STATE OF MAINE
HANCOCK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. HAN-24-65

STATE OF MAINE,
Appellee

v.

RAYMOND LESTER,
Appellant

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF APPELLEE

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Attorney General

ROBERT L. ELLIS, JR.
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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Factual Background

On June 18, 2022, after 11:41 p.m., Raymond Lester ran over and killed Nicole Mokeme with his BMW SUV on a walking path at the Schoodic Institute at Acadia National Park in Winter Harbor. Her mangled body was discovered early the next morning by a student on a field trip with the Massachusetts Maritime Academy. (Trial Transcript Volume I ("T. Vol. I") at 28-29, 37, 44, State Exs. 4, 21). She died of severe internal and external blunt force injuries, the impact having caused numerous broken bones and forcing her intestines out of her body onto the path. (T. Vol. I at 57-58; T. Vol. III at 200-209; State Exs. 97-125). Tire tracks led to her body from the road—over the grass in a perpendicular direction from Jacobson Drive, through the trees, to the paved walking path at the apparent point of impact, and then continuing beyond Nicole's body. (T. Vol. I at 69-71, 84; Vol. II at 9-11; State Exs. 9-19, 32, 63). Pieces of black plastic were found at the scene and on Nicole's body. (T. Vol. I at 77-78, 84-85, 88-89, 91, 105-106; State Exs. 28-30, 39, 40, 45, 46).

Nicole had been the "lead organizer" of a "Black Excellence Retreat" occurring that week at the Schoodic Institute; the retreat was described as "a space for the 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." (T.

Vol. II at 65-66, 88, 89). Nicole had arrived at the Institute with Raymond Lester, with whom she had been in a relationship, and she shared a room with him at the dormitory (known as the "Bunkhouse") where the participants at the retreat stayed. (State Ex. 79; T. Vol. I at 17, 18, 69, 93, 135). The relationship had been deteriorating in the weeks leading up to the retreat: Nicole's neighbor in her apartment building in South Portland had been hearing frequent arguments coming from Nicole's apartment, with Lester's voice raised and aggressive before he exited while slamming doors and then driving away in his car. (T. Vol. II at 22-24).

Lester's rage at Nicole erupted during a group sunset kayak trip only two days before the murder. Nicole and Lester were sharing a tandem kayak and lagging behind the group. (T. Vol. II at 33-34.) As the kayak guide "paddled closer to them to try to bring them into shore, [the guide] just heard a lot of cursing, a lot of yelling. [Lester] was screaming F you, F this, F that, at Nicole…[The guide] heard a lot of expletives, a lot of yelling. [Lester] was very angry, contorted." (*Id.* at 34). Nicole, for her part, was not responding to his tantrum: "She was just sitting with her face completely like stonewall face, not speaking, not paddling, just shrunken down into the cockpit of the boat." (*Id*.) The guide commented, "I've taken thousands of people out sea kayaking and

I've never had anyone behave the way that he did on a sea kayak trip. That was the worst fight I've observed in a sea kayak boat." (*Id.* at 53).

By Saturday evening, June 18, Lester had become completely disruptive, menacing the retreat participants with his unsafe driving on the park roads, repeatedly blasting "lewd, obscure, violent music," and pointing at the participants from his car as if he were aiming a gun at them. (T. Vol. II at 73, 75, 97-98, 103, 139, 157, 158, 174, 175, 180, 182-183, 196, 216-217). He engaged in this conduct while the group gathered around a campfire at the area known as the Pavilion, socializing, playing music, and having dinner. (*Id*. at 75-76, 97-98, 135, 155, 175, 216). Retreat participants observed him drive at a high rate of speed up onto a basketball court and a walking path, and nearly hit pedestrians, including children, in the parking lots and roadway. (*Id*. at 76, 103, 163, 174, 184, 186, 219-220). Nicole went up to his car to speak with him at one point in the Pavilion area, but her words did not curb his behavior. (*Id*. at 161, 183).

Lester was drinking directly out of a bottle of Grey Goose vodka and appeared inebriated to two witnesses at some points during the evening. (*Id*. at 138, 107, 195-196). He was last seen around 11:30 p.m., when he was asking "where is Nicole." (*Id*. at 199, 219-220). Phone records show that the last call Nicole made was at 11:41 p.m., and it was to Raymond Lester. (T. Vol.

III at 90, 97, 122). There were no outgoing calls or texts on her phone after that time. (*Id*. at 90, 122).

Cell phone site location records showed that Lester left the Schoodic Institute and Acadia National Park shortly after midnight. (*Id.* at 89). Shards of his Grey Goose bottle were found the next morning near the park exit, with his DNA confirmed to be on the stopper and neck of the bottle. (*Id.* at 5-10, 15-18, 37-38, 50-51). His cell phone showed that he travelled "from the Route 1 corridor from Sullivan to Ellsworth, the 1A corridor from Ellsworth to Brewer,…the I-395 corridor from Brewer to Bangor and the I-95 corridor from Bangor to West Gardiner, and then the I-95 corridor from West Gardiner to Portland" arriving in Portland around 3:00 a.m. (*Id*. at 89). By 4:56 p.m. on June 19, 2022, he was at a Walmart in Warwick, Rhode Island, trading in his cell phone. (*Id.* at 87, 90, 90-97; State's Ex. 94).

Once the retreat participants became aware on the morning of June 19 that Nicole was missing, they tried repeatedly to contact Lester. Call detail records showed a text to Lester at 9:40:38 a.m.: "Peace Ray! Are you with Nicole?" (T. Vol. III at 124; State's Ex. 137 at 13). He responded, "Peace Mimi no I'm not sure…where she is." (*Id*.) Mimi followed up with, "Did you see her last night or this morning." (*Id*.) He responded, "I saw her last night and she said she was going back to the fire." (T. Vol. III at 124-125, State's Ex. 137 at

13). He later received a series of calls and texts from a Renee Johnson, imploring him, "Where are you"; "Where's Nicole"; "Please call"; and "We are extremely worried." (T. Vol. III at 125-126; State Ex. 137 at 14-16). He ignored those texts, as he did calls and texts from his mother, sister and others. (T. Vol. III at 125-126, 127; State's Ex. 137). He never placed any calls or texts to Nicole after her last call at 11:41 p.m. on June 18. (T. Vol. III at 128).

License plate readers[1] tracked Lester's BMW travelling through Brewer, Maine at about 12:55 a.m. on June 19. (*Id*. at 63). By 3:50 p.m., he had reached Canton Massachusetts. (*Id*. at 152-154). By June 20, he was in Georgia and on the following day, he had made it to Louisiana. (*Id.* at 155-156). The last hit from his BMW on a license plate reader was on June 21 at about 10:23 p.m. Mountain Time in Sierra Blanca, Texas, and he then went off the radar. (*Id.* at 156-159).

About a month later, on July 19, 2022, Lester turned himself in to the Quintana Roo State Police in Cancun, Mexico. (*Id*. at 160). The police transferred him to the Mexico immigration authorities, who then transported

[1] Sgt. Zachary Caron of the Brewer Police Department described a license plate reader as "a camera that takes a digital photo of license plates that go past it and records them in a data base." (T. Vol. III at 57).

him to Chicago, Illinois to the custody of the United States Marshal's Service on July 20, 2022. (*Id*.)

Lester was transported back to Maine and detectives with the Maine State Police met with him on July 27, 2022. (*Id*. at 160-162). Lester asked one question during that meeting, in a distinctively detached tone: "How did Nicole die? What was her cause of death?" (*Id*. at 162; State's Ex. 138).

The BMW was never located. On September 6, 2022, Lester mailed a letter from the Hancock County Jail to the dealer that sold him the BMW to report it stolen and to cancel the contract: "Please respond with necessary steps to cancel my CarMax car and get my car reported stolen." (T. Vol. III at 163-164; State Ex. 91).

Procedural Background

On June 21, 2022, the State filed a complaint in the Hancock County Unified Criminal Docket charging Raymond Lester with the murder of Nicole Mokeme. (App. at 31). He was arrested on July 26, 2022, and had his initial appearance the following day. (App. at 3). The Hancock County Grand Jury returned an indictment for murder on August 11, 2022. (App. at 30). At his arraignment on October 20, 2022, Lester pled not guilty. (App. at 5).

The jury trial (R. Murray, J.) began on November 1, 2023. (App. at 8). After three days of testimony, the jury found Lester guilty of murder. (App. at

9). On February 1, 2023, the court adjudicated Lester guilty and sentenced him to a term of 48 years. (App. 12).

Lester filed a timely Notice of Appeal on February 8, 2024, and an application to allow an appeal of his sentence on February 14, 2024. (App. at 10). On April 22, 2024, the Sentence Review Panel granted leave for Lester to appeal his sentence pursuant to M.R. App. P. 20(g) and (h). *State v. Lester*, Docket No. SRP-24-75 (Me. Sent. Rev. Panel April 22, 2024).

STATEMENT OF THE ISSUES

I. Whether the court erred in using the standard instruction for inferred intent, motive and premeditation.

II. Whether the court committed obvious error in not giving an instruction on the defense of intoxication when the defense was not raised or requested by Lester.

III. Whether the court misapplied sentencing principles at setting Lester's basic sentence at 40 years for a brutal domestic violence homicide.

ARGUMENT

I. The court made no error in using the standard instructions for inferred intent, motive and premeditation.

A. Procedural history

The court provided its proposed jury instructions to the parties in writing with the following instruction on intent and state of mind:

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

(App. at 65-66).

Lester objected:

[M]y concern with this instruction is that it seems to have multiple references that, in my opinion, … serve to lessen the State's burden. On page one there's a reference to saying you are not required to unanimously agree, on page two there's a reference that intent or mental state cannot be proved directly, that the State doesn't have to prove motive, but if there is no

> motive that's not reasonable doubt. It just seems to be that there are multiple references that serve to lessen what the State needs to prove. I also think that these instructions are confusing and they're kind of like a flow chart where it's like if not this, then that and you're kind of going to step B.

(App. at 18-19).

The court denied Lester's request to use the defense draft instruction, stating:

> The Court would note that the particular provisions that counsel has just referenced 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 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.

(App. 20-21).

B. Legal Argument

Lester challenges the court's instructions on an entirely different basis than that raised below (the instructions "lessen the State's burden and "are confusing." (App. 19)), arguing for the first time on appeal that jury instructions impermissibly singled out one party's evidence. (Appellant's brief at 18-25).[2] Arguably, the challenge is unpreserved: "An issue is

[2] Lester introduces his analysis at page 18 of his Brief with a series of decisions from other jurisdictions, mostly the deep south, that have nothing to do with the instructions in this case.

preserved for appellate review if there is a sufficient basis in the record to alert the trial court and the opposing party to the existence of the issue." *State v. Reeves*, 2022 ME 10, ¶ 35, 268 A.3d 281. Even if the challenge could be considered preserved, the court committed no error in its instructions, let alone obvious error: This Court reviews "[the] jury instructions as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law." *State v. Nightingale*, 2023 ME 71, ¶ 21, 304 A.3d 264.

The court's explanation of the element of a defendant's state of mind, including its discussion of inferred intent, motive and premeditation, was entirely correct. The instruction on inferred intent mirrored the standard instruction contained in Alexander*, Maine Jury Instruction Manual* § 6-39 at 6-79 (2024 ed.)("Manual"). As the Manual explains in the comment to the section:

> This instruction is frequently given to assure that jurors look behind statements regarding intent and consider all of the circumstances of the case. A mental state need not be proved by direct evidence, *mens rea* may be proved by the act itself,

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Indeed, the language from the first case on page 18 of the Appellant's brief, *Gunn v. State*, from Mississippi, cites to the *dissenting* opinion without making that reference clear. 374 So.3d 1206, 1215 (Miss. 2023) (Coleman J., dissenting). Two of the other cases ruled that an instruction in a sex case— "A conviction may be based solely on the uncorroborated of the alleged victim"—was improper, because 'it unfairly focusses the jury's attention on and highlights a single witness's testimony." *Brown v. State*, 11 So.3d 428, 430-431, 439 (Fla. Ct. App. 2nd Dist.), citing *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003). That instruction is not at all pertinent to this case.

> attendant circumstances, and any other evidence tending to prove the defendant's mental state.

(*Id.*) Lester has cited no authority for the proposition that this frequently given instruction was in error, because the trial court in fact committed no error in providing the jury with guidance on how to evaluate the evidence in determining whether Lester acted intentionally or knowingly.

Similarly, the court committed no error in correctly instructing the jury that evidence of premeditation is not necessary to prove that the defendant acted intentionally or knowingly. As the Manual points out in section 6-38 at pages 6-77, 6-78:

> Evidence of premeditation, planning or deliberation is not required for instructions on any of the mental state alternatives, although such evidence may be relevant to prove an intentional or knowing mental state … An intent to perform a certain act or cause a certain result may be formed in the instant before the action at issue in the case.

This Court has in fact explicitly approved of the instruction, based in part on the fact that "Maine law does not rely on a presumption of 'premeditation' to prove an essential element of unlawful homicide punishable as murder." *State v. Dumas*, 2010 ME 57, ¶ 25, 997 A.2d 760, citing *State v. Lafferty*, 309 A.2d 647, 664-65 (Me. 1973). "Because the court's instruction … correctly stated

the law and fairly informed the jury, it was not erroneous." *State v. Dumas* at ¶ 25.[3]

Finally, the court's instructions on motive nearly mirrors the Manual's recommended instructions at § 6-46, page 6-92. Indeed, this Court approved a similar instruction on motive over 40 years ago when it found no error in the following: "Motive is not an element of the crime of either aggravated assault or assault, and therefore, the State does not need to prove that either crime was committed with a motive; but that is a circumstance that you can consider in your deliberations." *State v. Bahre*, 456 A.2d 860, 868 (Me. 1983). As this Court explained in *Bahre*:

> Motive is a material circumstance that a jury may take into consideration in a case of circumstantial evidence. It is a proper matter for argument before the jury. Absence of motive, however, does not prove innocence, nor does the mere fact that it exists

[3] Lester cites to the Manual only once, ignoring those sections that endorse the court's instructions in this case, and his single citation is grossly misleading. In his argument that the court's instructions on premeditation highlighted the State's case, he quotes from the Manual: "This is improper, as it '*tends to wear down the judge's cloak of impartiality*.'" (Appellant's Brief at 24 (emphasis added)). In fact, the passage that Lester cited from the Manual has nothing to do with either premeditation or the court's instructions, but rather discourages judges from engaging in the substantial examination of witnesses during a jury trial: "[A] trial judge 'should not assume, at any time during the trial, the posture of an advocate by conducting to a substantial degree, quantitively or qualitatively, the examination or cross-examination of the accused or other witnesses in this case. Such conduct *tends to wear down the judge's cloak or impartiality*.'" Manual § 4.1 at 4-4 (emphasis added).

Lester's citation to *State v. Greenwood* in the motive section on the same page of the brief is similarly misleading. This Court faulted the trial judge in that case for assuming "the position of an advocate" by engaging in a "protracted interrogation" (29 questions) of the defendant's son, not for giving an instruction alleged to have "highlighted the State's case." 385 A.2d 803, 804-805 (Me. 1978).

> establish guilt. It is a circumstance which the jury should weigh with all the other facts and circumstances in evidence.

Id.

Lester cannot show that any of the three excerpts that he has challenged were inaccurate or somehow ran afoul of any rule against the court's highlighting a specific witness or commenting about a selected piece of evidence. "When viewed in its entirety, the instruction fairly and adequately apprised the jury of the relevant issues and governing law." *State v. Hansley*, 2019 ME 35, ¶ 12, 203 A.3d 827, 832.[4]

[4] The cases cited at page 25 of the Appellant's brief purport to support his argument that the alleged errors in the court's standard instructions were "not harmless beyond a reasonable doubt." The cases do not stand for that proposition. In *State v. Edwards,* the phrase cited by Lester that the "prohibition on judicial comments 'implement[s] both the trial by jury and impartial trial guarantees of our Declaration of Rights'" in fact referred to the judge's improper production of a chronology "which summarized certain central events testified to by the State's witnesses" for use by the jury during deliberations. 458 A.2d 422, 424 (Me. 1983). In his citation to *State v. Childs*, Lester represents that the case stands for the proposition that "judicial comments 'usurp the jury function'" when in fact the decision specifically found the instruction "did *not* usurp the jury function." 388 A.2d 76, 80 (Me. 1978)(emphasis added).

II. The court did not commit obvious error in not giving an intoxication instruction, when the defense of intoxication was not raised by Lester.

A. Procedural history

Lester never argued that he should be acquitted of intentional and knowing murder because he was drunk; rather, his position was that neither he nor his car ran over Nicole. In his opening, he asserted:

> [T]he State has to rule out that this wasn't somebody else who hit Nicole. The State has to rule out that Raymond wasn't somewhere else when Nicole died. The State has to rule out that it wasn't an accident. The State has to rule out that it wasn't a different car. The State has to rule out that Nicole's death wasn't caused by something else or someone else. If the State can't rule out even one of those things, then you cannot convict my client….
> You will not hear from one witness who will say they saw Raymond hit Nicole with a car. In fact, you'll not hear from one witness who saw anything happen to Nicole…No witness will describe seeing how the accident occurred. No witness will describe the vehicle, the make, the model, even the color. No witness will describe to you any accident at all.

(T. Vol. I at 22-23).

The closing continued the same theme of "my client did not do it" (or the State cannot prove my client did it):

> Leaving Schoodic that night. [The prosecutor] is saying that you can infer he was leaving, in fact that he had just ran over Nicole and he targeted her. Or you can infer that he was having a bad time at the retreat and decided to leave…
> Leaving his bag. [The prosecutor is] saying that's because he was in such a hurry to escape the crime that he committed. Or you can

> infer that he knew Nicole was alive and would bring the bag home the next day for him.

(T. Vol. III at 72). Lester went on to argue that his flight to Mexico was not evidence that he was involved in Nicole's death, but rather supported an inference "that Mr. Lester was concerned that he would not be treated fairly" by law enforcement should he remain available for questioning. (*Id.* at 72-73).

Lester also misstated what was necessary to prove guilt beyond a reasonable doubt by repeatedly arguing, as he had in his opening, that the State had to rule out all other possible suspects: "Did the State rule out that Nicole was not killed after Raymond left Schoodic?" (*Id*. at 73). "Because if it happened after that, then it didn't involve Raymond." (*Id*. at 74). "Did the State rule out it wasn't some other person who did this?" (*Id*. at 75-76).[5] "Next, did they rule out that it was not some other vehicle?" (*Id*. at 77).

Lester directed the jury to the photographs from the license plate readers of Lester's BMW to support his theory that he was not at all involved in Nicole's death, "You look at that vehicle, there is not damage…Is that consistent with a man who targeted someone, drove through the woods

[5] Lester's argument improperly invited speculation about unidentified persons with no apparent connection with the homicide. This is the reason that the court controls the presentation of alternative suspect evidence to ensure that it is admissible and probative. *State v. Daly*, 2021 ME 37, ¶ 18, 254 A.3d 426.

between two trees and struck someone causing that level of blunt force injuries?" (*Id.* at 81).

Lester only mentioned alcohol once in his closing argument: "The idea that he was drinking and driving too fast, he almost hit people?... Doesn't mean he intended to kill anyone *or that he hit anyone with his vehicle*. It means he was drinking, he was playing loud music, and he was driving inappropriately. That's what you can infer from that." (*Id*. at 85)(emphasis added).

Lester did not request an instruction on the defense of intoxication. (Defendant's Proposed Jury Instructions dated Oct. 31, 2023). The court further inquired at the conclusion of the instructions: "Any additional instructions, additional objections? Anything further as it relates to the instructions?" (T. Vol. IV at 109). Lester responded, "No, thank you." (*Id*.)

B. Legal argument

It was not obvious error for the court to omit an instruction on the defense of intoxication, when that instruction was not requested by the defense or clearly presented by the evidence:

> The State is not required to negate any facts expressly designated as a "defense," or any exception, exclusion or authorization that is set out in the statute defining the crime by proof at trial, unless the existence of the defense, exception, exclusion or authorization is in issue as a result of evidence admitted at the trial that is

> sufficient to raise a reasonable doubt on the issue, in which case the State must disprove its existence beyond a reasonable doubt. This subsection does not require a trial court to instruct on an issue that has been waived by the defendant. The subject of waiver is addressed by the Maine Rules of Unified Criminal Procedure.

17-A M.R.S. § 101(1). "The court is required to instruct the jury on the defendant's theory of a case when that theory involves a defense generated by the evidence and that must be disproved by the State or when that theory involves a lesser included offense rationally supported by the evidence." *State v. Hernandez*, 1998 ME 73, ¶ 7, 708 A.2d 1022.

Lester waived the instruction on the defense of intoxication, by affirmatively arguing that the only inference that could be drawn from his "drinking and driving" was that he was acting inappropriately, not that he hit anyone accidentally or intentionally, and by not either requesting an instruction on an intoxication defense or objecting to the court's failure to include such an instruction. *State v. Thistle*, 2024 ME 6, ¶ 15, 312 A.3d 1273, 1278; *State v. Ford*, 2013 ME 96, ¶ 17, 82 A.3d 75.

This Court will review the alleged failure to give the instruction under an "obvious error" standard:

> Obvious error is present in jury instructions where there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. "If these conditions are met, we will exercise our discretion to notice an

> unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *Id.*; *see Dolloff*, 2012 ME 130, ¶ 36, 58 A.3d 1032 ("An error is plain if the error is so clear under current law that the trial judge and prosecutor were derelict in countenancing it ...." (alteration omitted) (citation omitted) (quotation marks omitted)). "[W]e review jury instructions in their entirety to determine whether they presented the relevant issues to the jury fairly, accurately, and adequately, and we will vacate the court's judgment only if the erroneous instruction resulted in prejudice." *State v. Hansley*, 2019 ME 35, ¶ 8, 203 A.3d 827 (quotation marks omitted); *see also, e.g.*, *State v. Weaver*, 2016 ME 12, ¶ 11, 130 A.3d 972.

State v. Coleman, 2019 ME 170, ¶ 22, 221 A.3d 932.

This Court has held that, "Obvious error review provides no invitation to change trial and instruction request strategy when the results of the original strategy turn out less favorably than hoped for." *State v. Cleaves*, 2005 ME 67, ¶ 13, 874 A.2d 872, 874, cited by *State v. Ford* at ¶ 16. "If a defendant explicitly waives the delivery of an instruction *or makes a strategic or tactical decision not to request it*, we will decline to engage in appellate review, even for obvious error." *State v. Nobles*, 2018 ME 26, ¶ 34, 179 A.3d 910 (emphasis added); *State v. McLaughlin*, 2020 ME 82, ¶ 25, 235 A.3d 854 (McLaughlin deemed to have waived instruction when he "neither requested a jury instruction on this issue nor objected to the jury instructions that were given, even though he had multiple opportunities to do so.")

A defense based on intoxication squarely contradicted Lester's argument that he had nothing to do with Nicole's death. Indeed, in his closing, he argued that his drinking and driving was not evidence of his having harmed Nicole or anyone else. Moreover, simply because there was testimony that Lester had been "sipping on a clear bottle of alcohol" (T. Vol. II at 105) and appeared intoxicated to two of the witnesses at some point during the evening does not generate the defense that he was intoxicated hours later when Nicole was killed. Lester was, after all, able to leave the park and drive three hours back to Portland without apparent incident. His defense team never articulated the argument that Lester may have run Nicole over *because* he was drunk, and there was not sufficient evidence of intoxication that would raise a reasonable doubt about his intentional or knowing conduct in making a sharp turn off the road and continuing over the grass and through the trees, onto a walking path and into Nicole. There was no prejudice in the court's not giving an instruction on a defense that was inconsistent with the defense theory of the case. *State v. Ford*, at ¶ 17 (no error not to give instruction on intoxication defense when defense counsel "made strategic decisions not to pursue…voluntary intoxication defenses").

III. The court did not misapply sentencing principles at setting Lester's basic sentence at 40 years for a brutal domestic violence homicide.

The court did not misapply sentencing principles in setting the basic sentence at 40 years in this brutal domestic violence homicide. This Court reviews "the determination of the basic sentence de novo for misapplication of legal principles." *State v. Nightingale*, 2023 ME 71, ¶ 34, 304 A.3d 264.

The trial court did what it was required to do at the first step of the sentencing analysis: it considered "the particular nature and seriousness of the offense as committed by" Lester. 17-A M.R.S. § 1602(1)(A); Sentencing Hearing Transcript ("SHT") at 37. The court concluded that Lester's conduct was "the ultimate act of domestic violence" consisting of the "intentional act…in running [Nicole] down with his motor vehicle" and leaving "her to die on the side of the pathway in that special place and proceed[ing] to then immediately take flight." (SHT at 39.) As this Court has noted, murder "as an act of domestic violence 'is an objective factor properly considered in the first step of the sentencing analysis.'" *State v. Penley*, 2023 ME 7, ¶ 34, 288 A.3d 1183. The court below also had the benefit of information about sentences in cases characterized as comparable by the defense and the State. (App. 92-94). Based on the court's analysis, it was within its discretion to set the basic

sentence at 40 years on the continuum of 25 years to life. *State v. Nightingale* at ¶ 37.

Lester argues that 40 years is too high for a basic sentence, because the court should not have considered Lester's flight in the first step of the analysis. (Appellant's Brief at 30). His flight, however, was part of the course of conduct relating to the murder and probative of his intentional conduct. He did not stop the car, attempt to render aid, call 911, or even alert other people at the retreat. Fleeing the scene after running over a victim and leaving her to die is an appropriate consideration in determining the nature and seriousness of the conduct.

Lester further disputes the propriety of the length of the sentence, arguing that the comparable cases proffered by the State "involve conduct and circumstances that are clearly more serious than the conduct committed by Ray." (Appellant's Brief at 33.) The State strongly disagrees. The conduct of Evaristo DeDeus in running over his former girlfriend on a street in Lewiston, fleeing the scene, leaving his vehicle in Portland, taking a bus to Boston and attempting to get on a plane to Haiti is eerily similar to the facts in Lester. The basic sentence was set in that case at 40 to 50 years. (App. 92; see also Sentencing Transcript dated December 20, 2016, in *State v. DeDeus*, (Law Docket No. SRP 17-24) (Docket No. ANDSC-CR-2014-1023)(Kennedy, J.).

Tieman's shooting of his wife Valerie when she confronted him about his affair was also strikingly similar, with the court (Mullen, C.J.) setting the basic sentence at 40 to 45 years. (App. 93-94; *State v. Tieman*, 2019 ME 60, 207 A.3d 618). Lester's attempt to distinguish those cases by resorting to the citation of press reports at pages 33 through 34 of his Brief does not change the facts as described in the State's sentencing memorandum. In distinguishing the "conduct and circumstances" of the other cases, Lester should be relying on the transcripts of those proceedings, rather than press reports that may be inaccurate or sensational.

As this Court has recognized, neither 17-A M.R.S. § 1602 nor *State v. Hewey*[6] requires the trial court to analyze comparable sentences. This is not a mathematical calculation, like the federal sentencing guidelines, because there are so many variables in the facts making up the nature and seriousness of conduct among murder defendants.

> There is an inherent difficulty in collecting, compiling, and comparing cases involving identical charges but vastly differing facts and surrounding circumstances. A useful database for such information would need to include an accurate and complete description of the operative facts and the judge's pronouncement of the basic period of incarceration. We have previously recognized the difficulty in obtaining sentencing data. *See, e.g., Stanislaw I,* 2011 ME 67, ¶ 8 n. 7, 21 A.3d 91 ("[B]ecause of the multiple variables in conduct and process that may impact a

[6] 622 A.2d 1151 (Me. 1993).

> particular sentence, the Judicial Branch does not have the technological capacity to maintain the sentencing statistics that would support th[e] endeavor" to eliminate all inequalities in sentencing); *State v. Sweet,* 2000 ME 14, ¶ 37 n. 9, 745 A.2d 368 (Calkins, J., dissenting) ("Except for a case by case search in each of the Superior Court clerks' offices, there is no way to find out what sentences have been imposed."); *Berube,* 1997 ME 165, ¶ 5 n. 3, 698 A.2d 509 (noting the limitation of the data collected on final sentences in manslaughter cases, including the lack of information on the seriousness of the criminal conduct, aggravating and mitigating factors, or whether the sentence was the result of a plea).

State v. Nichols, 2013 ME 71, ¶ 21, 72 A.3d 503.

The difficulty in obtaining sufficient information about prior sentences is in fact indicated in Lester's sentencing memorandum below. (App. 72-84). He provided three comparable cases, referencing the basic sentence imposed in only one of the cases (Gaston), and noting only the final sentences in the other two cases (Hanaman and Sweeney). (App. at 82-83).[7] The final sentence is not a basis for comparison, since the basic sentence has been adjusted upward or downward, depending upon the aggravating and mitigating circumstances "appropriate to the case," including the individual offender's character and criminal history. 17-A M.R.S. § 1602(1)(B) & (2).

[7] In fact, the basic sentence (35 years) in *State v. Sweeney* was reported and available to Lester in this Court's decision. 2019 ME 164, ¶ 8, 221 A.2d 130. The State views the basic sentence of 35 years in *Sweeney* as low for a domestic violence homicide with the facts as described in the Court's decision but submits that the trial court may have ultimately been influenced by a fact not reported in the decision: Sweeney was deaf. *State v. Sweeney*, Brief of Appellee at 1, 2019 WL 7899672 (Law Court Docket No. FRA-19-140).

Moreover, because the sentence review process does not provide the State an opportunity to appeal those sentences that are so low as to be considered outliers, the value of comparing basic sentences is limited indeed. The court did not misapply sentencing principles by rejecting Lester's recommended 28 years as the basic sentence and was not bound by the 35-year basic sentence in the two cases selected by him for comparison.

CONCLUSION

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

Respectfully submitted,

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DATED: July 31, 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, Rory McNamara, Esq.

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