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

LAW COURT DOCKET NO. Pen-24-62

STATE OF MAINE
Appellee

v.

JOHN J. HANSEN
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Cases

Statutes

Rules

Treatises

Other Authorities

Legislative Materials

INTRODUCTION

As the court below found, this is an "unusual" case. Defendant "kidnapped" his thirteen-year-old daughter, the court found, by transporting her around in the middle of the night, in his confused state, because he felt it necessary to keep her safe from perceived threats. There are two issues for appeal:

(I) The varietal of kidnapping of which defendant was convicted requires the State to prove defendant intended to "secret or hold" the victim in a place where she was "not likely to be found." Yet, the uncontroverted evidence and the court's own findings reveal that the stepdaughter had continual usage of her cellphone – including for text-messaging, placing phone calls, social media, and location-tracking – during the ordeal. This Court should hold that such usage of the phone precludes, as a matter of law, "secreting and holding" in a place "not likely to be found."

(II) A parent may not be convicted of kidnapping his "child." 17-A M.R.S. § 301(2-B) provides a complete defense. Respectfully, the court below erred in not reading this provision to encompass stepchildren, despite its findings the defendant was otherwise a "wonderful, loving stepparent" who meant only to protect the victim from perceived threats. These findings, along with a correct construction of § 301(2-B), require vacatur.

STATEMENT OF THE CASE

After a bench-trial, defendant was acquitted of several counts but convicted of others, including: kidnapping, 17-A M.R.S. § 301(1)(B)(2)

(Class A) (Count II); criminal threatening, 17-A M.R.S. § 209(1) (Class C) (Count III); domestic violence assault, 17-A M.R.S. § 207-A(1)(A) (Class C) (Count IV); endangering the welfare of a child, 17-A M.R.S. § 554(1)(C) (Class D) (Count VII); driving to endanger, 29-A M.R.S. § 2413(1) (Class E) (Counts VIII & IX); and operating a vehicle without a license, 29-A M.R.S. § 1251(1)(A) (Class E) (Count X). The Penobscot County Unified Docket (Mallonee, J.) thereafter sentenced defendant to an aggregate term of twelve years' prison, suspending all but seven years of that term for the duration of six years' probation. This appeal follows.

I. The State's case

Defendant and Jessica were married in summer 2017. (1Tr. 22-23, 118, 2Tr. 34). Jessica's daughter, [redacted], who was thirteen during the events at issue in this case, "looked ... at [defendant] as like a father." (1Tr. 19, 119). Jessica acknowledged, defendant and [redacted] "had a good relationship. They were close." (1Tr. 119). [redacted] agreed, adding that before this case, she called defendant "Dad." (1Tr. 20). Since they began to reside together as a family in 2016, defendant undertook typical parental duties, including, "[t]ucking her in, making her dinner, school shoes, report cards," and transporting [redacted] to and from school and her extracurricular activities. (1Tr. 119; 2Tr. 35-36). The trial court supportably found that other than during the incidents in this case defendant was a "wonderful, loving stepparent" to [redacted]. (3Tr. 11).

The family moved from Milford to a house in Eddington in August 2022, and that timeframe provides the context for this appeal. (1Tr. 14-15, 19-20, 118; 2Tr. 43-44, 54).

A. Defendant began exhibiting "distorted thinking."

In August 2022, as the court found, defendant was experiencing "distorted thinking." (3Tr. 13-14). Whatever the reasons were – defendant had been diagnosed with post-traumatic-stress disorder and was using marijuana dab oil from perhaps questionable sources, (1Tr. 160-61; 2Tr. 39, 42) – defendant had felt pressure to move away from Milford and into Eddington so that he and his family could leave certain people behind. (2Tr. 43-44). In particular, defendant feared a man whom, out of fear, he would only identify at trial by the pseudonym "Joe." (2Tr. 45-46). "Joe" was the president of a motorcycle gang who, in that capacity, controlled "some pretty threatening people." (2Tr. 47). These were people who one would not want to cross, and defendant was under the belief that "Joe" sought to supplant defendant within his family. (2Tr. 52-53). At trial, defendant candidly admitted, "I thought maybe ["Joe"] had made a threat or two, or I wasn't really sure, to be honest. I was pretty confused." (2Tr. 67-68).

During the family's first few days in Eddington, defendant was "paranoid and on high alert." (2Tr. 58, 62, 64). A series of incidents didn't help: [redacted] had recently reported seeing a dark figure walking by her bedroom window. (1Tr. 67; 2Tr. 51). And someone had placed a dead frog in the family's mailbox. (1Tr. 66-67). Moreover, defendant was quite suspicious of anything regarding motorcycles. (2Tr. 56, 62). Family

members reported that defendant had been doing odd things of late. (1Tr. 191).

Defendant had been unable to sleep during the night of August 17 into August 18. (2Tr. 57). And he had smoked a joint containing some of the questionable marijuana oil on the night of August 18. (2Tr. 56). Defendant was "on alert" in the garage when, around 2 a.m. on August 20, he heard a motorcycle that sounded like those on which members of the motorcycle club rode at the end of their private road. (2Tr. 60-61, 64-66). Defendant "kind of panicked" and he thought to himself: "I need[] to get my kid out of here." (2Tr. 66). He thought they needed to go "somewhere safe." (2Tr. 67).

In his confusion, defendant suspected that Jessica, his wife, might somehow be in on the motorcycle club's plans. (2Tr. 67).

B. The court supportably found that defendant intended to protect [redacted].

According to the court, defendant "saw himself as protecting [redacted] rather than threatening or coercing her. And he certainly didn't intentionally place her in fear." (3Tr. 10). In so doing, defendant woke [redacted] from sleep at about 2 a.m. (1Tr. 33). [redacted] testified:

> He told me to come with him again,[1] and I kind of looked at him. I was like, why? And he said, don't worry about it. Just let's go. So, I asked him if I could bring my phone. And he said, yeah, sure. And then I asked him if I could bring my dog Nova, who was sleeping with me, and he said no. And then he turned around, and he said, actually, yeah, you can bring her.

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[1] Earlier, around 10 p.m. to 11 p.m. on August 18, defendant had summoned [redacted] outside so that she could ride her side-by-side and defendant could advise her to contact her biological father. (1Tr. 27, 30-32; 2Tr. 61, 105).

(1Tr. 35). [redacted] grabbed her phone and followed defendant out the bedroom door, stopping to use the bathroom, where she used her phone to text-message Jessica her location. (1Tr. 35-36). [redacted] explained that, via the application Snapchat, her mother was able to track the location of her phone. (1Tr. 49).

Outside, according to [redacted], defendant "grabbed" her hand and led her into the passenger seat of his truck. (1Tr. 37). Defendant acknowledged that he helped [redacted] get into his lifted truck. (2Tr. 69-70). This touching is the basis for the felony-level domestic violence assault charge (Count IV) – the only physical contact that occurred. (*See* 3Tr. 10; 2Tr. 69-70). [redacted] testified that she did not want to get into the truck. (1Tr. 36).

Inside the truck, [redacted] was joined by two of the family dogs, Boss and King ([redacted] had decided not to bring Nova). (1Tr. 35, 37). Together, they all drove a handful of minutes – seven or so, according to [redacted] – to a nearby church. (1Tr. 37). According to defendant, he hoped to leave [redacted] with a pastor while he returned to the house to check on Jessica. (2Tr. 72). Defendant knocked on a door, but nobody answered. (2Tr. 73). About this time, defendant is captured on a recording on [redacted]'s cellphone stating, "[redacted], I'm pretty confused." (SX 7 ca. 0:15 – 0:20).

Back behind the wheel, defendant continued to look for "somewhere safe." (2Tr. 74). After a brief stop at the local Salmon Club, defendant felt he needed "somewhere safer." (1Tr. 39; 2Tr. 74). His focus turned to what he called "the bike shop." (1Tr. 38; 2Tr. 74; SX 7 ca. 4:25 to 4:42). [redacted] testified that, on their way there, defendant was speeding, driving up to 85

miles per hour – the basis for the conviction for endangering [redacted]'s welfare. (1Tr. 63-64; 3Tr. 9).

At the "bike shop" – which looked to [redacted] to be "somebody's house" – defendant asked to borrow [redacted]'s phone, which he used to dial a number [redacted] didn't know. (1Tr. 38). Defendant explained that he had heard that the owner of the shop was "a safe, comfortable person," and that was whom he was trying to reach by phone. (2Tr. 74). But he only had the business number, which did not help at that hour, nearly 4 a.m. (2Tr. 74-75).

It is worth noting that, other than his brief requests to use [redacted]'s cellphone, [redacted] herself had it on her person. She was texting her mom the "[e]ntire night." (1Tr. 40; *see* SX 3). She testified that she was texting her mother from the time she went into the bathroom back at the house "all the way up until" she separated from defendant. (1Tr. 40). In fact, that is how Jessica became aware of [redacted]'s whereabouts; around 4 a.m., she awoke to use the bathroom and it was then that she noticed [redacted]'s many text messages. (1Tr. 123). In his findings, the judge expressed some confusion why [redacted] hadn't called rather than text-messaged:

> I don't know why [redacted] didn't call her mother from the bathroom rather than sending a text message. The ringer on the phone would have awakened her. The text message did not. I don't know why she didn't call her any time later rather than sending text messages.

(3Tr. 5). Eventually, around 4:15 a.m., [redacted] decided to text-message 9-1-1. (1Tr. 57-58; SX 2).

Outside the bike shop, defendant had a flash of reality, thinking to himself how suspicious it would look to see a truck outside at 4 a.m. with two

dogs in it. (2Tr. 76). Defendant thought to himself, "jeez, maybe I shouldn't be here." (2Tr. 77). So, defendant drove back to the church, thinking that he hadn't yet approached the pastor's quarters. (1Tr. 68-69; 2Tr. 77).

Back at the church, defendant left [redacted] in the truck while he approached what he believed to be the pastor's quarters. (2Tr. 77-78). Defendant told her not to let anyone in the truck while he was knocking on doors. (2Tr. 78).

After again receiving no answer, defendant realized that [redacted] needed sleep, so he took her to the Salmon Club. (2Tr. 78). There, he parked and exited the truck, again with [redacted] inside, under his jacket so she would be warm while she slept. (2Tr. 78). In fact, [redacted] testified that she urged defendant to stay in the truck because she did not want to be alone. (1Tr. 70).

At that point, defendant heard a motorcycle drive down the road and turn back towards them, passing by the Salmon Club twice. (2Tr. 79-80). By the time defendant had climbed back in the truck, however, Jessica had appeared in her Jeep. (1Tr. 71; 2Tr. 78-79). Jessica knew to drive to the Salmon Club because [redacted] had text-messaged her that they were there. (1Tr. 126).

Defendant "was in panic." (2Tr. 79). In his mind, he believed that Jessica's sudden appearance – he hadn't been told [redacted] had been texting with her – and the passing motorcycle were related. (2Tr. 79). Defendant feared that someone else was in the Jeep. (2Tr. 79).

Jessica rolled down her window and yelled, "give me back my daughter," "give her back," or "give me my kid." (1Tr. 71, 126; 2Tr. 81). Defendant quickly pulled out of the Salmon Club parking lot, thinking to himself "get [redacted] someplace safe." (1Tr. 71; 2Tr. 82). Jessica called 9-1-1. (1Tr. 126-27).

A little over a mile down the road, defendant pulled into a campground. (1Tr. 71; 2Tr. 82-83; *see* SX 8). Defendant searched for a safe location, thinking to himself that he needed to find the campground's owner to sit with [redacted], defendant admitting at trial that he "was a bit confused" at the time. (1Tr. 73; 2Tr. 83-84). They ended up at the camp store, where defendant got out of the truck and entered the store. (1Tr. 74; 2Tr. 84-85). [redacted] again texted her mother, telling her that she planned to run from the truck and hide. (1Tr. 74). While defendant was in the store, [redacted] made a run for it, hiding among bushes and garbage. (1Tr. 76-77; *see* SX 9). She text-messaged her location to her mother. (1Tr. 77-78, 129).

When he discovered that [redacted] was gone, defendant thought "someone took her out of the truck." (2Tr. 85, 87). It never occurred to him that she might have deserted him of her own accord, so he did not look for her. (2Tr. 87). Instead, defendant drove towards home. (2Tr. 89).

On the road home, however, defendant encountered Jessica's Jeep. (1Tr. 131). He felt he needed to get up close to the Jeep to see who was inside it. (2Tr. 93). Defendant followed, getting closer, but he struggled to see through the dark-tinted windows. (2Tr. 84). His truck made contact with her Jeep twice, defendant backing off when he realized things were "getting

pretty dangerous." (1Tr. 132; 2Tr. 95). When Jessica pulled over, he asked her where [redacted] was, but Jessica would not say. (2Tr. 95). Jessica placed another 9-1-1 call. (1Tr. 132-34; *see* SX 1).

Back at the house, defendant called 9-1-1, but he hung up abruptly when they started asking questions, fearful that if he involved the police, the motorcycle club might be more upset. (2Tr. 89-90). When 9-1-1 operators called the house moments later, defendant assured them that everything was okay. (2Tr. 90). He then climbed onto his motorcycle and returned to the campground, the last place he had seen [redacted]. (2Tr. 90).

Jessica continued on to the campground, where she was reunited with [redacted]. (1Tr. 136-38). A law enforcement officer soon arrived on scene, and not long after that, defendant arrived on his motorcycle, where he was quickly placed under arrest. (1Tr. 138-40, 179).

In summary, [redacted] denied that defendant ever voiced a threat to her or to her mother. (1Tr. 101-02). To the contrary, defendant repeatedly told [redacted] that his goal was to keep [redacted] safe. (1Tr. 101).

II. Legal wranglings

Following the State's case, the defense moved for judgment of acquittal. (1Tr. 202-06; 2Tr. 4-28). However, the court denied that motion. (2Tr. 29-31).

Later, in closing argument, the defense made several legal arguments, including some that are continued on appeal. Regarding Count II, kidnapping by "secreting and holding," 17-A M.R.S. § 301(1)(B)(2), for example, counsel argued that, as a matter of law, [redacted]'s continual access

to and use of her cellphone – with defendant's permission – precluded a conviction:

> And we allege that [redacted] was neither secreted nor held in a place where she was not likely to be found. She was texting with her mom the whole time, and he returned her phone to her.

(2Tr. 157). In rendering its verdict on Count II, the court noted that defendant certainly "undermined his own purpose by leaving the telephone in [redacted]'s hands" but stated, somewhat obliquely, "he didn't undermine it so much that it wasn't a crime." (3Tr. 13-14).

ISSUES PRESENTED FOR REVIEW

I. When a defendant permits his stepdaughter to carry and use her cellphone, with which she can send text messages, make phone calls, and share her real-time location, has the defendant restrained the stepdaughter by "secreting and holding" her "in a place where" she "is not likely to be found?"

II. When the court finds that the defendant is an otherwise "wonderful, loving stepparent," as a matter of law, does 17-A M.R.S. § 301(2-B) provide a complete defense to the crime of kidnapping by restraint?

ARGUMENT

First Assignment of Error

I. When a defendant permits his stepdaughter to carry and use her cellphone, with which she can send text messages, make phone calls, and share her real-time location, the defendant has not restrained the stepdaughter by "secreting and holding" her "in a place where" she "is not likely to be found."

The facts are not in dispute: throughout the ordeal, [redacted] remained capable of contacting virtually anyone on earth by phone; her mother could have communicated with [redacted]; and others, including her mother, had the ability to track [redacted]'s whereabouts in real time. As a matter of law, [redacted]'s access to her cellphone precludes a finding beyond a reasonable doubt that defendant was "secreting and holding" [redacted] where she was "not likely to be found." The remedy is to vacate the conviction on Count II.

A. Preservation and standard of review

Defense counsel argued, in his closing statement, that [redacted]'s ready access to her cellphone, which defendant permitted [redacted] to bring with her, precluded a conviction. (A82). Because that argument made known to the court what action defendant sought, this issue is preserved. *See* M.R. U. Crim. P. 51. Regardless, M.R. U. Crim. P. 29(a) requires a court to independently assess the sufficiency of the evidence. *State v. Kendall*, 2016 ME 147, ¶ 12, 148 A.3d 1230. Therefore, this Court will "view the evidence in the light most favorable to the State and review any applicable statute de novo to determine whether the fact-finder could have found beyond a

reasonable doubt every element of the offense charged." *State v. Murphy*, 2016 ME 5, ¶ 5, 130 A.3d 401.

B. Trial court's reasoning

The court reasoned that, despite the fact that defendant "undermined his own purpose by leaving the telephone in [redacted]'s hands," the court felt that "he didn't undermine it so much that it wasn't a crime." (3Tr. 13-14).

C. Analysis

A person knowingly left with an operable and usable cellphone is commonly understood to be capable of communicating with virtually anyone – by call, by text, by social media, etc. – and to be trackable. Indeed, the record-evidence establishes that [redacted] was in continual communication with her mother's phone, was capable of contacting others, including emergency and law enforcement personnel, and permitted her mother to location-track [redacted]. These facts do not permit a finding that defendant took [redacted] anywhere she was unlikely to be found, certainly not by "secreting or hiding."

As Professor Lafave has written "not likely to be found" refers to a state in which "the victim was kept isolated from anyone who might have been of assistance." Wayne R. Lafave, *Substantive Criminal Law*, § 18.1(c) (2023 ed.). To qualify, a defendant must "have taken special steps to ensure the victim cannot make contact with others." *Ibid.* That requirement was not met here; [redacted] was able to make contact with others, and the record – recall the court's statement – "I don't know why" [redacted] did not simply call

her mother or 9-1-1, (3Tr. 5) – establishes that she could have reached others more quickly than she did by text message.

Professor Lafave continues, "the essential concept is not geographical location but rather effective isolation from the usual protections of society." *Substantive Criminal Law*, § 18.1(c). Those with functional cellphones like [redacted]'s, ironically, have ready access to "the usual protections of society" inconceivable to those of us who grew up at the time of the enactment of 17-A M.R.S. § 301, when cellphones were non-existent. No one accustomed to those days could have fathomed being "kidnapped" while in unencumbered possession of a device that could instantaneously communicate with almost anyone on earth and leave a traceable record of location. Unless this Court wants to sweep up into § 301's ambit conduct that never would have been criminal in decades past, it should author an opinion that is clear: If a victim has full use of a modern smartphone, which is routinely used during the alleged kidnapping, and could have been used even more, there is no "secreting or hiding" in a place "not likely to be found."

In other words, only when a victim is cut off "from meaningful contact or communication with the public," will there be such kidnapping. *Ibid.* This occurs only when circumstances make "it unlikely that members of the public will know or learn of the victim's unwilling confinement within a reasonable period of time." *Ibid*. On these facts, no such kidnapping happened in our case.

This Court has so far issued but little guidance on the meaning of "secrete." In *State v. Haag*, 2012 ME 94, ¶ 19, 48 A.3d 207, the Court

resorted to Webster's dictionary to define "secrete:" "to deposit or conceal in a hiding place." The Court found it important, in that case, that "no one other than [the defendant] and the girls' mother" knew of the victims' whereabouts. *Haag*, 2012 ME 94, ¶ 22. Neither are true in our case: By virtue of her cellphone, [redacted] was not concealed and it was the phone that led to her rescue.

Respectfully, a more modern, nuanced take than *Haag* is due in this age of ubiquitous smartphones. Several courts have held that the denial to a victim of a cellphone is proof of secreting. *See*, *e.g.*, *People v Grohoske*, 148 A.D.3d 97, 102-03 (N.Y. App. Div. 2017) ("secreting or holding the victim in a place where he was not likely to be found" is established, in part, by proof that the defendant took the victim's cellphone); *State v. Mejia*, 227 P.3d 1139, 1144 (Or. 2010) ("secretly confining a person in a place where she is unlikely to be found" is established, in part by proof that the defendant took the defendant's cellphone); *see also State v. Perkins*, 2022 Wash. App. LEXIS 529 ** 4-7 (Wash. App. Div. 2022) (even though defendant took victim's cell phone, there is still insufficient evidence that victim was "secreted"). If that is true, so must be the converse: When a person is left free to carry and use her cellphone, she has not been secreted or hidden in a place where she is unlikely to be found.

Cell-site location information ("CSLI") is routinely utilized by law enforcement officials, and they need not even obtain such by warrant when there are apparent "child abductions." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018). Here, of course, law enforcement did not need to obtain

CSLI; [redacted] herself communicated freely with others throughout the ordeal. The point is, even had that not been so, simply by having an operable cellphone on her person, [redacted] was not secreted or hidden in a place unlikely to be found.

In closing, this is, as the trial court said, an "unusual case," (3Tr. 3), given the fact defendant had no intent or purpose to threaten [redacted]. (3Tr. 12). Though defendant asserts that the availability of [redacted]'s cellphone precludes, as a matter of law, a finding that defendant was "secreting or holding" her in a place where she is "not likely to be found," there is another, albeit it related, way this Court can rule for defendant even if it disagrees. 17-A M.R.S. § 301(1)(B)(2) requires proof that defendant *knowingly* "secreted or held" [redacted] in a place "not likely to be found." When a defendant permits the victim to bring her cellphone with her, has the State proven that the defendant is knowingly secreting or hiding the victim? This Court might justifiably hold that it has not. *Cf. Commonwealth v. Rivera*, 949 N.E.2d 916, 919-20 n. 5 (Mass. 2011) (insufficient proof of specific intent to insulate victim from contact or communication with public when the evidence does not foreclose possibility that victim would have contact with others). Defendant is serving a twelve-year sentence for something it appears he did not intend to do. As the court found, defendant was trying to bring [redacted] to others who might help keep her safe from the threats he, in his confusion, perceived.

Second Assignment of Error

II. When the court finds that the defendant is an otherwise "wonderful, loving stepparent," as a matter of law, 17-A M.R.S. § 301(2-B) provides a complete defense to the crime of kidnapping by restraint.

By statute, "[i]t is a defense to a prosecution under [17-A M.R.S. § 301] that the person restrained is the child of the [defendant]." 17-A M.R.S. § 301(2-B). The court certainly and supportably found that [redacted] was defendant's stepchild at the time of the incident. As a matter of law, then, he cannot be convicted of kidnapping pursuant to § 301. The remedy is vacatur.

A. Preservation and standard of review

Defendant did not raise this argument below. Nonetheless, "[t]he State's obligation to disprove a defense generated by the evidence is the functional equivalent of the State's burden to prove all of the elements of the offense." *State v. Begin*, 652 A.2d 102, 106 (Me. 1995). And, the sufficiency of such evidence is an issue that a lower court must assess *sua sponte*. *See* M.R. U. Crim. P. 29(a); *Kendall*, 2016 ME 147, ¶ 12; *State v. Wilson*, 2015 ME 148, ¶ 13 n. 6, 127 A.3d 1234 ("Because 'the trial was 'jury waived,' the issue of the sufficiency of the evidence may be considered on appeal even though motions for judgment of acquittal were not made.'" quoting *State v. Gatcomb*, 389 A.2d 22, 24 (Me. 1978)). As in the previous assignment of error, this Court will "view the evidence in the light most favorable to the State and review any applicable statute de novo to determine whether the fact-finder could have found beyond a reasonable doubt every element of the offense charged." *Murphy*, 2016 ME 5, ¶ 5.

B. Trial court's reasoning

The trial court did not explain its reasoning for convicting defendant notwithstanding the fact that defendant was [redacted]'s stepfather.

C. Analysis

There is no dispute about the fact that [redacted] was defendant's stepchild. Certainly, the evidence introduced at trial was more than sufficient to establish the parent-of-the-child defense. *See* 17-A M.R.S. § 101(1) (State is required to negate defense that is generated by sufficient evidence). That defense is plain and simple:

> It is a defense to a prosecution under this section that the person restrained is the child of the actor.

(17-A M.R.S. § 301(2-B)). "In 1965 the Legislature established as the public policy of this State that a parent cannot commit the crimes of kidnapping or unlawful confinement or transportation of his minor child." *State v. Benner*, 385 A.2d 48, 49 (Me. 1978). Of the forerunner provision,[2] the drafters of the Criminal Code wrote, it "'provides a blanket exception from liability for kidnapping in the case of a parent taking his minor child.'"[3] *Ibid*.

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[2] P.L. 1965, ch. 347 § 1 amended the kidnapping statute to read, "Whoever, **except in the case of a minor by his parent**, kidnaps or unlawfully confines, inveigles, decoys, imprisons, transports or carries out of the State, or from place to place within it, shall be imprisoned for any term of years." (emphasis added).

In 1979, the current language of § 301(2-B) was added to Title 17-A. *See* P.L. 1979, ch. 512 § 24.

[3] Historically, there have been a couple of statutory exceptions to this otherwise "blanket" rule, at least in the realm of criminal restraint (rather than kidnapping). For example, in former 302(1)(B), as discussed in *Benner*, there existed a provision covering custody disputes. 385 A.2d at 49.

After correctly finding that defendant was [redacted]'s stepparent, why then did the trial court not acquit defendant? Respectfully, it must have erred as a matter of law, reasoning that a stepparent is not a "parent" per § 301(2-B). This Court should reverse, construing "child" to include stepchildren, or else it will undermine stepparents throughout the state and expose them to unwarranted or overblown prosecutions.[4]

Title 17-A does not explicitly define "child." That means, this Court looks to the plain meaning of the statute in an attempt to divine the legislature's intent. *State v. Lowden*, 2014 ME 29, ¶ 14, 87 A.3d 694. "Words are to be construed according to their common meaning." *Ibid.* These terms will be literally construed with an eye towards lenity, with any remaining ambiguity resolved in favor of a defendant. *Id.* at ¶ 15.

Our question of statutory interpretation is much like that faced by federal courts regarding the exemption from prosecution for kidnapping accorded to any "parent." 18 U.S.C. § 1201(a) ("except in the case of a minor by the parent thereof"). The Tenth Circuit construed "parent" to include stepparents, noting dictionary definitions that include anyone "who holds

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Likewise, 17-A M.R.S. 303 nowadays prohibits criminal restraint by a parent. *See also State v. Butt*, 656 A.2d 1225 (Me. 1995).

[4] In late 1978, the Criminal Law Advisory Commission reported that, in proposing the parental defense to kidnapping, it was "motivated by [the] feeling that potential for overbreadth in applying § 301 to parents outweighed [any] problem posed by kidnappings." Stephen L. Diamond, *Report of the Dec. 28 Meeting of the Criminal Law Advisory Committee*, ¶ 1, CLRC-107-29, at https://www.maine.gov/legis/lawlib/lldl/papers/crimlawrev.html (last accessed May 16, 2024).

the position or exercises the functions of a parent." *United States v. Floyd*, 81 F.3d 1517, 1523 (10th Cir. 1996) quoting *The Oxford English Dictionary*, Vol. VII at 222 (2nd ed. 1989). Other courts agree. *See, e.g.*, *Byrd v. United States*, 705 A.2d 629, 632 (D.C. 1997) ("[A] 'parent' may include someone *in loco parentis*."). And the Mississippi Court of Appeals reversed a guilty plea to kidnapping by a stepparent, noting that because the defendant was *in loco parentis*, he was "actually innocent of the kidnapping charge." *Henderson v. State*, 170 So. 3d 547, 554 (Miss. Ct. App. 2014). "Child" is certainly correlative of "parent," and those foreign decisions are therefore persuasive.

But so are sources closer to home. For instance, Maine has a common-law understanding of "child" and "stepchild," and such common-law definitions are dispositive. *See Chapman v. United States*, 500 U.S. 453, 462-63 (1991) (where statutory term is undefined, first refer to common-law meaning, and only if there is none, revert to "ordinary meaning"). In *Guilford v. Monson*, 134 Me. 261, 264 (1936), this Court wrote of the common law tradition of a stepfather who has taken "the children into his family and under his care in such a way that he places himself *in loco parentis*." Such a stepfather "'assumes an obligation to support them, and acquires a correlative right to their services.'" *Ibid.* quoting 20 R. C. L., 594. The Law Court went on, "The term 'stepchildren' is ordinarily defined as the children by a former marriage of either the husband or wife...." *Guilford*, 134 Me. at 265. In other words, *Guilford* both establishes that "children" include "stepchildren" and that a stepparent acting *in loco parentis* enjoys a right to those children's "services."

"In common, as well as technical legal, parlance a stepchild is 'the child of one of the spouses by a former marriage.'" *State v. Buckles*, 508 N.E.2d 54, 55 (Ind. Ct. App. 1987) quoting *Black's Law Dictionary*, 1584 (1968). Certainly, "a child of one's wife or husband by a former partner" includes "stepchild." *Merriam-Webster Dictionary*, "Stepchild" https://www.merriam-webster.com/dictionary/stepchild (last accessed May 2, 2024). In other words, "child" is expansive; "stepchild" certainly falls within its ambit. All stepchildren are children.

Defendant contends that, on the facts, judgment is compelled. The trial court found that defendant was a "wonderful, loving stepparent" to [redacted]. (3Tr. 11). It repeatedly found that defendant, though experiencing distorted thinking, was acting with the intent to protect [redacted]. (*See*, *e.g.*, 2Tr. 18; 3Tr. 10, 12). Certainly, there was no evidence that defendant acted other than *in loco parentis* to [redacted], with both [redacted] and Jessica admitting that defendant's relationship with [redacted] was that of a father-daughter. (1Tr. 19-20, 119). However, should this Court retain any residual doubt of that relationship, it might remand for further consideration in light of its holding that stepchildren are children for purposes of 17-A M.R.S. § 301(2-B).

CONCLUSION

For the foregoing reasons, this Court should vacate and remand for, in this order of preference, entry of judgment of acquittal as to Count II, or further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Pen-24-62

State of Maine

v.

CERTIFICATE OF SIGNATURE

John J. Hansen

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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