**MAINE SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

**LAW DOCKET NO: AND-24-105**

**STATE OF MAINE,**
Appellee,

v.

**KULMIYE IDRIS**
Appellant.

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*On Appeal from the Androscoggin Superior Court, Androscoggin County, Maine*

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# BRIEF OF APPELLANT, KULMIYE IDRIS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### United States Supreme Court Cases



### Federal Statutes and Regulations



### Maine Supreme Court Cases

**Maine Statutes and Regulations**



**Maine Court Rules**



**Other Authorities**

## STATEMENT OF FACTS

On April 2, 2022, the complaining witness, [redacted] (hereafter "[redacted] alleged that the Appellant, Kulmiye "Kai" Idris, sexually assaulted her. Appellant was indicted for a single count of Gross Sexual Assault under Title 17-A Section 253(2)(D) of the Maine Revised Statutes on September 6, 2022. App. 13. The matter went to trial on February 12th and 13th, 2024 in Androscoggin County. App. 8. Justice Harold Stewart presided over the trial. Trial Transcript (hereafter "Tr.") 1, App. 8. The relevant testimony at trial is as follows:

[redacted] alleged that she knew Appellant through a group of friends. (Tr. 29). This group of friends gets together on a weekly basis to party and drink heavily. (Tr. 48:15-25). She testified that she and the Appellant were "close friends." (Tr. 29:2-16). [redacted] claimed no prior romantic relationship with Appellant. (Tr. 29-30). However, it was normal for [redacted] and Appellant to be flirtatious with each other. (Tr. 151:20-22).

On April 2, 2022, [redacted] went to her friend Lana Whittemore's house. (Tr. 31:3-16). There, [redacted] Whittemore and two other females were drinking and having fun (Tr. 31-32). The remaining friends in this friend group, including Appellant, arrived around 9:30 PM. (Tr. 104:19-24). [redacted] may have been drinking prior to going to Whittemore's house, although she could not recall. (Tr.

48:4-6). Appellant testified that he smoked marijuana and had a few shots prior to arriving at Whittemore's house. (Tr. 387:6-11).

While at the party, [redacted] drank until she was intoxicated, (Tr. 32:12-14), reportedly having ten Trulys[1] and two shots of Tito's vodka. (Tr. 49-50; 57:19-24). Appellant also consumed multiple shots and Trulys. (Tr. 393:18-19). Appellant testified that he was at a "six or seven" level of intoxication on a scale where ten is the most intoxicated he had ever been. (Tr. 393-94). [redacted] admitted hugging Appellant that evening (Tr. 52:5-6).

[redacted] remembered going to bed around midnight, or slightly before. (Tr. 32:58). [redacted] went to bed in Whittemore's bed (Tr. 33:2-3). This was a normal occurrence (Tr. 33:4-6). Often, Whittemore would join her in bed later in the evening. (Tr. 33:6-14). When [redacted] went to bed, there were five others in the house, one of which was Appellant. (Tr. 33:17-23). Everyone else in the house was awake at the time she went to bed. (Tr. 32:24-25). [redacted] later came back downstairs to reheat leftovers, eat a plate of food, and wash dishes (Tr. 112:11-16, 146:3-6). She testified that she had no recollection of doing this (Tr. 58-59).

Shortly after midnight, the party began to wind down (Tr. 109-10). Appellant left with two other attendees to drive them home around 1:00 AM (Tr. 110:16-21). Whittemore remained in her home, falling asleep on the downstairs

[1] Truly is a brand of alcoholic seltzer.

couch (Tr. 115:8-12). Appellant returned to Whittemore's house after dropping the other attendees off (Tr. 398-99). Whittemore, a self-admitted heavy sleeper, did not awake upon Appellant's return (Tr. 126:6-9). Appellant testified that the front door was locked, but [redacted] let him inside (Tr. 399:4-19).

Appellant further testified that he and [redacted] spent the next five to fifteen minutes chatting in the kitchen (Tr. 400-01). He took an additional shot of vodka, and [redacted] took an additional half-shot and continued to drink a Truly (Tr. 400:13-22). The pair then went upstairs and began kissing (Tr. 402-04). They then went to Whittemore's bedroom and had vaginal intercourse three times over the course of four hours (Tr. 404-09).

However, [redacted] testified that the next thing she remembered happening after she originally went upstairs was "I woke up to Kai having sex with me," (Tr. 34:2). [redacted] described vaginal sex (Tr. 34:6). When she awoke, she was "still very groggy," but she put her arm up and said "stop," (Tr. 34:9-10). On cross-examination, [redacted] acknowledged that she may not have used the word "stop" but "used negative language," (Tr. 59:17-24). [redacted] claimed he did not stop. She testified he stopped when "I assume that he ejaculated," (Tr. 34:21). Appellant then left (Tr. 35:9-11).

Soon after, [redacted] texted Appellant, asking "Why would you try to have sex when you knew I was half asleep, still half fucked up in Lana's bed?" (Tr.

35:25; 36:1-2). This message was sent at 5:25 AM on April 2, 2022 (Tr. 38-39). Appellant responded at 9:52 AM that same day (Tr. 40:5-6). He indicated he did not remember, but did say he was sorry (Tr. 40:7-14). For what Appellant was sorry is unclear. He did the same over Facebook Messenger, additionally making reference to being "black out drunk," (Tr. 41:2-12).

The afternoon of April 3, 2022, [redacted] reported a sexual assault. She did it, in part, because her former boyfriend, Patrick Levasseur (hereafter "Levasseur"), had learned of the alleged assault (Tr. 62:2-12). Levasseur was threatening to harm Appellant (Tr. 44:15-16). Levasseur agreed not to physically harm Appellant if [redacted] agreed to report the sexual assault (Tr. 70:16-20).

In fact, [redacted] and Levasseur had a long-term romantic relationship that had ended a few months before April 2, 2022 (Tr. 56:3-7, 68:1-6). The Appellant presented evidence that he had comforted [redacted] throughout the evening (Tr. 391-92). He argued that she was upset that Levasseur moved in with another woman, a fact she denied (Tr. 55:19-23, 392:2-5). [redacted] did acknowledge being upset with Levasseur the night in question, although for a different reason. (Tr. 56:1-9).

[redacted] went to the Lewiston Police Department to notify law enforcement of the alleged sexual assault (Tr. 45:6-11). Thereafter, she was admitted at the emergency department of St. Mary's Medical Center (Tr. 161-62). [redacted] was

first seen by Dr. Douglas Nam, who conducted a pelvic exam (Tr. 167:13-15). Dr. Nam testified that the exam was unremarkable with "no signs of tears or injuries or bleeding," (Tr. 168:1-2). Lisa Davis, a registered nurse at St. Mary's, testified that she conducted a Sexual Assault Forensic Exam on [redacted] (Tr. 194-208). Catherine MacMillan, a senior forensic DNA analyst at the Maine State Crime Lab, testified that a genital swab of [redacted] from the forensic exam showed a presence of sperm cells and saliva (Tr. 320:17-25). The DNA found on the genital swab matched the DNA of the Appellant (Tr. 323:6-11).

Throughout the trial, Justice Stewart and the parties debated the requisite *mens rea* level required under Section 253(2)(D) in wake of *State v. Asaad*, 2020 ME 11, 224 A.3d 596. (Tr. 236-42, 249-55, 352-59). The Trial Court eventually settled on a "recklessness" *mens rea* jury instruction. On February 13th, the jury returned a guilty verdict. (App. __; Tr. 529). On February 28, 2024, Appellant filed his Notice of Appeal.

## STATEMENT OF ISSUES

1. Whether a defendant may be convicted of Gross Sexual Assault pursuant to 17-A M.R.S. § 253(2)(D) using a *mens rea* level of "recklessly" in light of *State v. Asaad*, 2020 ME 11, 224 A.3d 596 and the post-*Asaad* amendment to 17-A M.R.S. § 253(2)(M)?

2. Does information pertaining to the crime scene, statements of identification, and other information irrelevant to medical care fall outside the hearsay exception delineated in M.R. Evid 803(4)? Does the admission of medical records and testimony including these statements to corroborate a non-credible witness constitute prejudice sufficient to impact the outcome of the proceedings?

3. Was there sufficient prosecutorial misconduct in the State's closing statement when it elicited jurors' sympathy for the complainant to merit vacating the verdict?

## SUMMARY OF THE ARGUMENT

First, Appellant contends that the Court applied the wrong level of *mens rea* in its jury instructions. This Court reviews a preserved objection to jury instructions for harmless error. If an objection was not preserved, this Court reviews instructions for obvious error. Appellant asserts that his objection to the jury instructions is preserved, but, if it was not, Appellant must still prevail because the Court failed to properly instruct the jury on the essential element of *mens rea*.

Appellant was convicted under Title 17-A Section 253(2)(D) of the Maine Revised Statutes, which criminalizes a sexual act if: (1) the other person is unconscious or otherwise physically incapable of resisting; and (2) has not consented to the sexual act. This act constitutes Class B Gross Sexual Assault. However, this Statute lacks an express *mens rea* element. This Court opined in *State v. Asaad*, 2020 ME 11, 224 A.3d 596, that a similar provision of this Statute, Section 253(2)(M), required some level of criminal intent.

Similarly, Section 253(2)(D) must also require *mens rea*. Not only does Gross Sexual Assault fall outside of the typical types of crimes where intent is not necessary, but *mens rea* also protects against the criminalization of inherently innocent conduct. Intent must be applied to both elements of Paragraph D, given the complicated and nuanced nature of human sexual activity, to separate sexual assault from innocent sexual acts.

The appropriate level of *mens rea* Paragraph D requires is "knowingly." Knowledge provides a sufficient standard to account for the necessary appraisal of the capabilities of the other party. Similarly, when there is a risk that a statute may criminalize morally blameworthy, but not inherently nefarious conduct, there must be some proportionality between the intent and the punishment. The Class B felony classification of Paragraph D calls for a knowing scienter to strike such a balance. Moreover, a knowledge requirement permits the use of a voluntary intoxication defense. The interrelation between intoxication and sex mandates the availability of this defense to prevent genuine, alcohol-induced confusion of body language from constituting Class B gross sexual assault. Additionally, the Trial Court should have exercised the rule of lenity, applying a knowledge requirement when the statute was silent on an intent element.

Second, the Trial Court erred in admitting the Complainant's hospital records and certain testimony from her medical providers. This Court reviews trial evidentiary rulings for abuse of discretion. The Trial Court abused its discretion in allowing Dr. Nam and Nurse Davis to testify to statements the Complainant made that contained information irrelevant to the Complainant's medical treatment or diagnosis. Further, the providers' testimony was substantially more prejudicial than probative because it confirmed the testimony of a non credible witness.

Finally, the State committed prosecutorial misconduct when it elicited juror sympathy for: (1) the medications [redacted] needed to take to cope with the side effects of the STD medications; and (2) evoking imagery of invasive physical examinations that she was subjected to. Unpreserved claims of prosecutorial misconduct are reviewed for obvious error, and the inherent prejudice of this misconduct merits vacating the verdict.

## ARGUMENT

### I. The Court Insufficiently Applied a Recklessly Standard to a Crime That Should Have the *Mens Rea* of Knowingly.

Criminal defendants have a fundamental right, guaranteed by the Fifth and Sixth Amendments to the United States Constitution, to a jury charged with determining whether the State has proved, beyond a reasonable doubt, facts that establish each element of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995). Based upon the constitutional importance of sufficient *mens rea* requirements and the rule of lenity, the Trial Court erroneously applied a reckless scienter when Title 17-A Section 253(2)(D) of the Maine Revised Statutes ought to require knowledge. Additionally, the reckless instruction prohibited a voluntary intoxication defense, which was substantially prejudicial. The evidence in this case was insufficient to find Appellant "knowingly" committed sexual assault, and, as such, the only remedy is to overturn the verdict.

A. *Standard of Review.*

When determining if there is an error in the jury instructions, this Court considers "the total effect created by all the instructions and the potential for juror misunderstanding, and whether the instructions informed the jury correctly and fairly in all necessary respects of the governing law." *State v. Westgate*, 2016 ME 145, ¶ 16, 148 A.3d 716. "Jury instructions are erroneous if they create 'the

possibility of jury confusion and a verdict based on impermissible criteria.'" *Id.* ¶ 16 (citing *State v. Ashby*, 1999 ME 188, ¶ 3, 743 A.2d 1254).

When an objection to jury instructions is preserved for appeal, the instructions are reviewed to determine whether the error was harmless. *State v. LaPierre*, 2000 ME 119, ¶ 18, 754 A.2d 978. An error is harmless only if it is highly probable that the error did not affect the jury's verdict. *Id*. If the objection was not preserved, the instruction is reviewed for obvious error. *State v. Lajoie*, 2017 ME 8, ¶ 13, 154 A.3d 132. "[A] failure to properly instruct the jury on each of the essential elements of the offense [charged] constitutes obvious error affecting substantial rights. . . ." *State v. Nickerson*, 534 A.2d 1323, 1325 (Me. 1988).

B. *Appellant Properly Preserved His Objection to the Jury Instructions, but Applying the Incorrect Mens Rea in Jury Instructions Constitutes Obvious Error Regardless.*

"A party preserves a challenge to the omission of a jury instruction, even without renewing an objection at the conclusion of the instructions, when the party previously requested the instruction but the court definitively denied it." *State v. Dumond*, 2000 ME 95, ¶ 10, 751 A.2d 1014. In *State v. Gagnier*, the Law Court assumed, without expressly deciding, that Defendant preserved his objection to the jury instructions when the trial court denied his request for a duress instruction

despite Defendant later agreeing to the jury instructions. 2015 ME 115, n.2, 123 A.3d 207. The same logic ought to apply in this case.

During the final discussion about the appropriate *mens rea*, Appellant requested the Court use "knowingly,"[2] (Tr. 352:14-19). However, prior to instructing the jury, the Court decided to use "recklessness" and requested no "further pushback" on that decision (Tr. 359:1-9). Afterward, Appellant did not object to the jury instructions as stated and written. It would be unnecessary and duplicative to require Appellant to explicitly object after the issue had been repeatedly debated throughout the case.

Assuming his challenge is preserved, it was highly probable that the decision affected the jury's verdict. There is a significant difference between a defendant "act[ing] knowingly with respect to attendant circumstances" and "consciously disregard[ing] a risk that such circumstances exist." 17-A M.R.S. § 35(2)-(3). This distinction was likely the difference between a guilty and not guilty verdict.

However, even if his objection was not preserved, Appellant must prevail. The Trial Court incorrectly applied a lower level of *mens rea* in the jury instructions, which constitutes obvious error. *Nickerson*, 534 A.2d at 1325.

C. *The Wake of State v. Asaad Leaves Judges Guessing.*

[2] During the final discussion prior to the Court's *mens rea* ruling, the Court asked the Appellant if he was still seeking "a *mens rea* of voluntary be given." Appellant agreed. It is clear based on the context that the Court misspoke, meaning to state "knowingly" instead of "voluntary." Appellant contends that his agreement with the Court should be interpreted as it was clearly intended.

Appellant was convicted of a single count of Gross Sexual Assault, in violation of Section 253(2)(D) (A person is guilty of gross sexual assault if that person engages in a sexual act with another person and…The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act.). This is a Class B crime. There is no express *mens rea* to commit Section 253(2)(D) sexual assault.

The Law Court previously addressed the mental state requirements of Section 253 in *State v. Asaad*, 2020 ME 11, ¶¶ 14-16, 224 A.3d 596. In *Asaad*, the defendant was charged with violating Section 253(2)(M). *Id.* ¶ 4. At that time, this Section read: "A person is guilty of gross sexual assault if that person engages in a sexual act with another person and ... [t]he other person has not expressly or impliedly acquiesced to the sexual act." § 253(2)(M) (2018). Violation of this Section was a Class C crime. *Id.* After a bench trial, the defendant was found guilty of violating Section 253(2)(M). The defendant appealed the conviction, arguing that the Section requires a *mens rea* of "knowing" and that the evidence could not sustain a conviction for that mental state requirement. *Asaad*, 2020 ME 11, ¶ 6, 224 A.3d 596.

The Court first determined that the evidence was "more than sufficient" to find Asaad knowingly violated Section 253(2)(M). *Id.* ¶ 13. The Court then turned to the *mens rea* determination. *Id.* ¶ 14. After quickly dispensing with the State's

"strict liability" argument, *Id.* ¶ 14, the Court declined to select a *mens rea* for section 253(2)(M), because "in this important and unsettled area of law the standard of behavior should be determined by the people's elected representatives." *Id.* ¶ 16. However, the Court did opine:

> There is a substantial difference between imposing felony liability when a defendant knowingly violates a victim's desire not to have sex and imposing that liability when a defendant recklessly or criminally negligently misunderstands that a victim does not consent.

*Id.*,¶ 16. In response to *Asaad*, the Legislature amended section 253(2)(M), applying a criminal negligence *mens rea*. 17-A M.R.S. § 253(2)(M) (2023).

Here, the trial court ultimately wrestled with, and then applied, the recklessly *mens rea* to the offense at bar. The Court mused:

> The book ends [*sic*] where I am is it's got to be a *mens rea* for sure. Criminal negligence for a Class B just doesn't seem right. The law court was talking about knowingly, those being the book ends [*sic*]. Recklessness seems like the right fit, but now I feel like I'm being arbitrary, like I'm just splitting the baby, and I'm really concerned about getting out there with the *mens rea*. That's what I think the State should think about.

(Tr. 255:1-11). The State argued that criminal negligence was the appropriate *mens rea*, (Tr. 354:1-5). Ultimately, after wrestling with the issue, the Court decided that the appropriate *mens rea* was recklessness.

> So, again, I feel a little uncomfortable going into this territory recognizing we're trying to anticipate what the law court may decide with this, but I think given all those factors, I am going to go with recklessness.

(Tr. 358:12-17). Accordingly, the trial court instructed the jury:

> Therefore, in order to convict Mr. Idris of the offense of gross sexual assault, the State must prove beyond a reasonable doubt each of the following elements: That on or about April 27, 2022, in Lewiston, Maine, that the defendant engaged in a sexual act with [redacted] and that [redacted] was unconscious or otherwise physically incapable of resisting the sexual act and that [redacted] had not consented to the sexual act and that with regard to whether [redacted] had consented, the defendant acted recklessly.

(Tr. 479:1-13). Further, the trial court told the jury that recklessly meant the following:

> A person acts recklessly with respect to the result of a person's conduct when the person consciously disregards a risk that their conduct will cause such particular result. A person acts recklessly with respect to attendant circumstances when the person consciously disregards a risk that such circumstances exist. And the disregard of the risk must be viewed in light of the nature and purpose of the person's conduct and the circumstances known to him and must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

(Tr. 480-81).

It is clear that the trial court struggled to grapple with the implications of *Asaad*. While the *Asaad* decision was limited to Section 253(2)(M), the opinion appears to imply that there is a range of appropriate *mens rea* for felony gross sexual assault, 2020 ME 11, ¶ 16, 224 A.3d 596, and the trial court interpreted that range to be between criminal negligence and knowing (Tr. 252-53, 358:4-17). The

Legislature's response in only amending Paragraph M muddied the waters even further.

*Asaad* acknowledged the need for *mens rea* when there is a determination on communications involving consent (or lack thereof). 2020 ME 11, ¶ 14, 224 A.3d 596. Paragraph D includes a "lack of consent" element. § 253(2)(D). The addition of the explicit *mens rea* to Paragraph M could be viewed to imply that Paragraph D, due to their similarities, should also use a criminal negligence standard. This implication impacted the trial court's decision, (Tr. 237-38). The Court's explanation of how it reached its ultimate conclusion highlights the key issue—trial courts are being pulled in three directions at once.

The Court conceded that Section 253 is generally written as a strict liability statute (Tr. 354-55). The Court recognized that *Asaad* may imply a preference towards "knowingly," (Tr. 238:17-19). However, the Court also acknowledged that Paragraphs D and M share a consent element, which may establish a shared *mens rea* requirement (Tr. 237-38). This determination is further complicated by the difference in the classes charged in Paragraphs D and M.

While the Legislature complied with the *Asaad* Court's recommendation to amend Section 253(2)(M), the ensuing amendment has caused significant confusion as to the requisite *mens rea* for other paragraphs within the statute.

### *D. Mens Rea Is Critical To A Constitutionally Sufficient Process and Should Only Be Waived in Limited Circumstances Not Present in This Case.*

The notion that "an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). While a State may dispense with *mens rea* requirements for less significant offenses without running afoul of substantive due process, it should not do so for serious crimes such as the one at bar. *See e.g. Staples v. United States*, 511 U.S. 600 (1994) (a statute may dispense with *mens rea* when there is a legislative intent to do so and it provides "for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.").

The Maine and United States Constitutions each present coextensive procedural Due Process rights. *Northup v. Poling,* 2000 ME 199, ¶ 9 n. 5, 761 A.2d 872; *DaimlerChrysler Corp. v. Me. Revenue Servs.,* 2007 ME 62, ¶ 26, 922 A.2d 465; *Doe I v. Williams*, 2013 ME 24, ¶ 61, 61 A.3d 718. So, too, substantive due process in the Maine Constitution is co-extensive with that of the United States Constitution. *Fichter v. Board of Envtl. Protection,* 604 A.2d 433, 436 (Me.1992); *Penobscot Area Hous. Dev. Corp. v. City of Brewer,* 434 A.2d 14, n. 9 (Me. 1981).

Statutes that dispense with *mens rea* but provide "for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary" are also unlikely to run afoul of the co-extensive Maine and Federal Due Process Clause. *Staples*, 511 U.S. at 616. Consequently, "offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*." *Staples*, 511 U.S. at 617; *see also Morissette*, 342 U.S. at 256 (dispensing with *mens rea* may be possible where the "penalties are relatively small, and conviction does no grave danger to an offender's reputation."). The Court has observed that *Morissette's* characterization of a public welfare offense "hardly seems apt, however, for a crime that is a felony....(is)…as bad a word as you can give to a man or thing." *Staples*, 511 U.S. at 618 (quoting *Morissette*, 342 U.S. at 260). While some categories of gross sexual assault are generally considered to be public welfare offenses, section 253(2)(D) cannot be considered in the same category of offense.

This Court has determined that statutory rape pursuant to Sections 253(1)(B) and (1)(C) is a strict liability crime. *State v. Fulton*, 2018 ME 3, ¶ 8, 178 A.3d 1225; *State v. Morrison* 2016 ME 47, n.1, 135 A.3d 343. Unlike subsection (2)(D), statutory rape protects a class of victim that is inherently unable to consent. Moreover, as written, the only determinations required for statutory rape are: (1) whether the defendant engaged in a sexual act with a person; (2) not the

defendant's spouse; and (3) that was under a certain age. § 253(1)(B), (C). There are no questions of consent, communications, incapacitations, or any behaviors by the minor.

In contrast, subsections (2)(D) and (2)(M) examine the presence of consent. The *Asaad* Court determined that this called for *mens rea*. 2020 ME 11, ¶ 14, 224 A.3d 596. Paragraph D is a felony crime that inquires into the presence of consent as well as the victim's capability to resist. It can neither be considered a public welfare offense nor akin to statutory rape, so Paragraph D must be assigned a scienter requirement.

### E. *The Supreme Court of the United States Has Recently and Repeatedly Emphasized the Need For Appropriate Mens Rea Standards to Avoid Criminalizing Apparently Innocent Conduct.*

Repeatedly and even recently, the United States Supreme Court has emphasized the need for adequate *mens rea*, often at least to the standard of knowingly, when otherwise innocent conduct is involved.

In *Liparota v. United States*, a federal food stamp fraud statute provided that "whoever knowingly uses…or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" was subject to a fine and imprisonment. 471 U.S. 419, 420 (1985). The government's position on appeal was that a defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.* at

423. The Court rejected that argument, because it would have criminalized "a broad range of apparently innocent conduct" and "swept in individuals who had no knowledge of the facts that made their conduct blameworthy." *Id.* at 426; *Elonis v. United States*, 575 U.S. 723, 735 (2015) (explaining *Liparota*). The Court "instead construed the statute to require knowledge of the facts that made the use of the food stamps unauthorized." *Id.* at 425.

The *X-Citement Video, Inc.*, case provides yet another example. The statute at issue in that case prohibited, *inter alia*, the knowing distribution of visual depictions involving the use of a minor engaged in sexually explicit conduct. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 65-66 (1994). The question for the court was whether the term "knowingly" applied only to the relevant verbs (*i.e.* distributing) or whether it also modified the phrase "the use of a minor." *Id.* at 68-69. As a preliminary matter, the Court declined to strictly construe the statute, explaining: "Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id.* at 70. The Court then reiterated: "*Morissette,* reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 72. And, the Court concluded that "knowingly" "extends both to

the sexually explicit nature of the material and to the age of the performers." *Id.* at 78; *accord Elonis*, 135 S.Ct. at 2022 (Thomas, J., dissenting) ("the defendant must *know* – not merely be reckless or negligent with respect to the fact – that he is committing acts that constitute the *actus reus* of the offense.") (emphasis in original).

In *Rehaif v. United States*, the Defendant entered the United States on a nonimmigrant student visa to attend university. 139 S. Ct. 2191, 2194 (2019). The Defendant was subsequently dismissed from the university for poor grades. *Id*. Later, the Defendant shot two firearms at a firing range. *Id*. The Defendant was charged under 18 USC § 922(g), which makes it illegal for aliens illegally in the country to possess firearms. *Id*. The Defendant was also charged under 18 U.S.C. § 924(a)(2), which provides that anyone who "knowingly violates" § 922 can be imprisoned for up to ten years. *Id*. The Supreme Court held that in a prosecution under §924(a)(2) and § 924(g), the Government must prove that the Defendant *knew* he possessed a firearm and that he *knew* he belonged to a group of individuals prohibited from possessing a firearm. *Id*. The Court reasoned that Congress intended to require a Defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id*. (quoting *X-Citement Video, Inc.*, *supra* at 72).

In *Ruan v. United States*, 142 S. Ct. 2370, 2374–75 (2022), the Supreme Court overturned the convictions of two doctors for violating 21 U.S.C. § 841. Section 841 makes it a federal crime, "[e]xcept as authorized ... for any person *knowingly or intentionally* ... to manufacture, distribute, or dispense ... a controlled substance." 21 U.S.C. § 841(a) (emphasis added).

While licensed doctors may prescribe controlled substances to their patients, a prescription is only authorized if a doctor issued it "for a legitimate medical purpose ... acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). Interpreting the statute, the United States Supreme Court found that Section 841's overt "knowingly or intentionally" *mens rea* applied to the statute's "except as authorized" clause. *Ruan*, 142 S. Ct. at 2371.

These cases stand for the proposition that knowledge that the conduct is wrong is what separates criminal conduct from apparently innocent conduct. Much like prescribing medicine, possessing firearms, distributing pornography, and using food stamps, sexual relations are inherently innocent conduct. Frankly, sex is a more commonly occuring act than the other types of conduct discussed above. For this reason, to avoid blurring the distinction between innocent and criminal sexual conduct, section 253(2)(D) should require scienter. It follows that this requirement must be applied to all the material elements of the statute because it is both the

incapability to resist and lack of consent that makes normally innocent conduct a Class B felony.

F. *Mens Rea Must be Applied to All Elements of Paragraph D.*

Section 253(2)(D) is separated from innocent sexual acts because it requires that: (1) "other person is unconscious or otherwise physically incapable of resisting;" and (2) "has not consented to the sexual act." The interdependence of these two elements is what elevates the crime to a Class B felony.

There is normalized sexual behavior that would satisfy the first element without meeting the second. Common examples of this include: married partners have a standing consent agreement that one partner may perform sexual acts on the other while the recipient is sleeping; or two adults engaging in consensual bondage and restraint during sexual acts. If the other person withdraws that consent, without effectively communicating it to the actor, then the actor has committed sexual assault. As discussed in *Asaad*, strict liability cannot apply to the existence of consent because this would "would foreclose any inquiry into whether the defendant actually received (let alone understood) the victim's communication." 2020 ME 11, ¶ 14, 224 A.3d 596.

In an inverse set of facts, the actor is, or should be, aware that the other person has not consented, but is unaware of the other's incapacity to resist. This may not be an issue for persons that are clearly unconscious, but intoxication

creates a gray area. A person may be relatively lucid, have partial control over their movements, but also lack the capacity to resist. A drunk actor might not be aware that the other person has just crossed that line, and proceeds with a sexual act without obtaining express consent. The other person does not resist or stop the advances as a result of the other person's intoxication, which is unknown to the actor. The actor has arguably violated Paragraph M, a Class C felony, but his conduct is charged as a Class B felony under Paragraph D solely due to facts unknown and unavailable to him.

Best practices dictate that each party to a sexual encounter obtains and maintains explicit consent throughout the interaction. However, both men and women prefer physical consent signaling to a "verbal ask-and-answer." Aya Gruber, *Consent Confusion*, 38 Cardozo L. Rev. 415, 442 (2016). The *Asaad* Court recognized that this is a "complicated and nuanced area of human behavior." 2020 ME 11, ¶ 15, 224 A.3d 596. Absent a scienter requirement for both elements, Paragraph D risks criminalizing normal, innocent conduct.

G. *The Trial Court Should Have Applied the Knowingly Standard.*

The question then becomes: what is the mental state for a Gross Sexual Assault charge under section 253(2)(D)?

i. A knowing *mens rea* fits the need for defendants to assess the physical state of the other person.

The Trial Court was correct that the mental state is not negligence. *See Elonis*, 135 S.Ct. at 2011 ("[W]e have long been reluctant to infer that a negligence standard was intended in criminal statutes."). Rather, the mental state must be knowingly. *See e.g. Liparota*, 471 U.S. at 426 (finding that the defendant must know that his possession of food stamps was unauthorized); *Staples*, 511 U.S. at 619 ("[defendant] must know the facts that make his conduct illegal"); *Rehaif, supra* (holding that defendant must know that he possessed a firearm and also have knowledge that he was in a group of individuals prohibited from possessing a firearm) and *Ruan supra* (determining that physician must know that prescribing was outside of legitimate medical practice).

While the Law Court declined to provide the statute to the Legislature in *Asaad*, it is plain that recklessness does not suffice here. Knowledge is what separates apparently innocent conduct from criminal conduct. *See e.g. X-Citement Video, Inc.*, 513 U.S. at 72; *Liparota*, 471 U.S. at 426; *Rehaif*, 139 S. Ct. at 2194.

The present charge requires a heightened standard, given the necessary appraisal of the capabilities of the other party ("The other person is unconscious or otherwise physically incapable of resisting…"). One can imagine the myriad of ways in which people in various levels of intoxication must assess whether someone is unconscious (or feigning sleep) or, even more complicated, physically incapable of resisting. Knowledge is required.

ii. Knowledge strikes a proportional balance between the risk of criminalizing innocent conduct with the need to penalize morally blameworthy behavior.

"As a matter of theory, disproportionately severe punishment offends notions of justice and sound criminal justice policy just as punishment of morally blameless conduct does." Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 146 (2009). This is not a foreign concept to the Maine Legislature, as it has established different penalties for homicide depending on the degree of blameworthiness:

> We must recognize that, in setting up a comprehensive schedule of penalties fundamentally fair and proportional to the particular criminal behavior subject to punishment, the Legislature may consider, as we believe it did, that death-producing conduct which manifests a depraved indifference to the value of human life, even when objectively viewed, is so highly charged with death-producing potential that it merits punishment in equal degree with an intentional or knowing homicide.

*State v. Reardon*, 486 A.2d 112, 120 (Me. 1984) (observing the different punishments between depraved indifference murder and felony murder absent a subjective intent requirement). When, as here in Paragraph D, the Legislature has failed to provide a specific level of *mens rea*, this Court ought to follow the same proportionality principle.

"[S]evere penalties and high stigma should be available only where the defendant is seriously at fault. Otherwise, there will be a culpability gap in which blameworthy conduct may result in disproportionately severe penalties." Smith,

*supra*, at 141. The crime must fit the punishment. "Imposing punishment in excess of blameworthiness is just as offensive in principle as convicting blameless conduct because, either way, courts are imposing punishment that is not justified by the culpability of the offender's act." Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 Hastings L.J. 1609, 1660 (2018). As such, the penalties associated with a base-level Class B felony merit a level of intent higher than recklessness.

iii. A knowledge requirement permits an involuntary intoxication defense in an area of life where alcohol is heavily prevalent.

Without the knowledge requirement, the Court prohibited the Voluntary Intoxication instruction. 17-A M.R.S. § 37(1). While not a complete defense, voluntary intoxication is a factor in determining whether the appropriate *mens rea* has been met. *State v. Gallant*, 2004 ME 67, ¶ 3, 847 A.2d 413. Importantly, a Voluntary Intoxication instruction is only permitted when the crime has an intentional or knowing *mens rea*. *State v. Cote*, 560 A.2d 558 (Me. 1989); *State v. Barrett,* 408 A.2d 1273 (Me. 1979). This particular subsection of the Gross Sexual Assault statute begs for a voluntary intoxication instruction in many cases. This case was one of them.

Appellant is a member of a group that gets together on a weekly basis to party and drink heavily (Tr. 48:18-21, 384:7-11). He testified that he was intoxicated—about a six or seven on a scale where one is sober and ten is the most intoxicated he had ever been (Tr. 393-94). He "smoked a little bit of weed" and

took "a shot or two" of vodka before arriving at the gathering and he continued to take shots and drink Truly's while at the gathering (Tr. 387:6-11, 393:18-19). Appellant was, self-admittedly, intoxicated enough to make the poor choice to drive under the influence of alcohol and marijuana (Tr. 396:12-18). When he returned to Whittemore's house, Appellant took another shot of vodka. (Tr. 400:17-19). The sexual acts at issue took place at some time thereafter. Given the level of intoxication, there is a genuine question of fact as to whether Appellant had "reached such a degree of complete drunkenness that he is on account of it incapable of forming the requisite intent or of possessing the necessary knowledge essential to the commission of the crime charged." *State v. Lewisohn*, 379 A.2d 1192, 1209 (Me. 1977) (citing *State v. Smith*, 277 A.2d 481, 492 (Me. 1971)).

The consumption of alcohol is a social activity, so it is not surprising that some studies show that approximately half of both victims and perpetrators drink alcohol before a sexual assault occurs. Antonia Abbey et al., *Alcohol and Sexual Assault*, 25 Alcohol Res. & Health 43, 44 (2001). Adding alcohol to this already "complicated and nuanced area of human behavior," *Asaad*, 2020 ME 11, ¶15 15, 224 A.3d 596, only serves to complicate things further. There is a level of intoxication where the ability to analyze another's body language for consent and physical capacity purposes is significantly inhibited. Voluntary intoxication must

remain available as a defense for factfinders to decide whether a defendant was too inebriated to appreciate a lack of consent or inability to resist.

H. *As Applied to the Facts in this Case, the Evidence Was Not Sufficient to Support a Verdict With a "Knowingly" Mens Rea.*

"In assessing the sufficiency of evidence to support a criminal conviction, we review the evidence, and all reasonable inferences drawn from that evidence, in the light most favorable to the State to determine whether the trier of fact could have found every element of the offense charged beyond a reasonable doubt." *State v. Tayman*, 2008 ME 177, ¶ 4, 960 A.2d 1151. In the present case, unlike *Asaad*, there is insufficient evidence to support Appellant's conviction when a "knowingly" *mens rea* is applied to Section 253(2)(D).

*Asaad* was a jury waived trial for a Class C Gross Sexual Assault. at ¶ 1. As the Law Court summarized:

> Asaad went to the victim's house and eventually they began to engage in consensual sexual activity. When Asaad "inserted his penis inside of [the victim]," she asked him to stop; despite the victim "saying no and stop on several occasions," Asaad "continued to penetrate her until he ejaculated."

*Id*. ¶ 3.

*Asaad* represents a markedly different circumstance than the case and statute at bar. In *Asaad*, the victim told the defendant repeatedly that she would not have sex without a condom, but he engaged in sex with her without a condom regardless. *Id.* ¶ 10. When she realized what was happening, she told Asaad to

"stop" and hit him. *Id.* ¶ 12. The Law Court accepted the trial court's finding that "Although Asaad claimed that he stopped when the victim told him to stop, the trial court explicitly rejected Asaad's testimony on this point." *Id*. Accordingly, it was meaningless whether knowledge, recklessness, or criminal negligence was used in *Asaad*. Thus, the Law Court declined to address which *mens rea* level was appropriate for the crime. *Id*. ¶ 14.

The case at bar is a different story. The group of friends at issue had a history of drinking and engaging in casual sexual activity. While that never is an invitation for a sexual assault, it certainly requires an adequate *mens rea*.

Here, [redacted] was voluntarily intoxicated. She reported having ten Truly's and two shots of Tito's vodka (Tr. 49-50; 57:19-24). While she remembered going to bed around midnight, she had no memory of coming back down to hangout with friends in the wee small hours of the morning (Tr. 32:22-25, 58-59).

[redacted] remembered "I woke up to Kai having sex with me," but the lead up to that drunken sexual activity was not as clear (Tr. 34:2). Specifically, Appellant left the party shortly after 1:00 AM (Tr. 397:1-7). He drove five minutes back to his residence to drop two partygoers off at their vehicle, and, without getting out of his vehicle, drove right back to Whittemore's house (Tr. 387:2-5, 398-99). [redacted] texted Appellant at 5:25 AM, soon after the alleged sexual assault.

Additionally, [redacted] had a long-term romantic relationship that had ended a few months before the incident (Tr. 56:10-14, 68:1-4). She reported the incident to the police so her ex-boyfriend would not injure Appellant. Per Amanda Siragusa—one of the friend group—it was normal for Appellant and [redacted] to be flirty with each other (Tr. 151:20-22). [redacted] admitted hugging Appellant that evening, but denied sexual flirtation (Tr. 52:2-6). Appellant presented evidence that this was a sought after sexual encounter by both parties.

Even when viewing the facts in the light most favorable to the State, there is not enough evidence to show that Appellant knew [redacted] was unconscious or otherwise physically incapable of resisting and had not consented to the sexual act. [redacted] was intoxicated to the point that she could not remember the latter portion of the evening, but not so intoxicated that she was unable to perform normal tasks like doing the dishes. Moreover, there is a four hour window between Appellant's return to Whittemore's residence and the assault that neither [redacted] nor the State can account for. The only person who can account for that time is Appellant, and he testified that the pair had consensual sexual activities multiple times during that period. There is insufficient evidence to show that [redacted] had either not consented or was physically incapable of resisting.

I. *The Rule of Lenity Suggests That a Stronger Mens Rea Should Have Been Applied In the Absence of Legislative Guidance.*

Notably, "[w]hen interpreting a criminal statute, (courts) are guided by two interrelated rules of statutory construction: the rule of lenity, and the rule of strict construction. Pursuant to each of these rules, any ambiguity left unresolved by a strict construction of the statute must be resolved in the defendant's favor." *State v. Lowden*, 2014 ME 29, ¶ 15, 87 A.3d 694 (citations omitted). Here, while the trial court quite correctly applied a *mens rea* to the otherwise silent statute, it should have applied the mens rea of knowingly, exercising the rule of lenity.

## II. The Trial Court Erred in Admitting Statements Not Made for Medical Diagnosis or Treatment and These Statements Impermissibly Corroborated [redacted]

The Law Court reviews the trial court's evidentiary rulings for abuse of discretion. *State v. Ifill*, 574 A.2d 889, 890 (Me. 1990). Exceeding the bounds of discretion in decision-making may be found when the courts, (1) consider a factor prohibited by law, (2) decline to consider a legally proper factor under a mistaken belief that the factor cannot be considered, or (3) act based on a mistaken view of the law. *Pettinelli v. Yost*, 2007 ME 121, ¶ 11, 930 A.2d 1074.

The Trial Court abused its discretion in admitting the hospital records because they contained inadmissible hearsay that does not fall into the exception for statements made for the purposes of medical diagnosis or treatment under Maine Rule of Evidence 803(4). However, even if the statements at issue were

admissible under Rule 803, they caused unfair prejudice to Defendant because the statements corroborated a non-credible complainant.

*A. Statements in the hospital records were not reasonably pertinent to medical diagnosis or treatment.*

Generally, out-of-court statements offered to prove the matter asserted are inadmissible as hearsay. M.R. Evid. 801(c), 802. There are various exceptions to this rule, one of which are statements made for medical diagnosis or treatment. M.R. Evid. 803(4); 16 M.R.S. § 357. A statement falls within this exception if it: "(A) Is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) Describes medical history; past or present symptoms or sensations; their inception; or their general cause." *Id.* The Law Court has tailored this rule to exclude statements of fault or blame, descriptions of the crime scene, or other details not relevant to the treatment. *See State v. Sickles*, 655 A.2d 1254, 1257 (Me. 1995); *State v. Leone*, 581 A.2d 394, 399 (Me. 1990); *State v. True*, 438 A.2d 460, 467 (Me. 1981); *Walton v. Ireland*, 2014 ME 130, ¶ 18, 104 A.3d 883.

"Pertinence may be tested by asking whether the information is of a type on which a physician could reasonably rely to form a diagnosis or provide treatment." *Id.* (citations omitted). In *Sickles*, a sex crime complainant made a statement to an emergency department doctor that she had asked the perpetrator "to stop." *Id.* The Law Court determined that this statement was not pertinent because it was "irrelevant to her diagnosis or opinion that the victim's physical symptoms were

consistent with the incident as the victim described." *Id.* Specifically, the doctor's examination "was limited to providing emergency room care" and the doctor never indicated how that statement helped his diagnosis. *Id.*

Similarly, in *True*, the gynecologist of a sex crime complainant was asked on direct examination what the complainant had called him about. 438 A.2d at 467 (Me. 1981). The gynecologist testified that the complainant said, "my brother was here, he raped, he forced himself on me." The *True* Court held that testimony to be inadmissible because "the identity of the perpetrator and the scene of the alleged rape do not fall within that hearsay exception." *Id.* at 466-67.

In the present case, during direct examination, Dr. Nam and Ms. Davis were instructed to read directly from the medical records (Tr. 166:6-9). In reading the record into evidence, Dr. Nam states, in pertinent part, as follows:

> Patient states she slept at her friend's house last night and awoke between 4:00 and 5:00 to someone having sex with me. Patient has been to the Lewiston Police Department, has changed her clothes and showered. . . .

(Tr. 163:15-19). Dr. Nam later testified:

> Patient states that she was sleeping at a friend's house . . . She stated that she was naked from the waist down and that an individual that was known to her was on top of her.

(Tr. 166:16-22). Ms. Davis similarly testified:

> Patient states that she slept at a friend's house and woke up between 4 a.m. and 5 a.m. with someone having sex with me. . . .

(Tr. 195:5-7). With the exception of the timeframe and bare fact that someone allegedly had non-consensual sex with [redacted] nothing in these excerpts is pertinent to diagnosis or treatment. These are statements of identification, descriptions of the crime scene, and additional information irrelevant to [redacted] emergency room care. Pursuant to *Sickles* and *True*, these excerpts do not fall within the Rule 803(4) exception. As such, the statements were inadmissible hearsay, and the Trial Court abused its discretion in admitting this testimony.

B. *Permitting Dr. Nam and Ms. Davis to reiterate the Complainant's allegations was unfairly prejudicial.*

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R. Evid. 403. Prejudice, in this context, is an undue tendency to move the tribunal to decide on an improper basis. *State v. Brine*, 1998 ME 191, ¶ 9, 716 A.2d 208. Dr. Nam and Ms. Davis's improper corroboration of [redacted] allegations was needlessly cumulative and was substantially more prejudicial than probative.

As stated *supra*, in *State v. True*, a gynecologist performed an examination on the complainant after an alleged sexual assault by the complainant's brother. 438 A.2d at 463-64 (Me. 1981). The gynecologist, Dr. Bennert was informed of the allegations by the complainant's mother, who had previously heard them

directly from the complainant. *Id.* Dr. Bennert's examination turned up no evidence of intercourse. *Id.* at 464. At trial, Dr. Bennert's testified about the results of his examination as well as his understanding of the allegations. *Id*. The Court initially determined that Dr. Bennert's statement that "[the complainant] said my brother was here, he raped, he forced himself on me" did not fall within any hearsay exception. *Id.* at 466-67. The Court then determined that the "hearsay appearing to confirm the prosecutrix's story, coming as it did from the mouths of disinterested third parties, would almost certainly count heavily with any jury." *Id.* at 469. (relying on *State v. King*, 123 Me. 256, 257-58, 122 A. 578 (1923)). Because the "only direct evidence on the point was the testimony of the prosecutrix herself," and her "credibility on the critical issue of force was inherently suspect," the Court held that "the combined impact on the jurors' minds of this hearsay testimony corroborating the details of Lona's testimony surely affected substantial rights of defendant." *Id.*

The case at bar presents the same issue. The only evidence on point is [redacted] testimony that Appellant had sex with her while she was sleeping (Tr. 34:2). Dr. Nam's examination reported no signs of sexual assault (Tr. 168:1-2). Defendant testified that the parties had consensual sex three times (Tr. 404-09). [redacted] recount of the events on the early morning of April 2, 2022 is the only evidence that she was incapable of resisting and did not consent.

Much like the complainant in *True*, [redacted] credibility is also suspect. She had been drinking heavily the evening prior. (Tr. 32:12-14). She and Appellant had a flirtatious friendship, (Tr. 152:23-24). That evening, [redacted] was upset or potentially jealous of her ex-boyfriend (Tr. 56-57, 150:21-23, 391-92). Most importantly, [redacted] had no recollection that she had come back downstairs that evening and started cleaning the dishes (Tr. 107:3-5). Alcohol, jealousy over exes, and flirty friendships is a notorious combination. Coupled with intoxication impacting her ability to perceive and recall events, there are genuine issues with [redacted] credibility.

Allowing two witnesses to improperly corroborate [redacted] testimony with hearsay created a substantial risk of prejudice through cumulative evidence. When [redacted] credibility was unreliable for a number of reasons, "it is almost inevitable that the admission of such testimony from the third party will prove prejudicial." *King*, 123 Me. at 258. The Court abused its discretion in permitting Dr. Nam and Ms. Davis to restate [redacted] allegations, and this error was sufficiently prejudicial to have impacted the outcome of these proceedings.

## III. The State Committed Prosecutorial Misconduct by Eliciting Jurors' Sympathy for the Treatment [redacted] Sought.

An unpreserved claim of prosecutorial misconduct is reviewed for obvious error. *State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.3d 1032. To demonstrate obvious error, the defendant must show that there is "(1) an error, (2) that is plain, and (3)

that affects substantial rights." *Id.* (citing *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147.). A jury verdict must be set aside if the error seriously affects the fairness and integrity or public reputation of judicial proceedings. *Id.* A prosecutor commits misconduct if she "[makes] statements pandering to jurors' sympathy, bias, or prejudice." *Id.* ¶ 42 (citing *State v. Burgoyne*, 452 A.2d 393, 396-97 (Me. 1982).).

During its closing statement in the present case, the State referenced the treatment [redacted] received on multiple occasions (Tr. 495:2-13, 496:9-18). In the first instance, the State argued that [redacted] was seeking drugs to ensure she did not receive an STD (Tr. 495:5-8). However, the State highlighted that some of those drugs "might make her sick, so she has to take more drugs to deal with the nausea of those drugs because of the sexual assault she endured." (Tr. 495:8-12). Shortly thereafter, the State mentioned that [redacted] "subject[ed] herself to a sexual assault forensic evaluation that you heard and I think her words were, They poked and swabbed every hole in my body?" (Tr. 496:10-13).

In describing the nausea and myriad of drugs [redacted] had to take in response to medication she received as a result of the alleged sexual assault, the State was clearly pandering to the jurors' sympathy. Moreover, the intrusive imagery of [redacted] "subjecting herself" to being "poked and swabbed" in her orifices was elicited for the sole purpose of plucking on the heart strings of jurors. These

descriptions are among the last things the jury heard before deliberations, making them inherently prejudicial to the extent that they seriously affect the fairness of the proceeding. As a result, the verdict must be set aside.

## CONCLUSION

For the reasons stated herein, the Appellant asks this Court to reverse the Judgment of the Superior Court.

Dated this 21st day of June, 2024 in Portland, Maine.

Respectfully Submitted,
ZERILLO LAW FIRM, LLC

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