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

LAW COURT DOCKET NO. Han-24-65

STATE OF MAINE
Appellee

v.

RAYMOND N. LESTER
Appellant

ON APPEAL from the Hancock County
Unified Criminal Docket

BRIEF OF APPELLANT

Rory A. McNamara # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

Second Assignment of Error

Third Assignment of Error

TABLE OF AUTHORITIES

United States Supreme Court Cases

Cases

Statutes

Rules

Treatises

INTRODUCTION

Defendant presents two interrelated arguments about the conduct of his trial:

(I) Counter longstanding case-law prohibiting judges from singling out one party's case for special scrutiny, the trial court overruled defendant's objections to portions of the court's instructions. Those challenged portions of the instructions highlighted the proveability of the mental state element. While some facets of the instructions are legally accurate – and others are not – the sum effect of the court's instructions unfairly favored the State.

(II) Conversely, despite the uncontroverted evidence that defendant was drunk driving, heavily intoxicated and near incoherence, the court omitted an intoxication instruction per 17-A M.R.S. § 37. That omission affected substantial rights because jurors might well have otherwise found that he recklessly struck the decedent with his vehicle, as he nearly hit several other people in the preceding minutes and hours. Further, the imbalance in the court's instructions, caused by this omission as compared to the gratuitous State-friendly comments addressed in the first assignment of error, undermines the fairness and public reputation of the judicial system.

There is also a sentencing argument:

(III) The court's selection of a 40-year basic sentence suffers from two errors. First, that number is based, in part, on defendant's *post*-offense conduct, his "flight" from the scene, which is impermissible. Second, the court inexplicably favored the State's proposed basic sentence over defendant's. The court's laconic discussion of its rationale for doing so is

error where, as here, the "comparable" cases supposedly favoring the State's basic sentence are clearly more egregious than the facts of this case.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of intentional or knowing murder, 17-A M.R.S. § 201(1)(A). The Hancock County Unified Criminal Docket (Murray, R.) thereafter sentenced defendant to 48 years' prison. Defendant timely filed a notice of appeal and an application for leave to appeal the sentence imposed against him. The Sentence Review Panel granted leave to present the latter, which the Court consolidated with defendant's direct appeal.

I. The State's case

A. Nicole and Raymond attended a retreat together.

Raymond Lester and Nicole Mokeme were seemingly living together in South Portland during the months preceding summer 2022. (2Tr. 16-17). Nicole was then involved with the planning of the Black Excellence Retreat that was to take place in Acadia National Park – at the Schoodic Institute, to be specific – around the Juneteenth holiday. (2Tr. 27-28). "The retreat was just supposed to be a space for community to go to heal, to be together, to relationship build, to just have fun outdoors and get away from the stress of just everyday life." (2Tr. 65).

A sea-kayak guide witnessed Nicole and Ray together on Thursday, June 16. (2Tr. 28-30). That day, Nicole and Ray were jointly navigating the tidal currents in a tandem kayak. (2Tr. 29-30). Everyone in the kayaking

group "started off the trip in a really good mood." (2Tr. 32-33). Twenty or so minutes later, however, the guide grew concerned when Nicole's and Ray's kayak drifted farther from shore. (2Tr. 33-34). As the guide approached them to offer assistance, she "heard a lot of cursing, a lot of yelling. [Ray] was screaming F you, F this, F that, at Nicole." (2Tr. 34). Though she could not make out the details, the guide could see that Raymond looked "very angry" and Nicole appeared "like stonewall face, not speaking, not paddling, just shrunken down into the cockpit of the boat." (2Tr. 34).

Back on shore, Ray "stayed down on the beach crouched down and he was almost in physical agony." (2Tr. 38). Nicole seemed "withdrawn" and watched Ray from a distance, "warily." (2Tr. 41). He did not interact with the rest of the group. (2Tr. 39). Ray remained "clenched jaw" and did not speak for the remainder of the kayak trip. (2Tr. 40-41). Back in the parking lot at the end of the outing, Nicole and Ray left together, though Ray still appeared to the guide to be "very emotional and angry." (2Tr. 44-45).

B. June 18th-19th

A couple of days later, retreat participants were gathered at the Schoodic Institute, enjoying a cookout and socializing. (2Tr. 70-71, 97). In particular, a group gathered near a firepit at a spot known as the pavilion, which was set off a short drive or walk from the bunkhouse where they were lodging during the retreat. (2Tr. 71). They were barbecuing, eating, playing games and just "hanging out." (2Tr. 71-72).

Raymond was driving recklessly, speeding and nearly hitting multiple people with his dark-colored BMW. (2Tr. 73, 97-98, 103-06, 137, 219-20).

He was listening to a rap song with violent lyrics at a high volume, over and over again. (2Tr. 75, 98, 103, 137-39, 157, 216). Others either saw Ray drinking "straight" from a bottle Grey Goose Vodka or got the impression that he had been drinking because, either because of his behavior or odor. (2Tr. 107, 129, 138, 195). In the BMW, Ray sat "slouched" and "kind of incoherent of what was going on." (2Tr. 137). His speech was "very slurred," Ray was obviously drunk. (2Tr. 138).

According to a witness, Nicole left the campfire around 10:30 p.m., after appearing ill at ease. (2Tr. 144, 147). But another witness who testified that she left the firepit around 10:30 p.m. reported that neither Nicole nor Ray were there at that point. (2Tr. 77). Yet another witness reported seeing Nicole back at the bunkhouses between 11:30 p.m. and midnight. (2Tr. 219).

The last outgoing communication from Nicole's cellphone – a phone call to Ray – originated from that device just seconds before 11:42 p.m. (3Tr. 90, 99-101).

C. Sunday morning, June 19th

The next morning, Nicole did not text-message the group with an itinerary of the day's planned events, as she had done on previous occasions. (2Tr. 78-79). A college student at Schoodic Institute on a school-sponsored trip found Nicole's body along a paved walking path. (1Tr. 31).

Emergency responders were called to the scene just before 7 a.m. (1Tr. 57). They immediately identified what they believed to be tire-tracks in the bushes near Nicole's body. (1Tr. 58, 63, 70, 74, 84; 2Tr. 10). Investigators

also located pieces of black plastic in the vicinity, even some on Nicole's body. (1Tr. 63, 65, 91, 105-06).

Around 10 a.m., a woman living near the Institute was out walking when she found clear-glass shards in and near the roadway leading to the Institute. (3Tr. 5-11). Police later took custody of the glass, including the mouthpiece of a Grey Good Vodka bottle, and submitted it to the lab for testing. (3Tr. 15). DNA-testing established a "match;" defendant is a major contributor of the DNA on the mouthpiece. (3Tr. 51).

Cell-site location information suggests that Ray's phone left the Acadia National Park area around 12:06 a.m. on June 19. (3Tr. 90-91).

D. Ray left Maine.

A license-plate reader observed Ray's BMW enter Brewer at 12:55 a.m. on June 19, heading west. (3Tr. 63-64). The next day, Ray sold his cellphone while in Warwick, Rhode Island. (3Tr. 117). Continuing south in the subsequent days, the BMW was tracked in Georgia and Texas. (3Tr. 64-65, 153-56, 159). Photos of the BMW, captured by various traffic-surveillance cameras, show no apparent damage to the vehicle. (3Tr. 173-74, 185; SXs 89, 90). Investigators never recovered the BMW; in September 2022, Ray reported it stolen. (3Tr. 164-65).

Via stipulation, the jury heard that Ray turned himself in to police in Mexico on July 19, 2022, leading to his return to Maine. (3Tr. 160). The State, in its closing argument, repeatedly contended that defendant had fled from the scene, indicating his guilt. (4Tr. 16, 39, 46, 63, 92, 93).

The deputy chief medical examiner testified that Nicole died from blunt force trauma. (3Tr. 209). She had broken ribs, a transected vertebral column, fractures to the pelvis and femur, and numerous indicia of trauma to her face, head, legs, chest and neck. (3Tr. 200-08). Her intestines were partially eviscerated. (3Tr. 208).

E. Evidence of an imperfect relationship

In the months preceding the retreat, according to Nicole's neighbor, there was "quite a bit of door slamming" by Ray at Nicole's residence. (2Tr. 22). From the tone and volume of their voices, the neighbor believed that there was a good amount of arguing occurring in the weeks before the trip to Acadia. (2Tr. 22-24).

A friend of Nicole, who stayed just down the hall from Nicole's and Ray's shared room at the bunkhouse, noted that the two "didn't seem close" or "together." (2Tr. 93).

II. The defense

Defense counsel floated two separate defenses. *First*, counsel contended that the State had done a poor job of investigating the situation, focusing in on Ray solely because he had not remained at Schoodic Institute. (4Tr. 72-73, 76, 86-87). In support, counsel noted how police did not identify or speak with all those who were present at the retreat, (4Tr. 75-76); how police did not investigate local body-shops for damaged vehicles, (4Tr. 76-77); how police did not review the license-plate reader in Brewer for images of damaged vehicles, (4Tr. 76-77); how police did not compare the wheel-width measurements they took at the scene to known BMW wheel

widths, (4Tr. 77, 80); and how police did not check to see whether the black plastic pieces which they speculated were from the undercarriage of Ray's BMW were actually the sort of plastic used by BMW. (4Tr. 78-79). Counsel noted the unlikelihood that Nicole's injuries – "all above the knee" – were inflicted only by the undercarriage of the BMW, the State having no other theory to argue, in light of the photos showing the BMW with no apparent damages. (4Tr. 81-82).

Second, counsel touched on the possibility that Ray's BMW might have struck Nicole:

> Did the State prove that this wasn't accidental? So [the prosecutor] offered you his precise theory as to what happened. That Nicole was targeted and she's running and she tosses her phone, and none of that was proven whatsoever. It's entirely speculative. If she's running on foot, how did that even happen? You saw that parking lot. You saw where it was located. Where did the vehicle start chasing her? Where did she come from? Mr. Lester only has at most, again, three minutes by their own time line. She's coming from the bunkhouse, she wouldn't have been coming from that direction. The story doesn't make sense.

(4Tr. 84). Counsel added: "What did the State prove about this accident? Did they prove it was an accident? Did they prove it was intentional? No, they offered you no complete theories as to what happened." (4Tr. 85).

Counsel went on to attack the notion that Ray intended to kill Nicole: "They had a bad argument out on the ocean. They were both hypothermic. Does that show murderous intent because they argued in the kayak?" (4Tr. 85). Counsel focused on defendant's driving:

> The idea that he was drinking and driving too fast, he almost hit people? It does not reflect well on Mr. Lester's behavior that day. Doesn't mean he intended to kill anyone or that he hit anyone with his vehicle. It means he was playing loud music, and he was

> driving inappropriately. That's what you can infer from that. There's no evidence that he had any kind of murderous intent toward anyone. So did they rule out that it wasn't an accident? No. Did they prove it was intentional? No. We don't know. That's the point.

(4Tr. 85-86). This line of defense was an obvious attempt to open the door to a conviction for the lesser-included charge of manslaughter, in which the jury was instructed. (4Tr. 104-05). Counsel added that there was no evidence that Ray targeted Nicole. (4Tr. 89).

III. Legal rulings

Prior to the court's final instructions, defense counsel objected:

> So in terms of the actual instruction on murder, my concern with this instruction is that it seems to have multiple references that, in my opinion, are – serve to lessen the State's burden. On page one there's a reference to saying that you are not required to unanimously agree, on page two there's a reference that intent of mental state cannot be proved directly, that the State doesn't have to prove premeditation, that the State doesn't have to prove motive, but if there is no motive that's not reasonable doubt. It just seems to me that there are multiple references that serve to lessen what the State needs to prove.

(4Tr. 6-7). Counsel for the State responded that the challenged provisions were legally accurate:

> [I]t it correct that the jury does not have to be unanimous on the alternative means of causing the death. There's case law on that. The intent or mental state is also correctly stated and we do not have to prove he acted with premeditation to show that it was intentional or knowing. So those are all correct statements of the law. If we need to, we can probably pull out a Law Court case for every single one of them.

(4Tr. 8). Defense counsel replied that he "was not implying that there are any actual inaccuracies." (4Tr. 8). Rather, those provisions, when

considered in toto, "appear to undermine or lessen the State's burden." (4Tr. 8).

The court overruled defendant's objection to the instruction:

> The Court would note that the particular provisions that counsel has just references in the proposed instructions drafted by the Court that deal with the issue of intent, motive, premeditation, they're also language that comes directly from the Alexander's [sic] manual as it relates to each of those topics. It follows that same kind of language in regard to those same topics. So the Court is fairly confident that those do in fact reflect tested, if you will, provisions as it relates to those topics and would not be inclined to either delete or adjust them based on the argument presented.

(4Tr. 8-9).

The court eventually instructed the jury, in pertinent part:

> Intent or the mental state ordinarily cannot be proved directly because there is rarely direct evidence of the operation of the human mind. But you may infer a person's intent or state of mind from the surrounding circumstances. You may consider any statement made and any act done or omitted by the person and all other facts in evidence which indicate state of mind. You may consider any statement made and any act done or omitted by the person and all other facts in evidence which indicate state of mind. You may consider it reasonable to infer and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you to decide what facts to find from the evidence.
>
> The State does not have to prove that Mr. Lester acted with premeditation, that is, with planning or deliberation, to establish that his conduct was intentional. Rather, the intent to cause death may arise in the instant before the death producing conduct. However, you may consider any evidence of premeditation, if you find such exists, as it bears upon whether Mr. Lester acted intentionally.
>
> The State also does not have to prove motive, that is, the reason or reasons why a person acted as he or she did. Absence of motive does not necessarily raise a reasonable doubt respecting the guilt of an accused. Nor does the mere fact that it exists establish guilt. Instead evidence of the presence or absence of motive is a matter for you to consider along with all

> other facts and circumstances in evidence in determining whether the State has met its burden of proving beyond a reasonable doubt the crime charged.

(4Tr. 102-03).

IV. Sentencing

About three months after defendant was convicted of intentional or knowing murder, sentencing was held. In its sentencing memorandum, the defense argued for a basic sentence of 28 years' prison. (*Defendant's Sentencing Memorandum* at 9). Comparable cases in which basic sentences of 35 years' prison were selected were brought to the court's attention. (*Id.* at 11-13) citing *State v. Gaston*, 2021 ME 25, ¶ 35, 250 A.3d 137 (35-year basic sentence even though three young children in close proximity during murder); *State v. Sweeney*, 2019 ME 164, ¶ 8, 221 A.3d 130. (35-year basic sentence even though the murder committed with a baseball bat while the victim was sleeping obviously required some premeditation).

The State, in contrast, sought a 40- to 50-year basic sentence. (*State's Sentencing Memorandum* at 13). Its comparables included a 40-50-year basic sentence for killing a pregnant former girlfriend; a 45-year basic sentence for one of the most brutal beatings the presiding judge had ever seen, committed while the decedent's two young children were in the same house; a life-term basic sentence for two murders committed with children present; and a 40-45-year basic sentence for a deliberate execution-style shooting committed with clear motive. (*Id.* at 8-10) citing *State v. Evaristo De Deus*, ANDSC-CR-2014-1023; *State v. Athayde*, 2022 ME 41, 277 A.3d

387; *State v. Penley*, 2023 ME 7, 288 A.3d 1183; *State v. Tieman*, 2019 ME 60, 207 A.3d 618.

The court ultimately set a basic sentence of 40 years' prison, noting the intentionality of the crime; its characteristics of domestic violence; the comparable cases presented by the parties; and defendant's "flight" from Maine. (STr. 38-39). After weighing aggravating and mitigating factors, the court increased Ray's sentence to 48 years' prison. (STr. 39-41).

ISSUES PRESENTED FOR REVIEW

I. Did the trial court err by singling out for special attention how the State may prove intent and the fact that the State need not prove motive or premeditation?

II. Did the trial court commit obvious error by omitting to give an intoxication instruction pursuant to 17-A M.R.S. § 37?

III. Did the sentencing court misapply principle by setting defendant's basic sentence at 40 years?

ARGUMENT

First Assignment of Error

I. The trial court erred by singling out for special attention how the State may prove intent and the fact that the State need not prove motive or premeditation.

This Court has historically been concerned lest a jury instruction "single out" one party's evidence or theory for "special scrutiny." *See, e.g.*, *State v. McDonough*, 507 A.2d 573, 575-76 (Me. 1986). Thus, this Court has

held, defendants shall not receive jury-instructions that describe a defense theory "for generating reasonable doubt." *State v. Hernandez*, 1998 ME 73, ¶ 7, 708 A.2d 1022. And it has also found "harmful error of constitutional dimension" when a judge's instructions single out parts of a party's closing argument for special attention. *State v. Pomerleau*, 363 A.2d 692, 695-96 (Me. 1976).

Several parts of the court's instructions in this case crossed the line into "special scrutiny" territory. To remain consistent, this Court should vacate, holding that instructions that highlight for special attention how *the State* can prove its case – the exact correlative of the rule established in *Hernandez* – are impermissible. In the future, the State should be left to make its arguments – *e.g.*, that it need not have direct evidence of intent; that it need not prove motive; and that it need not prove premeditation – without assistance from the bench.

Because there is a relative dearth of evidence that Ray intended to kill Nicole – indeed, the evidence suggests he nearly *recklessly* struck several different people with his BMW that night – the judicial blessing of the State's talking points is not harmless. Each of the challenged instructions touched on intent, and the jury should have decided the case without being primed, by the court's instructions, in how easy it is for the State to prove its case.

A. Preservation and standard of review

Defense counsel's objection to the court's instructions served to preserve this issue. *See* M.R. U. Crim. P. 51. Therefore, this Court will review for prejudicial error. *See State v. Skarbinski*, 2011 ME 65, ¶ 3, 21 A.3d 86

(*per curiam*) (reviewing whether jury instruction infringes on jury's role as fact-finder); *State v. Gantnier*, 2008 ME 40, ¶ 13, 942 A.2d 1191. However, to the extent that a court's instruction constitutes an expression of an opinion on an issue of "controverted" fact, the State is not entitled to the opportunity to establish harmlessness. *State v. Kessler*, 453 A.2d 1174, 1176-77 (Me. 1983); 14 M.R.S. § 1105.

B. Trial court's reasoning

As discussed *supra* in the statement of the case and excerpted in the appendix at A15 through A21, the trial court overruled defendant's objection because the challenged instructions were "tested" and mirrored those in "Alexander's manual." (4Tr. 8-9).

C. Analysis

1. Maine law prohibits jury instructions that single out one party's evidence.

A jury instruction can be erroneous if it "singles out and gives undue prominence to certain portions of the evidence." *Gunn v. State*, 374 So. 3d 1206, 1215 (Miss. 2023) (internal quotation marks and citation omitted). This may be true even when the challenged "instruction is correct as a legal proposition." *Bester v. State*, 55 So.2d 379, 381 (Miss. 1951) (*per curiam*); *cf. Brown v. State*, 11 So.3d 428, 439 (Fla. Dist. Ct. App. 2009) (even though instruction that complainant's testimony need not be corroborated "is a correct statement of law," it is nonetheless improper judicial comment on evidence); *cf. Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003) (judicial comment on can be improper even though it accurately "presents a concept

used in appellate review"). "Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention." *Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008).

For example, this Court found "harmful error of constitutional dimension" because of a judge's instruction that highlighted defense counsel's argument. *State v. Pomerleau*, 363 A.2d 692, 695-96 (Me. 1976). In *Pomerleau*, the court "singled out for special attention parts of defense counsel's closing argument to the jury." Relatedly, in a series of decisions, this Court has declined to approve of jury instructions which improperly "single out" certain pieces of evidence or argument. *State v. Barry*, 495 A.2d 825, 827-28 (Me. 1985) (instruction that notes ways to evaluate credibility specifically as to a defendant improperly singles out defendants*); State v. McDonough*, 507 A.2d 573, 575-76 (Me. 1986) (instruction to evaluate with special scrutiny the uncorroborated testimony of a prosecutrix improperly singles out such evidence); *State v. Kim*, 2001 ME 99, ¶ 8, 773 A.2d 1051 ("Because traditional alibi instructions are in the nature of a comment by the court on the evidence, such instructions are neither required nor appropriate in most instances."); *State v. Lavoie*, 561 A.2d 1021 (Me. 1981) ("As a matter of law, it is incorrect to single out the testimony of an eyewitness for special scrutiny.") abrogated by *State v. Mahmoud*, 2016 ME 135, 147 A.3d 833 (courts have discretion to give cross-racial identification instruction).

"Jury instructions," this Court has written, "are intended to state the law which is relevant and applicable to the particular facts in controversy,

not to highlight a party's argument." *State v. Hernandez*, 1998 ME 73, ¶ 7, 708 A.2d 1022 (emphasis added; cleaned up; internal citation and quotation marks omitted). To uphold this principle, this Court has repeatedly written, courts are not "required to instruct the jury on a defendant's theory when that theory represents a method for generating reasonable doubt." *Ibid.*; *State v. Bridges*, 2003 ME 103, ¶ 43, 829 A.2d 247 (same); *State v. Branagan*, Mem-11-99 (July 5, 2011) (same); *State v. Higbie*, 2004 ME 59, ¶ 9, 847 A.2d 401 (court "need not instruct on defendant's view of methods for generating reasonable doubt").

Congruity with this principle of jurisprudence dictates that trial courts must avoid highlighting *the State's* case, too. If judges are not to instruct the jury about how a defendant might establish reasonable doubt, those same judges should not then turn around and instruct the jury about how the State might prove its case. This is especially important in Maine where, since at least 1887, courts have been on notice not to express opinions on issues of fact, and this Court has denied defendants otherwise appropriate jury instructions because of that prohibition. 14 M.R.S. § 1105; *State v. Kessler*, 453 A.2d 1174, 1176 (Me. 1983); *cf. Kim*, 2001 ME 99, ¶ 8 (denying a defendant an alibi instruction because it constituted a comment on the evidence, contra § 1105).

2. The court singled out the State's case for special comment.

Defendant now turns to a discussion of how various aspects of the jury instructions in our case did not live up to that principle.

i. How easy it is for the State to prove *mens rea*

The Court began its discussion of *mens rea* by making sure that jurors' expectations were low: "[O]rdinarily" *mens rea* "cannot be proved directly." That's because "there is rarely direct evidence of the operation of the human mind." While correct as an abstract legal principle, the court's comments here primed jurors to expect less than they otherwise might have.

There *are* numerous rather "direct" indicia of *mens rea* that might be present in any given homicide case: *e.g.*, use of a firearm, a pre-death statement, detailed planning, etc. Properly, the absence of these characteristics from our case might have raised reasonable doubts about whether Ray – who nearly ran over several people that night, surely *recklessly* (*i.e.*, less than intentionally) – harbored the requisite mental state for a murder rather than manslaughter conviction. Why, if not to highlight *how* the State can prove its case, does a court give such an instruction?

The rest of the court's instruction about mental states highlighted the numerous ways the State might prove the mental-state element:

> [Y]ou may infer a person's intent or state of mind from the surrounding circumstances. You may consider any statement made and any act done or omitted by the person and all other facts in evidence which indicate state of mind. You may consider any statement made and any act done or omitted by the person and all other facts in evidence which indicate state of mind. You may consider it reasonable to infer and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Can you imagine a similarly defense-oriented instruction, one perhaps that repeatedly tells jurors obvious things they "may consider" when deliberating

over whether there exists reasonable doubt? *Cf. State v. Russell*, 2023 ME 64, ¶¶ 17-22, 303 A.2d 640 (Court disapproves of jury instruction that "the defendant may rely on relevant omissions in the police investigation to raise reasonable doubts").

Respectfully, these patently obvious, needlessly repetitive mentions of how the State may prove *mens rea* only serve to highlight the proveability of the State's case – with the imprimatur of the bench. There is no principled reason to permit them in the current form. The State might make these points in its argumentation. Singling out *mens rea* for such special judicial attention, however, only helps the State lift its burden.

ii. The State need not prove premeditation.

Immediately on the heels of the court's instruction that jurors "may consider" virtually anything when evaluating *mens rea*, the court instructed them not to hold out for proof of premeditation:

> The State does not have to prove that Mr. Lester acted with premeditation, that is, with planning or deliberation, to establish that his conduct was intentional. Rather, the intent to cause death may arise in the instant before the death producing conduct. However, you may consider any evidence of premeditation, if you find such exists, as it bears upon whether Mr. Lester acted intentionally.

Even were this instruction legally correct – it is not, which defendant will discuss momentarily – it is more appropriate as argumentation by the State, not judicially endorsed pseudo-law.

The instruction is legally incorrect because jurors were told they "may consider any evidence of premeditation" only "if you find such exists." But a juror may consider *the lack of* evidence of premeditation as bearing on

whether Ray harbored the requisite *mentes reae* (*i.e.*, intentional or knowing state of mind). Jurors, in other words, may depend on the absence of evidence. *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (reasonable doubt may arise from "lack of evidence"). The court's instruction appears to bar that, or at least seriously dissuade jurors from doing so.

And, instructing jurors that, "[t]he State does not have to prove that [Ray] acted with premeditation…," tells jurors to forget about something they might need in order to be persuaded beyond a reasonable doubt. Respectfully, if the jury thinks that the State cannot prove an intentional or knowing state of mind without proof of premeditation – which is entirely within his or her prerogative as finder of fact – then the instruction is wrong. In that case, the State *does* have to prove premeditation. A categorical statement to the contrary is misleading.

It would be accurate to say, "Premeditation is not a separate element." Likewise, "Intentional or knowing conduct may be proven without proof of premeditation." But it is incorrect that, as a matter of law, the State need never prove premeditation. When its proof of *mens rea* depends on premeditation in the eyes of the factfinder, it *must* so prove. Here, jurors were instructed not to look at the absence of proof of premeditation. That hole in the State's case might otherwise have been a very real factor in their deliberations.

Again, even putting aside the question whether the instruction is legally correct, the problem in the first place is that the court is commenting on such things at all. It is highlighting the State's case, and in such detail and

length that it is difficult to see its comments as not drawing attention to the proveability of the State's case. This is improper, as it "'tends to wear down the judge's cloak of impartiality.'" Donald G. Alexander, *Maine Jury Instruction Manual*, § 4-1 (2024 ed.) quoting *State v. Bachelder*, 403 A.2d 754, 759 (Me. 1979).

iii. The State need not prove motive.

Unlike the court's comments about premeditation, its discussion of motive is at least legally correct. In contrast, the bolded language at least makes it clear that the absence of evidence of motive can be counted against the State:

> The State also does not have to prove motive, that is, the reason or reasons why a person acted as he or she did. Absence of motive does not necessarily raise a reasonable doubt respecting the guilt of an accused. Nor does the mere fact that it exists establish guilt. Instead **evidence of the presence or absence of motive** is a matter for you to consider along with all other facts and circumstances in evidence in determining whether the State has met its burden of proving beyond a reasonable doubt the crime charged.

(emphasis added). Nonetheless, again, why is the court expending any energy explaining to the jury how the State can prove its case? That should be fodder for the parties' argumentation. A court should not be dwelling on what, properly, is the State's job. By doing so in such repetitive volume, the court unintentionally highlighted the State's case. *See State v. Greenwood*, 385 A.2d 803, 804-805 (Me. 1978) (when judge "assume[s] the posture of an advocate," "the jury may infer that the presiding justice has retreated from a position of complete impartiality").

3. Together, the comments are prejudicial.

All that separated defendant from a manslaughter conviction was the jury's determination that he acted either intentionally or knowingly. Given his admittedly poor, drunken driving that night, it was a close case. The judge's repeated highlighting of the State's ability to prove the requisite mental state is not harmless beyond a reasonable doubt. *See State v. Edwards*, 458 A.2d 422, 424 (Me. 1983) (prohibition on judicial comments "implement[s] both the trial by jury and impartial trial guarantees of our Declaration of Rights…."); *State v. Childs*, 388 A.2d 76, 80 (Me. 1978) (judicial comments "usurp the jury function.").

Second Assignment of Error

II. The trial court committed obvious error by omitting to give an intoxication instruction pursuant to 17-A M.R.S. § 37.

The evidence clearly established that Ray had been drinking all night. According to one witness, Ray sat "slouched" and was "kind of incoherent of what was going on." (2Tr. 137). His drunk driving nearly resulted in numerous collisions with others. Respectfully, given these circumstances, it was obvious error for the court to omit to instruct the jury in the defense of intoxication, 17-A M.R.S. § 37.

A. Preservation and standard of review

This argument is not preserved. Therefore, this Court's review is for obvious error. *See State v. Ford*, 2013 ME 96, ¶ 11-12, 82 A.3d 75. This Court's obvious-error test queries whether there is error that is plain, affects

substantial rights, and deserves remedy to correct unfairness or detriment to the integrity or public reputation of the court system. *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147.

B. Trial court's reasoning

It is not apparent from the record why the trial court did not instruct the jury in a § 37 intoxication defense.

C. Analysis

For offenses alleging intentional or knowing conduct, "evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind." 17-A M.R.S. § 37(1). Here, there was ample evidence to generate that instruction, and defense counsel argued to the jury that defendant may have struck Nicole while drunk driving. Under these circumstances, such an instruction was warranted.

1. There was plain error.

When the topic of a manslaughter instruction came up at trial, the State noted, "[W]e are requesting a lesser included instruction on manslaughter due to the fact that there's evidence that was presented at trial about the fact that Mr. Lester appeared to be intoxicated that night and was almost hitting other people during the course of the evening…." (4Tr. 4). Defendant, of course, agreed that there was such evidence, noting in closing:

> The idea that he was drinking and driving too fast, he almost hit people? It does not reflect well on Mr. Lester's behavior that day. Doesn't mean he intended to kill anyone or that he hit anyone with his vehicle. It means he was playing loud music, and he was driving inappropriately. That's what you can infer from that. There's no evidence that he had any kind of murderous intent toward anyone. So did they rule out that it wasn't an accident?

> No. Did they prove it was intentional? No. We don't know. That's the point.

(4Tr. 85-86). Thus, it is apparent that both parties should agree that an intoxication instruction was generated. Both effectively acknowledged – correctly – that evidence of intoxication was "sufficient to raise a reasonable doubt on the issue" of intent – the point of a § 37 defense. *Cf. State v. Lewis*, 584 A.2d 622, 626 (Me. 1990) ("The standard for determining whether there should be an instruction on this issue is whether there was sufficient evidence of involuntary intoxication generated during the trial to justify the existence of a reasonable doubt as to whether Lewis possessed the required intentional or knowing state of mind."); *cf. United States v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997) ("We conclude that the district court's failure to instruct on voluntary intoxication as a defense to aiding and abetting second degree murder meets all three of *Olano* 's conditions, and that a failure to remedy the plain error would result in a miscarriage of justice."); *Fletcher v. State*, 621 So. 2d 1010, 1018-22 (Ala. Crim. App. 1993) (plain error when court neglects to give intoxication instruction).

In these circumstances, it should have been plain to the attorneys and judge that an intoxication instruction was required. "It is well-settled that failure to give an instruction on a defense generated by the evidence is obvious error, at least when the defendant embraces the defense in question." *State v. Begin*, 652 A.2d 102, 106 (Me. 1995). "[I]t is … obvious error to fail to instruct the jury on the functional equivalent of an element of

the offense in the form of a statutory defense generated by the evidence." *Ibid.*

2. The omission affected substantial rights and undermined the fairness of the trial.

Assessing prejudice here calls for the Court to consider, not whether Ray would have been acquitted completely; rather, the question is whether, with the required instruction, he would have been acquitted of murder but found guilty of manslaughter. There is not much evidence tending to establish that Ray intentionally or knowingly, rather than recklessly, struck Nicole with his vehicle. He was driving drunkenly, nearly hitting several people (and children). It is quite possible that the jury, properly instructed, would have been of the opinion that driving drunk – even "chasing" Nicole to scare her (rather than hit her) – constitutes a conscious disregard of the risk that Ray could hit her – *i.e.*, recklessness. *See* 17-A M.R.S. § 57.

While the court appropriately (other than defendant's argument, *supra*) instructed the jury in the need to find that Ray committed either intentional or knowing conduct, the "interrelationship" of those states of mind with an intoxication defense "may be difficult for a layman to grasp." *State v. Foster*, 405 A.2d 726, 729 (Me. 1979). Jurors may have been primed by defense counsel's argument that Ray's intoxication meant that he lacked either of the requisite *mentes reae*, but they were not explicitly given the legal framework to endorse that determination. For laymen, clarity is needed. Defendant notes, too, the imbalance. Whereas § 37 explicitly provides for an instruction that was not given, the court nevertheless expended considerable

time giving the challenged instructions discussed in the previous assignment of error, which are not called for by statute.

The point is, on the all-important element of state of mind, the court's instructions needlessly highlighted the State's case and, in contrast, neglected to mention the *statutory* defense favoring defendant. Where the jury should have been told that Ray's intoxication was a potential basis for an acquittal on the murder charge, the court instead impressed upon them what the State need not prove and how the State might prove its case. Such juxtaposition undermines the court system's reputation for fairness, independently warranting reversal. *See State v. White*, 2022 ME 54, ¶¶ 34-37, 285 A.3d 262 (on Court's supervisory authority to protect integrity, fairness and public reputation of judicial system).

Third Assignment of Error

III. The sentencing court misapplied principle by setting defendant's basic sentence at 40 years.

In Maine, a basic sentence is supposed to objectively represent a certain spot along the "continuum of seriousness." *State v. Nichols*, 2013 ME 71, ¶ 26, 72 A.3d 503. Respectfully, sentencing will never live up to the ideals of just, individualized sentences that are proportionate and predictable without more fulsome explanations of trial courts' sentencing rationales, particularly those for basic sentences. The Sentence Review Panel, likewise, cannot carry out its statutory obligations, *see* 15 M.R.S. §§

2154-2155, when a sentencing court gives an explanation of its sentencing analysis that is as brief as that in this case.

As there is already one patent error – the court's counting of defendant's "flight" as somehow part of "the offense" – this Court should remand for a more developed discussion of how, exactly, a 40-year basic sentence was selected here. The court seems to have arrived at such a basic sentence after relying to some degree on "comparable" cases that are clearly more egregious than defendant's conduct. Such is a misapplication of the principle that there are to be no manifest and unwarranted inequalities in sentences.

A. Preservation and standard of review

On a sentence appeal, this Court reviews "the sentencing court's determination of the basic period of incarceration for misapplication of sentencing principles." *Nichols*, 2013 ME 71, ¶ 13. Confusingly, this Court has said that it will "also review the basic term for an abuse of the court's sentencing power." *Ibid.*

B. Trial court's reasoning

After explaining to the audience what a basic sentence is, the court's discussion of its basic-sentence rationale was brief:

> In that regard, the Court has been presented with cases, again, by the defense that have sentences that reflected domestic-violence-related murders. The [final] sentences actually imposed basically ran from sentences of 38 years to 40 years over three specifically that were cited by the defendant.
>
> The State presented, again, comparable murder cases, all typically, again, with a component of domestic violence associated with them. And this [sic] cases presented by the State

> ran a gamut from roughly 45 to 55 years. So that is a helpful comparison, but obviously the Court also is required to ultimately individualize the sentence in regard to this person's conduct and this defendant.
>
> And in doing so in this case, the Court is also directed by law on this analysis of a basic period of incarceration to consider as what the law calls a special factor, and to assign a special weight with respect to instances where the victim was the domestic – was a victim of domestic violence in the ultimate conduct and act of this defendant. Clearly, this was a case where we were faced with the ultimate act of domestic violence, which led to Nicole's death.
>
> Considering that and the conduct in this case, the Court notes that the conduct – that's the big point – on that June day was the intentional act of this defendant in running her down with his motor vehicle. He went on to leave her to die on the side of the pathway in that special place and proceeded to then immediately take flight. Took flight from the scene, took flight from the state, took flight from the country, and continued to remain in that status until he finally turned himself in.
>
> Balancing that conduct on the – on the continuum of ways in which the crime of murder can be convicted – can be imposed were undertaken [sic]. The Court believes that the basic period of sentencing on that first step should be a sentence of 40 years' incarceration.

(STr. 38-39).

C. Analysis

There are two problems with the court's basic-sentence rationale: (1) it erroneously counts defendant's post-crime conduct – *i.e.*, his "flight" – at the wrong step of the sentencing process, and (2) the manner in which it was imposed – its brevity and equivocation of defendant's conduct with conduct committed in the State's "comparable" cases – is insufficient and inaccurate.

1. Counting defendant's "flight" pulled the basic sentence away from solely "the nature and seriousness of the offense."

"The basic period of incarceration must be based solely on **the nature and seriousness of the offense**, without taking into account the circumstances of the offender." *State v. Hawkins*, 633 A.2d 78, 79 (Me. 1993) (emphasis added); *State v. Sweet*, 2000 ME 14, ¶ 11, 745 A.2d 368 ("First, the court must determine a basic sentence based solely on the nature and seriousness of the offense."); 17-A M.R.S. § 1602(1)(A) ("First, the court shall determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual."). "The offense," of course, is murder. "The offense," in other words, is not defendant's post-offense conduct – his "flight."

By misapplying this principle, the court prejudiced defendant, even though it might have separately counted defendant's "flight" as an aggravating factor. That is because 5/6 (83%) of defendant's final sentence results from the court's basic-sentence calculations. Its basic sentence, in other words, was much more potent than its Step Two (aggravating/ mitigating) math. Moreover, given the dearth of other stated rationale – really just a handful of sentences' worth – for its chosen basic sentence, the court's two sentences expended discussing Ray's "flight" are rather prominent. They must have played a significant role in the court's basic sentence; other than a fleeting mention of "domestic violence" and intentionality, the court had nothing else to explain why its basic sentence exceeded the minimum by 60% (*i.e.*, 40 years rather than 25 years).

2. The basic sentence too closely resembles those appropriate for more egregious murders.

Defendant proposed a basic sentence of 28 years' prison. (*Defendant's Sentencing Memorandum* at 9). The State proposed a 40-50-year basic-sentence range. (*State's Sentencing Memorandum* at 7-9, 13). The centerpiece of the State's proposal was its discussion of "comparable" cases, the very same the court described, when explaining its basic sentence, as "a helpful comparison." (STr. 38).

Given that comment and the court's otherwise laconic explanation of its basic sentence, defendant infers that the court gave considerable credence to the State's so-called "comparable" cases. This is error, as those sentences involve conduct and circumstances that are clearly more serious than that committed by Ray:

- *State v. Penley*, 2023 ME 7, 288 A.3d 1183 involved *two* murders, clear premeditation, and children were present during the murders. The court set a basic sentence of life. 2023 ME 7, ¶ 9.
- *State v. Athayde*, 2022 ME 41, 277 A.3d 287 involved extended violence during which children were present, with the experienced judge (Stokes, A.R.J.) noting that the decedent's conduct was among the most brutal that he had ever seen. 2022 ME 41, ¶ 17. The court set the basic sentence at 45 years. *Ibid*; *see also Hartford man sentenced to 50 years for girlfriend's murder*, available at

https://www.sunjournal.com/2021/08/31/hartford-man-sentenced-to-50-years-for-girlfriends-murder/ (accessed June 7, 2024).

- *State v. Evaristo DeDeus*, ANDSC-CR-2014-1023 involved the killing of a pregnant decedent, a clear motive, and clear premeditation. *See De Deus gets 45 years in prison for killing pregnant ex-girlfriend*, available at https://www.newscentermaine.com/article/news/local/de-deus-gets-45-years-in-prison-for-killing-pregnant-ex-girlfriend/97-375219429 (accessed June 7, 2024).
- *State v. Tieman*, 2019 ME 60, 207 A.2d 618 involved a husband murdering his wife execution-style after the victim had outed Tieman's affair with another woman, clearly demonstrating motive and premeditation. *See Luc Tieman sentenced to 55 years for murdering, burying his wife Valerie* https://www.centralmaine.com/2024/05/30/post-conviction-review-of-james-sweeneys-murder-conviction-concludes-at-farmington-court/ (accessed June 7, 2024).

Our case did not involve similar brutality, multiple victims, children – either born or unborn – or such clear motive or premeditation. Yet, the court's 40-year basic sentence implies that was persuaded that defendant's conduct at least somewhat resembled that in these "comparable" cases. How can that be?

Federal courts provide an example. Reviewing courts examine both the substantive reasonableness as well as the procedural propriety of the process by which the court arrived at its final sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007) (cataloging the following procedural errors: "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or **failing to adequately explain the chosen sentence**--including an explanation for any deviation from the Guidelines range") (emphasis added). "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). Thus, federal appellate courts hold that lower courts err when they offer "insufficient" explanation of their sentencing reasoning. *Cf. United States v. Roberson*, 2023 U.S. App. LEXIS 3921, *6, 2023 WL 2064581 (4th Cir. 2023) ("An insufficient explanation of the sentence imposed constitutes significant procedural error by the district court."). "'[A]n appellate court may not guess at the district court's [sentencing] rationale, searching the record for statements by the Government or defense counsel or for any other clues that might explain a sentence.'" *Id.* at ** 5-6 quoting *United States v. Carter*, 564 F.3d 325, 329-30 (4th Cir. 2009).

Any defendant must recognize that it is difficult to fix a position along the "continuum of seriousness." Nevertheless, that is what the sentencing process requires. And it only becomes more difficult the more brevity this

Court tolerates while reviewing sentences. Respectfully, courts must engage in on-the-record analyses that permit the development of objective sentencing criteria. If there truly are objective bases for defendant's 40-year basic sentence, the court should be required to clearly explain what they are, both for defendant himself and the principle of general deterrence.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

June 27, 2024

/s/ Rory A. McNamara

Rory A. McNamara, #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
207-475-7810

ATTORNEY FOR APPELLANT-DEFENDANT

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. Han-24-65

State of Maine

v.

CERTIFICATE OF SIGNATURE

Raymond N. Lester

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).

Name of party on whose behalf the brief is filed: **Raymond Lester**

Attorney's name: **Rory A. McNamara, *Esq*.**

Attorney's Maine Bar No.: **5609**

Attorney's email address: **rory@drakelawllc.com**

Attorney's street address: **P.O. Box 143, York, ME 03909**

Attorney's business telephone number: **207-475-7810**

Date: **6/27/2024**