to purchase 25 caliber ammunition at a local gun shop; put duct tape over the outsoles of his boots to conceal his tread; and fabricated a pocket on the inside of his jacket with duct tape to hold a hard plastic sheath for the machete. (*Id.* at 19, 20, 79-80, 89-96; T., 1/18/23 at 259-263).

The attack occurred at Quimby Field, a municipal ballfield in Gardiner. Residents across the street from Quimby Field were awakened after 12:30 a.m. by voices yelling followed by the sound of a gunshot. (T., 1/18/23 at 39, 41, 49). After the gunshot, one neighbor heard someone yell "you fucking

pussy" and a second person repeatedly crying "help me." (*Id*. at 41-43). Another neighbor, Galen Davis, looked out his window to see two figures fighting in the street, with one standing over the other, appearing to punch down at the other repeatedly. (*Id.* at 52-53). Davis then saw the attacker walk in the direction of Davis's home and veer toward the right across Davis's lawn and out of sight. (*Id*. at 53-54).

Both Davis and his neighbor called 911. (*Id.* at 39 and 47). Minutes later, the injured man from the street, Caleb Trudeau, appeared on Davis's front porch, pleading for help. (*Id*. at 57-58). Officers from the Gardiner Police Department arrived at Davis's home, and documented their response on body-worn cameras, including their observations of Trudeau's devastating injuries. (State's Ex. 101 and 106). Officer Sean Dixon, who had served as a combat medic for the Marines in Iraq, initially noted lacerations on Trudeau's skull and then observed that his wrists "were almost completely severed…There was no muscle attachment…he wasn't freely moving his wrists, they were just flopping around." (T., 1/18/23 at 68-69, 86.) Trudeau "was asking for water, saying he was thirsty and asking if he was going to die." (*Id*. at 83). When Dixon went back to his cruiser to retrieve first aid items, he noted a "large area in the middle of the road with blood and items…It looked like a chunk of hair and a piece of rope." (*Id.* at 81). When officers asked

Trudeau who had done this to him, he responded, "Dylan Ketcham." (*Id*. at 95, 101-102).

Alonzo Connor, the officer who responded with Dixon, began to follow the attacker's footprints into the woods until he was called back by Dixon. (*Id.* at 92-93). Connor went to his cruiser to retrieve additional medical supplies, and noticed a body across the street, face down in the snow, on the side of the ballfield. (*Id.* at 93-94). The victim, later identified as Jordan Johnson, had been shot in the head and succumbed to his injuries a few days later. (*Id*. at 151, 154, 157.) The Chief Medical Examiner found that his death was caused by "a single gunshot wound that entered his forehead, the bullet went through at least three lobes of his brain" and "lodged in the back of his head." (*Id*. at 157).

With the assistance of a Maine State Police canine, officers followed the attacker's tracks through the woods and observed boots, a jacket, and a heavy pair of pants discarded along the track. (*Id*. at 192, 212, 213-214.) The footprints in the snow had a drip trail of blood to the left of them. (*Id*. at 248-249). The officers located Dylan Ketcham in the basement of a barn at 75 River Road. (*Id*. at 202-204). He had minimal injuries, most of which could have been sustained during his flight through the woods; the most serious of the injuries was a cut to his left palm that could have been sustained when he

drew the machete from his coat. (*Id*. at 128-130, 264-266; T., 1/24/23 at 262-263).

Officers from the Maine State Police Evidence Response Team collected the items discarded along the track. (T., 1/18/23 at 207-208). The track went by a parking lot behind an Alzheimer's care facility, with a trail of "drip stains" of blood veering towards a dumpster. (*Id*. at 106-107, 252-253). Inside the dumpster, they found the machete, with red brown staining along the serrated edge of the blade and multi-colored string around the handle. (*Id.* at 252-254; T., 1/24/23 at 15-19). The string on the handle was similar to the string that Officer Dixon had observed in the bloody area in Lincoln Avenue. (T. 1/18/23 at 253).

Continuing along the track through the woods, officers recovered a pair of boots, a coat, and pants. (*Id*. at 258-263). The treads of the boots were covered with duct tape, Ketcham's apparent attempt to conceal his tracks. (*Id*. at 259-260). One of the boots contained a cell phone. (T., 1/24/23 at 18). The coat had an interior pocket constructed from duct tape that held in place a plastic sheath for a Carnivore X brand machete, the same make as the machete found in the dumpster. (T., 1/18/23 at 262-263). In another pocket of the coat, there was a box of 25 caliber ammunition and a receipt dated January 24, 2020, at 3:30 p.m. for the purchase of that ammunition from Neilson's

Sporting Goods. (T., 1/24/23 at 19-20.) A roll of duct tape was found in the pants pocket. (*Id*. at 20-21).

Using a metal detector, officers from the Evidence Response Team recovered the Bauer pistol from under the snow in Quimby Field. (T., 1/18/20 at 273-275; T., 1/24/20 at 32-34). There was a shell casing still in the pistol, indicating that the casing had not ejected properly when the bullet was fired and that the pistol would not have been capable of firing again until the casing was cleared from the chamber. (T., 1/24/20 at 34-36, 269-270). The firearms examiner at the Maine State Police Crime Laboratory determined that the bullet collected at autopsy and the shell casing in the pistol were in fact fired from the same Bauer pistol retrieved from the ballfield. (*Id*. at 276-271). The pistol had belonged to Ketcham's sister, who had only noticed it missing from her apartment when officers contacted her after the shooting. (*Id*. at 89, 90-91, 94).

The Evidence Response Team took samples of blood from the side of the parking lot near Johnson's body, other areas of the parking lot, the roadway, the porch of the Davis home and the passive drops along the track into the woods. (*Id*. at 8, 10, 12, 13, 15, 22, 44-50). The forensic chemist at the Maine State Crime Laboratory also took samples from the notches in the blade of the machete. (*Id*. at 50). The DNA analyst concluded that the blood on the side of

the ballfield parking lot and hill was Johnson's; the blood from the ballfield, roadway, porch, and blade of the machete was Trudeau's, and the passive drips to the left of Ketcham's path of flight matched Ketcham's DNA. (*Id* at 58-72).

Caleb Trudeau was life flighted to Massachusetts General Hospital after the surgeons at Maine Medical Center in Portland determined they could not save his hands and the "team in Boston" reviewed photographs of his injuries and indicated that "they would be able to provide Caleb with a better outcome …than amputation." (*Id.* at 256-258). Trudeau remained at Mass General for six months for treatment. (*Id*. at 196-197). By the time of trial, three years after the attack, Trudeau still had only limited use of his right hand (with use of only his thumb, pointer finger and some of his middle finger), and he could not open his left hand or use the fingers on the left hand. (*Id*. at 199).

On the day and evening leading up to the confrontation at Quimby Field, Trudeau had been working, loading pallets in the warehouse at Pine State Beverage, and texting Jordan Johnson about their plans to meet when he got off his shift about 7:00 p.m. (*Id.* at 168, 171). Johnson was angry at Ketcham over a stolen bike, and he was gearing up for a fight. (*Id*. at 172-173, 174). Trudeau initially encouraged Johnson, rationalizing that the fight would settle the differences between friends; as the night went on, however, he became

concerned about the risks of his participation, because he had a young son and was about to inherit his late father's home. (*Id.* at 174-175).

After Trudeau got off work, Johnson joined him, and they went to Jordan's mother's house to obtain and do drugs. (*Id.* at 176-178). By the time they left her house, Johnson and Ketcham were texting about a meeting place, and both were becoming increasingly angry at each other. (*Id*. at 179, 181). Johnson and Trudeau were not armed when they arrived at the intersection of Cottage Street and Lincoln Avenue near Quimby Field, and Ketcham approached them from Lincoln Avenue. (*Id.* at 181, 182-183). Trudeau expected "there would be a fistfight," but he did not plan to participate: "I was just there as like a bystander…Just to make sure like between two of my friends that neither of them took it too far." (*Id*. at 183).

Trudeau initially hung back while Johnson approached Ketcham. (*Id*. at 185). Ketcham pulled out the pistol, put it to Johnson's forehead and motioned for him to start walking. (*Id*. at 184-185). Johnson responded, "[W]hat the fuck, bro." (*Id*. at 185). Trudeau then ran at Ketcham in an attempt to get the pistol, with Johnson behind Trudeau. (*Id*. at 184, 187, 188-190). Trudeau pursued Ketcham to the other end of the ballfield parking lot, "up the hill of Quimby Field, in the snow." (*Id.* at 189). Ketcham shot twice, before Trudeau managed to get the pistol away from Ketcham, causing the

pistol to fall into the snow. (*Id*. at 189, 213). As Trudeau related, "[T]he gun was fired before I touched Dylan…Jordan never touched Dylan actually." (*Id*. at 213). Trudeau did not see Johnson after Ketcham fired the pistol. (*Id*. at 190).

Ketcham then pulled a machete with an 11 ½ inch blade out of his coat pocket. (*Id*. at 49, 190). Before understanding what the object was, Trudeau attempted to "like push his hand back inside of his pocket with it." (*Id.*) Realizing that Ketcham was armed with a machete, Trudeau ran toward Lincoln Avenue and "fell off the snowbank into the road." (*Id*. at 190, 191, 192). Trudeau "put my hand up and…asked him not to…He hit me in my arm with it." (*Id*. at 192). After Trudeau could no longer hold up his first arm due to the injuries that Ketcham had inflicted, he raised his second arm in an attempt to deflect the blows. (*Id*. at 193). After he could no longer hold up his second arm, Ketcham struck Trudeau with the machete on his head and neck. (*Id*. at 193). Trudeau repeatedly asked Ketcham to stop, but "[h]e just kept hitting me." (*Id*.)

Trudeau was struck more than 13 times and briefly lost consciousness in the road. (*Id*. at 194). When he woke up, he "laid there and…called for help." (*Id*.) He somehow made it to Davis's porch and kicked the door. (*Id.* at 195). He thought he "was going to die." (*Id*. at 196). His devastating injuries

were documented at Maine Medical Center. (*Id*. at 258; State's Exs. 14-16). His extensive injuries included "lacerations to his scalp, the left side of his neck, another laceration over his left collarbone and injuries to both his arms…several of them included injury to his tendons and his bones." (T., 1/24/23 at 255).

Procedural Background

Ketcham was arrested on January 25, 2020, on the charge of elevated aggravated assault and had his initial appearance two days later. (Appendix (App.) at 1, Complaint dated 1/27/2020).) An amended complaint was filed on January 29, 2020, charging murder after Jordan Johnson passed away. (App. at 2). On July 24, 2020, the Kennebec County Grand Jury returned an indictment charging Ketcham with elevated aggravated assault and attempted murder on Caleb Trudeau and the intentional and knowing murder of Jordan Johnson. (App. at 29-31). The trial court permitted an amendment to the indictment on August 10, 2020, to replace the erroneous reference to a knife with the word "firearm" as the weapon used in the murder. (App. at 32).

The first trial began on September 19, 2022. (App. at 16). A mistrial was declared by the trial court on September 21, 2022, after the court had *sua sponte* raised concerns about the graphic nature of the video from the officers' body-worn cameras depicting the scene and Trudeau's injuries minutes after

Ketcham's attack. (See T., 9/19/22 at 113-116, 120, 138-139, 146-153; T., 9/20/22 at 31-35; Order Granting Motion for Mistrial, CR-20-124 (Me. Super. Ken. Cnty., Sept. 21, 2022).

The second trial commenced on January 17, 2021. (App. 19). On September 27, 2021, after two days of testimony, the jury found Ketcham guilty of the murder of Jordan Johnson and the attempted murder and elevated aggravated assault of Caleb Trudeau. (T., 1/27/2023 at 168-169). On May 16, 2023, Ketcham was sentenced to 45 years on murder; 30 years on attempted murder, with all but 20 years suspended, and four years of probation; and a concurrent term of 15 years on elevated aggravated assault. (App. at 26).

Ketcham filed two notices of appeal on June 1, 2023, under 15 M.R.S. § 2115 and M.R. App. P. 2B(b)(1). (App. 22). Ketcham did not apply for a review of his sentence under 15 M.R.S. § 2151 until February 26, 2024, when he moved the Court to accept his notice of appeal dated June 1, 2023, as his application for a sentence appeal. On February 28, 2024, this Court granted the motion. On April 22, 2024, the Sentence Review Panel granted leave for him to appeal his sentence. *State v. Ketcham*, Docket No. SRP-24-90 (Me. Sent. Rev. Panel Apr. 22, 2024).

STATEMENT OF THE ISSUES

I. **Whether the court abused its discretion in excluding certain hearsay statements between the victims, when Ketcham was not a party to the conversation and the statements were not relevant to a determination of whether he believed that deadly force was necessary.**

II. **Whether the court abused its discretion in failing *sua sponte* to order a mid-trial competency evaluation because Ketcham appeared to have a flat affect during the trial.**

III. **Whether the court's sentence of 45 years on murder and 30 years, all but 20 suspended, on attempted murder was proper given Ketcham's premeditation, his intent to cause multiple deaths, and the brutal nature of his attack on his second victim.**

ARGUMENT

I. **The court did not abuse its discretion in denying the defense request for admission of a particular Facebook message between the victims that was not relevant to any issues at trial.**

A. Procedural history

Prior to the first trial, the parties moved in limine regarding the admissibility of a conversation between the victims on Facebook messenger in the day leading up to the confrontation with Ketcham. (App. at 33-45). Following oral arguments on September 16, 2022, the court issued its decision

by email dated September 17, 2022, indicating that the statements were admissible regarding the victims' plans to meet with Ketcham and their relationship with Ketcham. (App. at 24). The court further indicated that it was inclined to admit statements relevant "to whether [Johnson) and Trudeau provoked the violence and/or were the initial aggressors,'" and ruled that certain song lyrics included in the victims' exchange ("I got murder on my mind") were admissible. (App. at 24, 36).

On the second day of the second trial, the parties were still debating which of the victims' Facebook messages could be used as evidence. Defense counsel had initially proffered a PowerPoint presentation that included all the messages, but later indicated that he was planning to use Defense Exhibits 20 and 21 in lieu of the lengthy PowerPoint. (T., 1/24/23 at 158, 160-161; See Exs. 20 & 21 in Supplemental Appendix ("S.App.") at 13-47).

The surviving victim, Caleb Trudeau, testified and was subject to extensive questioning, both on direct and cross-examination, about the messages in Defense Exhibits 20 and 21. (T., 1/24/23 at 173-175, 229-241). The parties had reached an agreement as to which portions of Exhibits 20 and 21 could be read to the jury, with the admissible portions highlighted by a handwritten star or check mark. (*Id.* at 235-236; S.App. at 13-41).

The State did not object until the defense exceeded the agreement on which statements were admissible. (T., 1/24/23 at 235-237; 242). Specifically, the defense proffered a "particular message" from Johnson about a miniature bat: "Instead of a nigger beater I call it the Dylan beater." Trudeau had responded, "Dylan's practically a nigger imo."[1] (S.App. 3-4; T., 1/24/23 at 242). Ketcham argued that the statement was relevant because, "It's an offer of violence on Dylan." (S.App. at 4; T., 1/24/23 at 243).

The court at that point reined in defense counsel's questioning:

> …I think we are going to have to give a limiting instruction to the jury because you are confusing something very important here. Mr. Ketcham doesn't know anything about this. So he can only use this for self-defense if he knew about it. That is the law in Maine. I allowed this for the limited purpose of showing their state of mind and their plan. That's different.
>
> …[T]he more I think about this, the more I have to give a limiting instruction. Because he has to believe force is reasonable based upon the circumstances known to him. That's the law. So I'm not going to allow this any further.

(S.App. 4-5).

During jury deliberations, the jury asked for the transcript of Caleb Trudeau's testimony, copies of the text messages between Ketcham and Johnson, and copies of the Facebook messages between Johnson and Trudeau.

[1] With reference to the racial slur, Ketcham and Johnson are Caucasian. Trudeau is Asian American.

(S.App. at 8-9; T. 1/27/24 at 156-163). The court declined to provide the unredacted Facebook messages between the victims:

> [M]embers of the jury, because the paper records were not admitted into evidence, I cannot provide copies…With respect to the Facebook messages, these cannot be considered on the issue of self-defense as the defendant was not aware of these exchanges. [T]hey were admitted for a separate purpose. With respect to the texts between the defendant and Jordan Johnson, we will attempt to put together a partial transcript of those exchanges tonight and give them to you tomorrow.

(S.App. at 8-9; T., 1/27/23 at 159-160).

B. Legal Argument

The court did not abuse its discretion in excluding the hearsay statements between Jordan Johnson and Caleb Trudeau referring to the miniature bat as a "Dylan beater." *State v. Penley*, 2023 ME 7, ¶ 15, 288 A.3d 1183 (admission or exclusion of hearsay evidence is reviewed for an abuse of discretion). This Court gives "broad deference" to the trial court "in making admissibility determinations under Rule 403." *State v. Coleman*, 2024 ME 35, ¶ 18, ___A.3d____.

Under Rule 803(3) of the Rules of Evidence, a hearsay statement is admissible "if it is '[a] statement of the declarant's then-existing state of mind (such as motive intent, or plan).'" (*State v. Penley*, at ¶ 15). This Court reiterated in *Penley* that the "state of mind hearsay exception is limited to

evidence that is highly relevant and uttered in circumstances indicating its truthfulness above and beyond the reliability presumed of all statements of present mental state." (*Id*., citing *State v. Mahaney*, 437 A.2d 613, 617 (Me. 1981)).

Ketcham sought admission of the statements between the victims to prove that they intended to inflict violence on Ketcham and therefore Ketcham was reasonable in his belief that his use of deadly force was necessary in self-defense. (T., 1/24/23 at 243-244, App. 38-41). Specifically, Ketcham wanted the statements admitted to prove that Johnson or Trudeau had used unlawful force against Ketcham, making his use of deadly force reasonable. (App. 38-39).

In determining whether a defendant was justified in using deadly force in self-defense, the factfinder considers any evidence that would support the defendant's belief that the victim may use deadly force. See, e.g., *State v. Cardilli*, 2021 ME 31, ¶ 22, 254 A.3d 415. If the evidence that the victim might use deadly force is not known to the defendant, then the evidence is not admissible to support the defendant's belief that deadly force is necessary. For example, the victim's alleged reputation for violence is excluded when the defendant was not aware of that reputation at the time of his conduct. *State v. Holland*, 2012 ME 2, ¶ 21, 34 A.3d 1130 (the victims' reputation for violence

was not admissible, if not known to the defendant, "because it has slight probative value and is likely to be highly prejudicial, so as to divert attention from what actually occurred.")

By statute,

> A person is justified in using deadly force upon another person:
> **A.** When the person *reasonably believes* it necessary and reasonably believes such other person is:
> **(1)** About to use unlawful, deadly force against the person…

17-A M.R.S. § 108(2)(A)(1) (emphasis added). Similar to a reputation for violence not known to a defendant, the victims' statements of which Ketcham was not aware were not probative of his belief, reasonable or unreasonable, that deadly force was necessary.

The Facebook messages consisted of trash talk between the victims venting about Ketcham and gearing up for a fight: "I'm going to beat the fuck out of [Ketcham]," "[C]an we really crack that kid or what…," "I'm going to trash on him bad." (T., 1/24/23 at 173.) While Johnson and Trudeau discussed bringing "a miniature croquet bat of some sort" as a weapon, they were in fact unarmed at the time of the confrontation, not knowing that Ketcham would arm himself with a pistol and a machete. (*Id*. at 181-182.) All the statements anticipating a fight were admitted through the testimony of Caleb Trudeau. To the extent that the messages were relevant to the victims'

plan to confront Ketcham or to the impeachment of Trudeau, those messages (and more) were read to the jury.

Unlike the messages between the victims, the texts between Ketcham and his victim, Jordan Johnson, leading up to their meeting were directly related to Ketcham's state of mind at the time of the confrontation. The statements in those texts not only contain Ketcham's admissions but were highly probative of Ketcham's knowledge about the dispute between the two men and what was likely to happen at Quimby Field. *State v. Stanley*, 2000 ME 22, ¶¶10-11, 745 A.2d 981 (evidence of a victim's prior act of violence that is known to the defendant is admissible "to demonstrate the reasonableness of a defendant's apprehension of danger," not as evidence of the victim's character).

As Trudeau testified, and the texts that included Ketcham confirmed, "They [Johnson and Ketcham] were both very angry at each other…It definitely just continued to escalate." (T., 1/24/23 at 179). There was nothing in the messages, however, that would have led Ketcham to reasonably believe that Johnson (or Trudeau) intended to use unlawful deadly force or that deadly force was necessary in confronting his former friends.

The court did not abuse its "broad discretion" in excluding the hearsay statement between the two victims about the "Dylan beater" under Rule 403

as not relevant to Ketcham's alleged belief that deadly force would be necessary. Even if this court were to conclude that the exclusion of that particular statement was error, the error, if any, did not affect Ketcham's "substantial rights." *State v. Penley*, 2023 ME at ¶ 19. Given the statements that had already been admitted describing the victims' plan for a fight, it is "highly probable" that the exclusion of the reference to the bat as a "Dylan beater" "did not affect the jury's verdict." *Id*.

The court further did not abuse its discretion in declining to provide the jury with a copy of Defendant's Exhibits 20 and 21. Only portions of those exhibits had been admitted into evidence, with the exhibits themselves containing other inadmissible hearsay and images. Ketcham's apparent complaint that the court allowed the jurors to view the paper copies of the messages between Ketcham and Johnson, but not between Johnson and Trudeau, fails to appreciate the distinction between the two communications. The messages between Ketcham and Johnson contained Ketcham's admissions and the information that was available to him, without inadmissible content. The court committed no error in declining to provide the jury with the unredacted printouts of messages of the hearsay statements between the victims contained in Defense Exhibits 20 and 21.

II. The court committed no error in not *sua sponte* ordering a competency examination because Ketcham appeared to have a flat affect during the trial.

A. Procedural history

Shortly after Ketcham's arrest, on January 31, 2020, defense counsel requested an order for a competency examination of Ketcham. (App. at 3). The order was granted four days later. (*Id*.) Dr. Robert Riley conducted the examination on behalf of the State Forensic Service and his conclusions indicated that Ketcham might be malingering or exaggerating symptoms of possible mental illness. (App. at 4; see also "Report of Inpatient 60 Day Competency Evaluation" ("Report") dated July 6, 2020, and provided to the parties on or about July 14, 2020.) Dr. Riley concluded that Ketcham was competent to stand trial: "While he does report some periodic psychiatric symptoms at the present time, it is unlikely that he has mental health issues of such severity at the present time that he would not be able to demonstrate the skills needed for trial competence, were he to choose to do so." (Report at 10).

On the third day of trial, the court engaged in a colloquy with Ketcham about whether he wished to testify. (T., 1/25/23 at 10-11, 15-17). Ketcham informed the court that he had decided not to take the stand. (T., 1/25/23 at

15). After Ketcham notified the court of his decision and the court dealt with another procedural matter, the court:

> shared some observations of the defendant's demeanor throughout the trial. And what I observed was that he seems to have a flat affect. He seems to be either medicated or shut down somewhat. He's not sleeping at the defense table but he is not reacting to evidence. I see him communicating with counsel on occasion.

(*Id*. at 36).

As a result of the court's observation of Ketcham's flat affect, the court asked defense counsel if Ketcham "had been evaluated or if the defense had any concern about his competence." (*Id*.) Counsel responded that "right up until the eve of trial we really had very little concern." (*Id*. at 37). He indicated that the defense team had "noticed the same things" and that had caused them "a bit of concern throughout the trial." (*Id*.) Accordingly, they had "kept an eye on it" and "made a series of communications with him" to make sure that he was paying attention and understood the proceedings. (*Id.*) "And to my mind throughout the trial he has been responsive and appropriate." (*Id*.) Counsel continued that the team "had a bit of an increased concern because…there's something about today…he really sort of seemed a little different." (*Id*.) Due to the "bit of an increased concern," the team "had a

very specific and lengthy conversation with him about that," and had concluded that "he is competent." (*Id*. at 36-37).

B. Legal argument

Ketcham has the burden of overcoming the presumption that he was competent to stand trial, including at the point that he made the decision not to testify. *State v. Gerrier*, 2018 ME 160, ¶¶ 8, 10, 12, 197 A.3d 1083. It was not obvious error for the court not to order a mid-trial competency evaluation when a pre-trial forensic evaluation had found Ketcham competent to stand trial, even though he seemed to have developed a flat affect as he watched the evidence pile up against him. The court *sua sponte* expressed "not concern exactly" but made a specific inquiry about whether Ketcham's "affect" indicated a lack of competence to the defense team, who would have been in the best position to assess Ketcham's capacity to work with counsel. (T., 1/25/23 at 36). Defense counsel, who had the "initial responsibility of raising the question of incompetence" and the "duty to 'promptly bring the matter to the attention of the court'" (*Gerrier* at ¶ 8), assured the court that the defense team shared the court's observations, but had engaged in a lengthy discussion with Ketcham and concluded that he was competent to continue the trial. (T., 1/25/23 at 36-37). Based on this record, there is no indication that the court "[learned] from observation, reasonable claim or credible source that there

[was] genuine doubt of defendant's mental condition to comprehend his situation or make his defense." *Gerrier* at ¶ 8.

Ketcham argues for the first time on appeal that he was not competent to make the decision to waive his right to testify at trial and that his testimony would have been "crucial to his claim of self-defense." (Appellant's Brief at 28). He further asserts that his decision not to testify "may have significantly impacted the outcome of the case." (*Id.*) On the contrary, given the evidence of premeditation, the brutality of the attack on Trudeau, and Ketcham's myriad statements to investigators minimizing his conduct, the *only* rational choice was for Ketcham not to testify.

Had Ketcham testified, he would have been confronted with the fact that he put duct tape over the treads of his new boots, used duct tape to create an interior pocket to conceal the machete, stole his sister's pistol, and then purchased ammunition for it only hours before the confrontation. In addition, the investigators had interviewed Ketcham, both at the Gardiner Police Department and at the scene of the attack. Although his self-serving statements were not presented at the State's case in chief, one of the interviews, an 85-page transcript, was attached as Exhibit B to the State's sentencing memorandum to demonstrate his utter lack of remorse, indeed an

arrogant sense of justification, after having shot one friend and brutally attacked another, leaving him for dead in a pool of blood.

During the interview, Ketcham attempted to manipulate the investigators, by presenting only enough information that he calculated would justify his actions:

- "I know how this shit works like, I really don't want a like, I don't want a fuck myself over by saying the wrong thing…I literally didn't do anything wrong." (Transcript of Interview (Ex. B to State's Sentencing Memorandum) ("Tr.") at 17, lines 773-774).

- "[I]f I'm in cuffs, and they're not, it's fucking bullshit." (Tr. at 16, line 743).

- Ketcham acknowledged that Trudeau had "been my best friend since kindergarten. Like, I got him his job at Pine State." (Tr. at 21, line 992.).

- Ketcham asserted, "I feel like I've done nothin' wrong, like honestly, like I feel like I've done nothin' wrong." (Tr. at 25, lines 190-191).

- Ketcham vented to the detectives that he needed recordings of his phone calls with Johnson to defend himself: "I'm so fucked if I don't have those fuckin phone calls…" When asked what it was "going to look like if you don't have the phone calls," Ketcham responded, "probably, like, ten years of fuckin' prison…Like… 'cause I know damn well that they're sayin' the exact opposite of what I'm sayin'." (Tr. at 34-35, lines 650-659).

- Ketcham asserted, "I shouldn't be going to jail." He implored the detectives, "[C]an I like go to an insane asylum or something like, I, I can't do this shit, I can't, like, this is such fucking bullshit." (Tr. at 36 line 727 and at 37 lines 770-771).

Ketcham's statements also contain some obvious dissembling. When asked where the machete was, he initially claimed that he did not know what happened to it, even though he had intentionally disposed of it in a dumpster during his flight from the scene. (Tr. at 79, lines 823-829). He minimized his attack on Trudeau, indicating that he struck Trudeau a "few times," and then when pressed on a number, "[r]ight around" five times. (Tr. 41, lines 987-993). He also made admissions: that he did not see any weapons on Johnson and Trudeau, that he stole the pistol from his sister, and that he was angry with Johnson. (Tr. 22 at lines 24-29; 79 at lines 814-821; 82 at lines 965-968). He asserted that Johnson owed him money and that Ketcham chose Quimby Field as the place to meet that night after the heated cell phone conversation. (Tr. 17 at lines 801-808; 20, at lines 951-960; 27 at lines 272-273).

Finally, there were Ketcham's writings from the jail that might have come into evidence had he taken the stand. In particular, there was one passage that provided evidence of the motive for his brutal attack on Trudeau—to enhance his status:

> Written Proudly from the shittiest Jail in Maine…My Message to the State of Maine District Attorney is to Choke to Death on FAG Dick but anyway Ill start by telling Y'all What Actually Fucking happened. Soo to Start, the Kennebec Journal Made Me out to look like a Monster. They made me Appear to be a cold blooded Psycho Path. ThIS IS Not the Reality of the Situation. Although I almost have to Thank them because I have NEVER gotten so much

> RESPECT in my life, in a Fucked Up way…this is kinda what Ive been looking For My Whole life. …9 out of 10 people in here is scared of me and Everybody Respects me in here. I'm treated like a celebraty (sic). Everybody is My BITCH or treats me nice. Two to three people give me their breakfast and Lunch Trays without Me even asking lol.

(Exhibit C to State's Sentencing Memo at P260-261).

Ketcham's decision not to expose himself to cross-examination was not a product of any lack of competence. Instead, that decision demonstrated that he was indeed competent and able to follow the advice of his defense counsel. The court did not commit obvious error in exploring Ketcham's flat affect with counsel and then taking no further action based upon counsel's assurance that Ketcham appeared competent to proceed.

III. The court did not misapply legal principles in setting the basic sentence for a pre-meditated murder at 40 to 45 years and for an attempted murder committed with extreme cruelty at 30 years; nor did it abuse its discretion in reaching a final sentence of 45 years on the murder and 30 years, all but 20 suspended, on the attempted murder.

There was no impropriety in the sentences imposed by the court for the crimes of murder, attempted murder and elevated aggravated assault. This Court will review the trial court's basic sentence "de novo for misapplication of legal principles and for an abuse of the court's sentencing power." *State v. Nightingale*, 2023 ME 71, ¶ 34, 304 A.3d 264, citing *State* v. *Athayde*, 2022 ME

41, ¶ 51, 277 A.3d 387. The Court then reviews the maximum sentence for an abuse of discretion and for "disregard of the relevant sentencing factors or abuse of the court's sentencing power." *State v. Williams*, 2020 ME 128, ¶ 56, 241 A.3d 835 (citations omitted).

The court followed the procedure under 17-A M.R.S. § 1602 in analyzing the basic sentence and maximum sentence for all three convictions, and then advancing to the third step of the final sentence with respect to the convictions of attempted murder and elevated aggravated assault. Under the *Shortsleeves* factors, Ketcham was eligible for a life sentence because he met at least three of the gateway factors: premeditation-in-fact, the intent to cause multiple deaths and the use of extreme cruelty in his attempt to kill his second victim. *State v. Shortsleeves*, 580 A.2d 145, 149-150 (Me. 1990).

In turning first to the two-step analysis required for the crime of murder, the court found in the first step, the basic sentence, that there was "factually reliable evidence in the trial record that establishes the factor of premeditation" and that Ketcham intended to cause multiple deaths. (T., 5/16/23 at 48-49; S.App. at 54-55). The court described the nature of the murder as "the premeditated unjustified killing of an unarmed former friend" and went on to say that "in addition to being premeditated and unjustified, this conduct can also be objectively described as Mr. Ketcham murdering

Jordan Johnson for no reason at all…this murder was done with no regard or …with indifference to the value of human life." (S.App. at 57). The court appropriately set the basic sentence in the 40 to 45 year range. (*Id.*)

At the second step of the sentencing analysis, the determination of the maximum sentence, the court considered the mitigating factor of Ketcham's youth: "He was a very immature 21 years of age at the time he murdered Mr. Johnson." (S.App. at 58). The court had also reviewed the evaluation by Dr. Riley and noted that Dr. Riley "was not able to identify any kind of mental illness of mental condition that could come close to explaining what happened that night." (S.App. at 59). The court concluded however, that the aggravating factors, including the "profound victim impact," outweighed "the identified mitigating factors." (S.App. at 60-61). As a result, the court imposed a final sentence of 45 years on the murder conviction. (S.App. at 61).

In turning to the attempted murder and elevated aggravated assault against Caleb Trudeau, the court determined that those crimes were a separate act from the murder, given the difference in weapon, victim, motive and timing, and that the sentences should run consecutive to the murder but concurrent to each other. (S.App. at 66-67). In setting the basic sentence for the attempted murder, the court observed: "The aggression and the brutality of this merciless attack on Mr. Trudeau is not just disproportionate…it just

shocks the conscience. This relentless attack with the machete is difficult if not impossible to understand. …[T]his conduct would have to be considered one of the most heinous ways attempted murder can be committed." (S.App. at 63). The court went on to find that: "Mr. Ketcham inflicted multiple and merciless blows on Mr. Trudeau's arms, hands, neck and head, all the while Mr. Trudeau was begging for his life. Mr. Ketcham taunted him, calling him a name that will not be repeated here. And he left Mr. Trudeau to die in a large pool of blood." (*Id*.).

In setting the maximum sentence at 30 years, the court again recognized Ketcham's age and lack of a criminal record as mitigating circumstances but concluded that the aggravating factors substantially outweighed the mitigating factors: "[O]ur victim impact cannot be overstated. Multiple surgeries, weeks and months of physical pain. Loss of physical strength and dexterity, disfigurement. Separation from friends and family. And the profound psychological trauma that anyone in Mr. Trudeau's situation would experience and might experience for some time." (S.App. at 65). In the final step, the court suspended all but 20 years of the 30-year sentence, concluding "based upon this record that Mr. Ketcham presents …a grave danger to public safety. And assuming that he is released from prison at some time, he will

need structure, he will need supervision, before he can safely return to live in the community." (S.App. at 65-66).

The final sentence was 45 years for murder, followed by 30 years all but 20 years suspended and four years of probation for attempted murder and 15 years (concurrent with the sentence for attempted murder) for elevated aggravated assault.

The court did not misapply sentencing principles in setting the basic sentence for premeditated murder at 40 to 45 years and did not abuse its discretion in imposing a final sentence of 45 years. Nor did it abuse its discretion in determining that the gunshot death of Johnson was different conduct or a different episode from the machete attack on Trudeau, warranting the imposition of consecutive sentences. *State v. Hansen*, 2020 ME 43, ¶¶ 38-39, 228 A.3d 1082 (standard of review in imposing consecutive sentences is abuse of discretion). Finally, it did not misapply sentencing principles in setting the basic sentence for the egregious attack on Trudeau at the maximum of 30 years for a Class A crime or abuse its discretion in imposing a maximum sentence of 30 years, given the unimaginable cruelty of the conduct without any reasonable explanation for it.

Ketcham argues that his sentence is excessive based solely on his age—

21 at the time of the offense and 24 at the time of sentencing. While his youth must be, and was, taken into consideration in imposing sentence, it does not give him a pass on a lengthy incarceration.

A life sentence on a youthful murderer does not violate the clauses banning cruel and unusual punishment under the Eighth Amendment of the United States Constitution or Article I Section 9 of the Maine Constitution. The United States Supreme Court has ruled that imposition of a *mandatory* life sentence on a *juvenile* offender for the crime of murder contravenes the Eighth Amendment's ban on cruel and unusual punishment, because it prevents the court "from taking account…an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller v. Alabama*, 567 U.S. 460, 476 (2012). Ketcham, while young, was not a juvenile at the time of the conduct, and his sentence was neither life, nor a mandatory life sentence. In setting a sentence of a term of years, the court did in fact consider the mitigating circumstance of his youth. The 45-year sentence for murder was neither cruel nor unusual under the circumstances.

This Court has already rejected in *State v. Dobbins* the argument advanced by Ketcham in this case: "that 'youth is the ultimate mitigating factor' and that Maine courts 'should not be authorized to impose life sentences or de facto life sentences on young people with no meaningful hope

for rehabilitation or release.'" 2019 ME 116, ¶¶ 53-60, 215 A.3d 769. Based in part on the Supreme Court caselaw, this Court concluded in *Dobbins* that a 65-year sentence for murder on a defendant who was 18 at the time of his conduct and 21 at the time of sentencing was constitutional, because trial court's sentencing procedure did indeed consider mitigating circumstances and individual characteristics in imposing the sentence. (*Id*.) As in the Ketcham case, the sentence was "entirely proportionate, even for someone of his age" and that it was "the brutal nature of this crime, and not the sentence, that shocks the conscience." (*Id.* at ¶ 60).

Like the *Dobbins* case, Ketcham's argument is factually and legally inaccurate. Ketcham was not a juvenile at the time of the offense, and his sentence was neither a mandatory life sentence nor a de facto life sentence. (*Id*. at 54-56). If Ketcham complies with prison rules, his sentence will be less than 65 years (the same length as Dobbins's sentence) with credit for good time served.

This Court should also reject the concept that a sentence of a term of years imposed under a proper sentencing analysis could ever be invalidated as a "de facto life sentence." "The fact that a sentence may be a 'de facto' life sentence does not change its legality." *State v. Burdick*, 2001 ME 143, ¶ 40, 782 A.2d 319 (Alexander, J. concurring). As the concurring opinion in *Burdick*

pointed out in a footnote, the *Hewey* analysis[2] ensuring fair and proportionate sentences would be undermined if the courts were to discount sentences based solely on the age of the offender: "If a 'de facto' life sentence renders a sentence under a term of years statute illegal, then the same forty-year sentence that is legal for a twenty-year-old would be illegal for a fifty-year-old." (*Id.* at n. 20). The court below followed the prescribed sentencing analysis, considering all mitigating and aggravating circumstances, and that analysis led to a fair and just final sentence of 45 years for murder and 30 years, all but 20 suspended, for the machete attack that would have caused the death of Caleb Trudeau but for the quick response of neighbors and first responders. There was no error in the imposition of the sentence in this case.

[2] *State v. Hewey*, 622 A.2d 1151 (Me. 1993), in which this Court articulated the sentencing procedure now codified in 17-A M.R.S. § 1602.

CONCLUSION

By reason of the foregoing, this Court should affirm the conviction and sentence below.

Respectfully submitted,

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DATED: July 10, 2024

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CERTIFICATE OF SERVICE

I, Leanne Robbin, Assistant Attorney General, certify that I have mailed two copies of the foregoing "BRIEF OF THE APPELLEE" to the Appellant's attorney of record, Michelle R. King, Esq.

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