MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO: AND-24-105

STATE OF MAINE,
Appellee,

v.

KULMIYE IDRIS
Appellant.

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

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REPLY BRIEF OF APPELLANT, KULMIYE IDRIS

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ARGUMENT

I. The Legislature's Determination Relating to the Mens Rea of 17-A M.R.S. § 235(2)(M) Must Not Be Applied to § 235(2)(D).

The State's primary argument, in its simplest terms, is that a defendant accused of sexual assault can be convicted of a Class B felony for mere careless behavior. (Red Br. 15-17, 21). This mistaken argument is based on the Legislature's response to *State v. Asaad*, 2020 ME 11, 224 A.3d 596, to criminalize instances when "[t]he other person has not consented to the sexual act and the actor is criminally negligent with regard to whether the other person has consented." The State opines that the statute at bar, Title 17-A Section 253(2)(D), which states "The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act," contains identical language to the statute at issue in *Asaad*.[1] Therefore, they reason that the same level of *mens rea* should apply. *Id.* The State's attempt to conflate similar language across different crimes regardless of the classification of offenses ignores the history surrounding *State v. Asaad*, the post-*Asaad* Amendment of Paragraph M, and the constitutional underpinnings of *mens rea* policy.

In *Asaad*, this Court was tasked with addressing whether Paragraph M was a strict liability statute, and, if not, what level of intent was required. 2020 ME 11, ¶ 6, 224 A.3d 596. The State argued that the statute should be considered a strict

[1] 17-A M.R.S. § 253(2)(M).

liability crime. *Id.* ¶¶ 4, 14. The Court rejected this argument, finding that the plain language of the statute required a *mens rea. Id.* ¶ 14. The Court then suggested that knowingly was a constitutionally sufficient level of intent for this Class C crime. *See Id.* ¶¶ 14-16. *Id.* However, the Court left the ultimate decision to the Legislature. *Id.* ¶¶ 15-16.

In making its decision, the Legislature considered the testimony of Attorney General Aaron Frey and the Criminal Law Advisory Commission ("CLAC"). *An Act to Update Criminal and Related Statutes and Respond to Decisions of the Law Court: Hearing on L.D. 1903 Before the Committee on Criminal Justice and Public Safety*, 130th Legislature (Feb 2, 2022). Attorney General Frey, the preeminent prosecutorial authority in Maine, suggested "recklessness" as the constitutionally sufficient level of intent. *Id.* The CLAC was split between "knowing" and "reckless" *mens rea*. *Id.* For whatever reason, the Legislature shirked its duty, ignored the suggestions of this Court, the Attorney General, and the CLAC, and instead opted for criminal negligence as the standard. § 253(2)(M).

This Court gave the Legislature the power to meet the minimal constitutional guarantees afforded defendants accused of gross sexual assault, and they refused to answer the call. The State now argues that the questionable judgment of the Legislature must not be disturbed. (Red Br. 21). While Appellant respects legislative primacy in the realm of criminal law and *mens rea* policy, the

Legislature's judgment is not unassailable to a co-equal branch of government—especially when that judgment ignores the "deeply ingrained legal tradition" of *mens rea* proportional to the punishment. *Tison v. Arizona*, 481 U.S. 137, 156 (1987). Although the Legislature's decision in amending Paragraph M is not within the scope of this appeal, this Court should refuse to extend the implications of that decision to Paragraph D.

Contrary to the State's argument, it makes little sense that the intent requirement assigned to a lesser offense would automatically translate to an offense of higher classification. The United States Supreme Court has repeatedly expressed a reluctance to infer that a negligence standard was intended in criminal statutes. *See Elonis v. United States*, 575 U.S. 723, 738 (2015); *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091 (1975) (Marshall, J., concurring). This Court should be equally as reluctant to assign criminal negligence to Paragraph D, a Class B felony.

II. There Is a Reasonable Probability That the Trial Court's Failure to Assign Mens Rea to All Elements Affected the Outcome of the Trial.

The State argues that the Appellant did not preserve his objection to the first element of the offense, "The other person is unconscious or otherwise physically incapable of resisting." (Red Br. 17-18). Even if preserved, the State reasons that the error is harmless. *Id.*

Counsel agrees that the record is not a model of clarity on this issue. (Tr. 236-42, 249-55, 352-59). Throughout the numerous discussions on the *mens rea* applicable here, the parties and the Court discussed the effect *State v. Asaad* and the subsequent legislative amendments. *Id.* These discussions centered around Paragraph D generally and did not focus on what elements the *mens rea* would be assigned to. *Id.* Appellant interpreted these discussions as the Court applying intent to the entire statute, as is customary in criminal law. *See Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element."). Eventually the Trial Court ended the discussion and ordered no "further pushback." (Tr. 359:5-8). The argument is sufficiently preserved.

Even assuming, *arguendo*, that the Appellant did not preserve his objection to the Court's jury instruction limiting *mens rea* to the consent element, it is extremely clear that the Court's instruction constitutes obvious error. It is reasonably probable that the error impacted the fairness of the trial. Moreover, there is a low probability that the error did not affect the jury's verdict.

A. *The Trial Court's Failure to Assign Intent to an Element Was a Plain Error That Affected the Fairness and Integrity of the Proceedings.*

For an instructional defect to constitute obvious error there must be: (1) an error; (2) that is plain; and (3) that affects substantial rights; and (4) the error

seriously affects the fairness and integrity or public reputation of judicial proceedings. *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. Each of these requirements was met when the Court failed to assign *mens rea* to the first element of Paragraph D.

It is worth noting that the State's Brief neither addressed the first three requirements for plain error, nor acknowledged Appellant's primary argument that, absent *mens rea* for the resistance element, the statute risks criminalizing otherwise innocent conduct. Instead, it asserts that there was sufficient evidence to find that Appellant knew that [redacted] was sleeping, and thus the fairness and integrity of the proceedings were unaffected. (Red Br. 18). However, this Court has ruled that there need only be a *reasonable probability* that the instruction affected the outcome of the trial. *Pabon*, 2011 ME 100, ¶ 35, 28 A.3d 1147. The evidence presented at trial in this case establishes a reasonable probability that Appellant did not know [redacted] was unconscious or otherwise physically incapable of resisting.

Because no instruction was given as to whether Appellant was reckless regarding [redacted] ability to resist, we cannot gauge the jury's assessment of Appellant's awareness of [redacted] state of consciousness. All we know is that the jury found that [redacted] was unable to resist. Yet, based on the evidence presented

at trial, there is a reasonable probability that the jury did not believe Appellant knew or was reckless in regard to that fact.

[redacted] testified that she woke up to Appellant having sex with her. (Tr. 34:2). 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). By her own admission in a text to Appellant, [redacted] stated she was only "half asleep, [and] still half fucked up" when Appellant had sex with her. (Tr. 35:25; 36:1-2). Even when looking solely at [redacted] testimony, half asleep and half intoxicated are significantly different from incapacitation or a deep slumber. This raises a significant question as to Appellant's assessment of [redacted] ability to resist. This question creates a reasonable probability that a jury would have found Appellant was not reckless in assessing her consciousness.

Further, when we look at the testimony of the State's other witnesses, the jury was aware that [redacted] went to bed around midnight but later came returned to the festivities to reheat leftovers, eat a plate of food, and wash dishes (Tr. 32:24, 112:11-16, 146:3-6). [redacted] testified that she did not recall these events. (Tr. 58-59). Even if the jury were to completely disregard Appellant's testimony, [redacted] own text to Appellant and lucidity in a "blackout" state of intoxication create a significant probability that some jurors would have a reasonable doubt as

to Appellant's knowledge of [redacted] consciousness. Thus, the Trial Court's error in not assigning *mens rea* to the first element of Paragraph D clearly affected fairness and integrity of these proceedings.

B. *There is Insufficient Evidence to Ensure the Error was Harmless.*

The State next contends that, even if the Trial Court committed obvious error when it failed to apply *mens rea* to the resistance element, that the error was harmless. (Red Br. 18). "[F]or error to be harmless, there must be a high level of confidence that it did not taint or otherwise affect the outcome of the trial." *State v. Garcia*, 2014 ME 150, ¶ 16, 106 A.3d 1137; *see also State v. Rivers*, 634 A.2d 1261, 1264 (Me. 1993) ("we view a preserved challenge to a claimed erroneous jury instruction as harmless error only if it is highly probable that the error did not affect the jury's verdict.") When reviewing the evidence presented at trial, it is likely that the Court's error impacted the verdict.

The State mentions Appellant's "own admissions, DNA evidence, and corroborative testimony from multiple witnesses" to support its position that the error was harmless. (Red Br. 18). The corroborative testimony from other witnesses that the State cites is the testimony of Lana Whittemore, who testified that she did not invite Appellant to return, and Amanda Siragusa, who testified that she did not hear Appellant being invited to return. (Tr. 79:14-24, 145:7-11). The State also cites evidence that Appellant's DNA was found on a genital swab of

[redacted] (Tr. 320-23). None of this evidence has any bearing on whether Appellant knew [redacted] was unable to resist his advances.

On the other hand, Appellant's "own admissions," meaning the Facebook message Appellant sent to [redacted] on the morning of April 3, 2022, do relate to the element at issue. Appellant's message was a direct response to a text sent by [redacted] at 5:25 A.M. (Red Br. 3, Tr. 40:4). That text stated "Why would you try to have sex when you knew I was half asleep, still half fucked up in Lana's bed?" (Tr. 36:25 - 37:1-2). Appellant responded *via* Facebook saying "I have no words for last night…I really, really care about you, and that's not how I want our vibes to be. I want to own up and man up because I'm not the type to shy away from the way I made you feel…I'm truly sorry…." (Tr. 42:2-12). The State would have this Court believe that this message constituted an admission that Appellant knew [redacted] was asleep.

Appellant's apology, when accused of having sex with [redacted] when she was half-asleep, makes no admission that he knew she was incapacitated. Additionally, when asked about this message, Appellant testified "it's me saying I'm sorry to her because I care about who she is and how she felt, and I would never have thought that after what happened the night before that that's how she would feel." (Tr. 415:12-16). This evidence alone does not provide the "high level

of confidence" that the lack of instructed *mens rea* did not affect the outcome of the trial. As such, the Trial Court's error was not harmless.

III. The Comprehensive Nature of Sexual Assault Examinations Is Not a Carte Blanche for the Admission of Non-medically Pertinent Statements.

In Appellant's brief, he argued that certain aspects of the medical records and the testimony of Dr. Nam and Nurse Davis were inadmissible hearsay pursuant to Maine Rule of Evidence 803. (Blue Br. 33-35). The State's response is that the statements fell within the bounds of the Rule 803(4) exception to hearsay because the treatment provided to [redacted] was holistic. (Red Br. 24-27). A deeper examination of the case law underpinning the State's claim reveals their inapplicability to the case at bar. Additionally, the State's position would lead to the admissibility of an overabundance of hearsay statements in sex crime cases.

A. *The State's Authorities are Not Applicable to this Matter.*

The State argues that details pertinent to the treatment of emotional or mental injuries are not hearsay pursuant to *Walton v. Ireland*, 2014 ME 130, 104 A.3d 883, *State v. Rosa*, 575 A.2d 727 (Me. 1990), and *State v. Cookson*, 2003 ME 136, 837 A.2d 101. (Red Br. 22-23).[2] Appellant agrees that these cases reinforce

[2] The State also cites 16 M.R.S. § 357 (2024) and *State v. Jones*, 2008 ME 112, 951 A.2d 803. While *Jones* holds that the Rule 803(4) analysis does not apply when the record satisfies § 357, *Id*. ¶ 12, this statute only applies to parts of the record that are related to treatment and medical history. *Nason v. Pruchnic*, 2019 ME 38, ¶ 18, 204 A.3d 861, corrected (Apr. 23, 2019). Appellant also contends that the statements of identification, description of the crime scene, and so on should have been redacted or excluded from the records admitted as unrelated to medical diagnosis or treatment.

the notion that statements made pertinent to treatment sought for non-physical injuries are covered by the Rule 803(4) exception. M.R. Evid. 803(4). However, these cases do not stand for the proposition that any statement remotely related to mental health is automatically admissible.

In *Walton*, this Court permitted a clinical therapist to testify to the statements of identification made by a patient. 2014 ME 130, ¶ 20, 104 A.3d 883. There, the child complainant was admitted to the care of the therapist for the purpose of addressing behavioral issues. *Id.* ¶ 4. The child disclosed sexual abuse by her father during a therapy session. *Id.* The Court determined that the identity of the abuser was pertinent to medical treatment for the purpose of developing a treatment plan for the child. *Id.* ¶ 20.

In *Rosa*, this Court held that a physician's testimony that the complainant "had been forced to have sexual relations; and during this episode, she had both been threatened with a knife and also choked by the neck." 575 A.2d 727, 729 (Me. 1990). The Court held that the forced nature of the sex and strangulation were relevant to his diagnosis. *Id.* Additionally, "the knife threat pertained to the emotional trauma that the physician was also addressing." *Id.*

Lastly, in *Cookson*, 2003 ME 136, 837 A.2d 101, this Court ruled that a nurse practitioner who diagnosed a murder victim with depression could testify as to the cause of the depression. *Id.* ¶ 26. There, the victim told the practitioner that

the cause of her depression was due to her abusive relationship with her partner and subsequent stalking. *Id.* ¶¶ 18-19. The Court found that the nurse reciting the victim's statements was pertinent to the victim's treatment for depression because it established the cause of her depression. *Id.* ¶ 26.

The case at bar is distinguishable from the cases the State cites. *Walton* determined that statements of identification made for the purpose of treatment planning around abuse in the home are medically pertinent. *Rosa* allows the admission of statements describing threats of violence as pertinent to treating emotional trauma. Similarly, *Cookson* provides for the pertinence of statements about the external causes of mental health issues. Here, the jury heard testimony from Dr. Nam and Ms. Davis repeated [redacted] statements as to the identity of the alleged perpetrator, descriptions of the crime scene, and [redacted] state of consciousness. The facts of this case align more with *State v. True*, 438 A.2d 460 (Me. 1981) (*True* was extensively discussed in Appellant's Brief, so Appellant will not rehash the entirety of the facts of this case, only those immediately relevant).

B. *State v. True Established the Rule, Not the Exception.*

In *True*, during a rape trial, the jury heard testimony from a gynecologist that "[the complainant] said my brother was here, he raped, he forced himself on me." *Id.* at 466-67. The Supreme Judicial Court held that this statement did not fall within the Rule 803(4) exception because it was not reasonably pertinent to any

medical diagnosis or treatment. *Id.* at 467. Specifically, the Court opined "[t]hat it was intercourse that caused Lona to see the doctor and that it occurred the previous evening are facts reasonably pertinent to the diagnosis…But the identity of the perpetrator and the scene of the alleged rape do not fall within that hearsay exception." *Id*. It is important to note that the Court overturned the guilty verdict in *True* because of the admission of the statement alleging the use of force, rather than the statement of identification. *See Id.* at 469. The same logic ought to apply here.

Dr. Nam and Ms. Davis's statements, specifically as they relate to [redacted] claiming she was asleep, are inadmissible pursuant to the logic in *True*. Moreover, the cases the State relies upon, *Walton*, *Rosa*, and *Cookson*, create exceptions to the rule established in *True*. However, those exceptions do not apply to this case. [redacted] state of consciousness at the time of the alleged sexual assault was neither pertinent to creating a treatment plan nor the external cause of her mental health issues. [redacted] was traumatized not because she was supposedly sleeping, but because someone had non-consensual intercourse with her.

C. *The State's Position Creates Harmful Hearsay Policy.*

Additionally, the State's position is problematic from a policy perspective. It appears that the State would have statements of identification, descriptions of the crime scene, and other unrelated facts deemed pertinent to medical treatment under

the umbrella of "emotional care." This approach would open the floodgates of admissibility for details elicited during Sexual Assault Forensic Examinations.

Ms. Davis testified that the Sexual Assault Forensic Examination is a comprehensive exam that addresses the victim's physical, emotional, and psychological needs. (Tr. 195:20-23). It is likely, like in the present case, that the treatment of emotional or psychological needs illicit details beyond what is typically considered pertinent to the medical diagnosis or treatment of adult victims. This is especially true if examiners are creating safety plans or making referrals to various advocacy services or organizations. Even within the limited realm of sex crime prosecutions, the State's approach could warp the pertinence requirement in Rule 803(4) to allow the admission of almost any fact or detail so long as the medical provider testified that it was relevant to address the victim's emotional or psychological needs.

Walton, *Rosa*, and *Cookson* established common-sense exceptions to the guidelines established in *True*. These exceptions must be construed conservatively, at least in regards to Sexual Assault Forensic Examinations, to prevent the evisceration of the long-standing limits to admissability pursuant to Rule 803(4)(A).

CONCLUSION

Counsel relies on his primary Brief regarding the remaining issues raised by Appellee. Otherwise, for the reasons stated herein, Appellant respectfully requests this Court vacate his convictions.

Dated this 30th day of August, 2024 in Portland, Maine.

Respectfully Submitted,
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