THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
Sitting as the Law Court

Law Court Docket Number: KEN-24-125

STATE OF MAINE

v.

AARON ENGROFF

On Appeal from a criminal conviction entered by the Unified Criminal Court sitting in Kennebec County.

Brief for Appellee – The State of Maine

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STATEMENT OF THE CASE

Procedural History

On March 23, 2022, the Defendant, Aaron Engroff, was indicted on four counts of Unlawful Sexual Contact (Class B) and four counts of Unlawful Sexual Touching (Class D). (A. 4.) The Defendant plead not guilty on April 20, 2022. (A. 6.) A dispositional conference was held on November 8, 2022 where no agreement was reached. (*Id.)* The Defendant filed a Motion for Bill of Particulars on December 27, 2022, a hearing was set on February 16, 2023, and the Court denied the Defendant's Motion on March 15, 2023. (A. 6-7.)

The Defendant filed his first request for speedy trial on February 21, 2023. (A. 7.) In April 2023, the Defendant waived his right to speedy trial and sought a continuance and a Rule 17 order to obtain school attendance records to assist with his defense. (A. 7, 43-44.) On June 7, 2023, the Defendant was scheduled for docket call and reasserted his speedy trial right orally before Justice Lipez. (A. 8, 42-48.) During that conference, the State articulated it was prepared for trial, but the Defendant stated he needed the trial specially set to secure witnesses from out of State. (A. 43-48.) The State noted the request may result in a time delay and should be weighed against the Defendant in any speedy trial determination. (A. 46.) The Defendant asserted he was prepared but wanted "time before the jury selection . . .

to just give a time to prepare to subpoena witnesses." *(Id.)* In order to keep the case as a priority, the Defendant's case was set for the Kennebec County "blitz" list to be used as a pre-management trial conference. (A. 47-48.) The "blitz," which included multiple days of intensive judicial settlement conferences, was a statewide attempt by the judicial branch to address the backlog that had become exuberant after the COVID pandemic. (A. 42-48.)

On June 21, 2023, a dispositional conference was held during the "blitz" and no resolution was reached. The matter was set for a conference on July 17, 2023 and continued for trial call on August 9, 2023; however, that date was cancelled by the court. (A. 8.) The court set this matter for jury selection on December 7, 2023; but, that was continued after the Defendant sent a letter on October 26, 2023 indicating he needed specific trial dates to subpoena out of state witnesses. (A. 8-9, 89.) On November 29, 2023, the State's attorney emailed the Clerk's Office requesting an update on the case. (A. 90-94.) The parties were informed by the Clerk's Office the matter was going to be set for January. (A. 91.)

On December 19, 2023, the Defendant filed a Motion to Dismiss arguing his speedy trial rights had been violated. (A. 9, 49-53.) On January 4, 2024, prior to jury selection, the State filed a *motion in limine* pursuant to 16 M.R.S. § 358 regarding the admittance of the Child Advocacy Center (hereinafter "CAC") interview with the Victim. (A. 10.) On January 5, 2024, the Court denied the Defendant's Motion

to Dismiss and a jury was selected. (A. 9, 23-28.) A hearing on the *motion in imine* occurred on January 10, 2024, where Justice Lipez found the State had met the necessary requirements to admit the CAC interview pursuant to 16 M.R.S. § 358. (A. 10, 29-35.)

Prior to trial, the State met with the Victim multiple times. During those meetings, the Victim disclosed information to the State that was exculpatory in nature. Specifically, on January 11, 2024, the State reviewed the CAC interview with the Victim. (A. 63, 78.) While reviewing, the Victim stated she did not remember an incident that she discussed in her CAC interview. (*Id.)* That information was disclosed to Defense Counsel, and after discussion with the court, that portion of the CAC was redacted and not played for the jury. (A. 20-22.) On January 12, 2024, the State disclosed again that the Victim's recollection regarding the location of a specific incident detailed on the CAC video was inconsistent. (A. 63, 78.) That information was provided to Defense counsel within twenty-four hours. (*Id.*) The Defendant was provided this information over a week before the trial began, giving him ample opportunity to prepare to cross-examine the Victim as to these inconsistencies. (A. 11, 63, 78.)

A jury trial was held from January 22, 2024 through January 25, 2024. V (A. 11.) During the trial, the CAC interview was played, and immediately after, the Victim testified in person. (Trial Tr. 67-73 (Jan. 22, 2024).) The Defendant had full

opportunity to confront the Victim through cross-examination. (*Id.* 73-83.) After the trial was completed, the jury returned verdicts of guilty for Counts 1, 2 and 3 and verdicts of not guilty for Counts 5 and 6.[1] (A.11; Trial Tr. 105-107(Jan. 22, 2024).)

After the jury returned its verdict, sentencing was scheduled for March 4, 2024. (A. 12.) In the interim, the Defendant filed a Motion for New Trial, again arguing issues regarding speedy trial and the admission of the CAC video. (A. 11, 75-82.) The Defendant's Motion was denied and a sentencing hearing was held. (A. 11, 20-22, 82.) After rendering sentence, the trial court stayed imposition of the sentence pending this appeal and placed the Defendant on post-conviction bail awaiting a decision from this Court. (A. 13.)

Statement of Facts

On January 5, 2022, Detective Brittany Johnson of the Kennebec County Sheriff's Office started investigating sexual assault allegations that occurred in both West Gardiner and Augusta. (Trial Tr. 102 (Jan. 22, 2024).) The Victim in this case disclosed to her stepmother that the Defendant, her uncle by marriage, sexually assaulted her starting at the age of seven. (State's Ex. 1; CAC Interview.) After making that disclosure, the Victim was brought to the CAC for a formal interview. (Tr. 103 (Jan. 22, 2024).) During that interview, the Victim described she would visit

[1] Prior to trial, the Court dismissed the original Count 4. Due to the dismissal of Count 4 prior to trial, the jury found the Defendant Not Guilty as to amended Counts 4 and 5, but the original indictment listed those charges as Counts 5 and 6. (A. 21.)

the Defendant and his family often between the ages of seven and eleven. (State's Ex. 1; CAC Interview.) The Victim lived primarily with her mother in New Hampshire and would visit her father's family in Maine. (State's Ex. 1; CAC Interview); (Trial Tr. 139-145 (Jan. 22, 2024).) When the Victim would visit, while she and the Defendant were alone, the Defendant forced the Victim onto his lap and touched her vagina, breasts, and thighs. (State's Ex. 1; CAC Interview.)

The Victim described several different specific incidents she remembered where the Defendant touched her inappropriately. (*Id.*) Those incidents occurred both in and out of Kennebec County over several years. (*Id.*) Some of those incidents included the first time the Defendant touched her, which occurred in Penobscot County, two incidents in West Gardiner where the Defendant and Victim were at his home alone, and an incident around Christmas of 2020 in Augusta at a family party. (*Id.*) The Victim explained the assaults stopped occurring once the Defendant and her aunt divorced. (*Id.*) The Victim did not disclose any of the abuse until after the divorce was finalized because she felt unsafe prior to that moment. (*Id.*)

After the CAC interview was completed, Detective Johnson interviewed other family members. Detective Johnson confirmed through speaking to the Victim's mother, aunt, and grandmother that the Victim did visit the Defendant's home often during the relevant age range and there were ample opportunities for the two to be alone. (Trial Tr. 139-145, 156-161, 164-181 (Jan. 22, 2024).) Additionally, the

Defendant's ex-wife confirmed she and the Defendant did live in several homes during the alleged assaults. (*Id.* 194-207, 215-218.) Those homes, dates, and locations were consistent with the allegations made by the Victim. (*Id*.)

At trial, the CAC video of the Victim disclosing the assaults was admitted as a hearsay exception pursuant to 16 M.R.S. § 358 and played for the jury. (*Id.* 68.) Immediately after the video was played, the Victim was called to the stand to testify. (*Id.* 69-82.) As with any cross-examination, the Defendant had the opportunity to question the Victim's statements during the CAC, her direct-examination, and any other prior inconsistent statements. (*Id.* 74-82.) Thereafter, the State called various witnesses to corroborate details of the Victim's allegations. (*Id.* 139-242.)

After the State closed its case-in-chief, the Defense presented their case by calling various witnesses to impeach the Victim's statement and credibility. (Trial Tr. 22-34 (Jan. 23, 2024).) Specifically, two witnesses testified there was no in-person Christmas get-together in 2020 due to the COVID-19 pandemic. (*Id.*) The jury was persuaded by both the State and Defense, finding the Defendant guilty of Counts 1, 2 and 3 and not guilty of Counts 5 and 6. (A.11; Trial Tr. 105-107(Jan. 22, 2024).)

ISSUES PRESENTED

I. Whether the trial court erred in denying Defendant's motion to dismiss based on speedy trial protections?

II. Whether the trial court violated Defendant's right to confrontation by admitting the Victim's statement pursuant to 16 M.R.S. § 358?

III. Whether the trial court violated Defendant's due process rights by admitting the Victim's statement pursuant to 16 M.R.S. § 358?

IV. Whether the trial court erred when admitting the Victim's statement pursuant to 16 M.R.S. § 358?

V. If the trial court did err in admitting the Victim's statement pursuant to 16 M.R.S. § 358, was that error harmless?

SUMMARY OF ARGUMENTS

I. The trial court did not err when it denied the Defendant's Motion to Dismiss due to his own actions in delaying trial. The record is clear that the reason for delay in this case rests on the Defendant's shoulders, as he continuously delayed by asking for specific dates. The right to speedy trial is paramount in the criminal justice system, but those protections do not include a defendant's desire for special date accommodations.

II. The Defendant's rights under the Confrontation Clause were not infringed because the Victim testified and was subject to cross-examination. Both state and federal common law have illustrated that rights under the Confrontation Clause are not absolute. Multitudes of hearsay exceptions have been enacted after taking into consideration certain policy implications that outweigh a defendant's right to confront a witness. Here, 16 M.R.S. § 358 created a fair balance between defendant rights and the protection of child sex victims by allowing admission of CAC interviews while requiring the child be subject to cross-examination.

III. The Defendant's right to due process was not infringed as he was given opportunity to challenge the admissibility of the video statement through the framework of 16 M.R.S. § 358. Additionally, 16 M.R.S. § 358 did not create an unconstitutional ex post facto law as it does not criminalize

conduct not previously illegal, no punishment standards changed, and does not the statute did not impede a defendant's ability to mount a defense.

IV. The trial court did not err when it allowed the CAC video to be admitted under 16 M.R.S. § 358 because procedural evidentiary rules existing at the time of trial are applicable. Therefore, because 16 M.R.S. § 358 created a hearsay exception, that rule of evidence is applicable at the time of the trial, regardless of when the matter was charged.

V. If this Court finds error was committed, the error was harmless. Reversal is improper because said evidentiary admissibility is a nonstructural error and would only require reversal if the Defendant's substantial rights were impacted. The alleged error did not infringe the Defendant's substantial rights because it is not reasonably probable that had the Victim's statement not been admitted under 16 M.R.S. § 358, the outcome of the trial would have changed.

ARGUMENT

I. The trial court did not err in denying Defendant's Motion to Dismiss based on speedy trial protections after properly weighing the necessary factors

Under both state and federal law, there are safeguards protecting a defendant's right to a speedy trial; however, those protections do not require a court to specially set a trial for the exact date requested by a defendant. Appellate review of a trial court's denial of a motion to dismiss is based on an abuse of discretion standard.[2] *State v. Hofland*, 2012 ME 129, ¶ 11, 58 A.3d 1023. Maine Rule of Criminal Procedure 48 describes a defendant's process to assert their right to a speedy trial, protected by both the Maine and U.S. Constitutions. *See* Me. Const. art. I, § 6; U.S. Const. amend. VI. Pursuant to Rule 48, a court may dismiss a criminal case if there

[2] In Defendant's brief, he encourages this Court to review this matter under the standard of clear error. (Blue Br. 19.) This Court has held for over a decade that abuse of discretion is the correct standard for review of a motion to dismiss. *Hofland*, 2012 ME 129, ¶ 11, 58 A.3d 1023. While the State disagrees with this Court applying a different standard, even if the standard of clear error was used, the denial of the Defendant's Motion to Dismiss is still valid.

As noted by this Court,

> Clear error exists and requires reversal of a finding if (1) there is no competent evidence in the record to support it, or (2) it is based on a clear misapprehension by the trial court of the meaning of the evidence, or (3) the force and effect of the evidence, taken as a total entity, rationally persuades to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.
>
> *Doe v. Lindahl*, 2023 ME 28, ¶ 9, 293 A.3d 439 (quoting *Remick v. Martin*, 2014 ME 120, ¶ 7, 103 A.3d 552.).

Here, the trial court clearly articulated the evidence it relied upon in making its decision. That evidence included the docket record, statements and motions by the Defendant, and the Defendant's own waiver of speedy trial rights. (A. 26-28.) The record shows that the evidence was competent, the trial court did not misunderstand the procedural posture, and the finding was not "so against the great preponderance of the believable evidence" for a reversal to be required. *Lindahl*, 2023 ME 28, ¶ 9, 293 A.3d 439. The facts in this case were correctly analyzed by the trial court under any standard as detailed in the body of this brief and reversal is inappropriate regardless of which standard this Court utilizes.

is "unnecessary delay." M.R. Crim. P. 48(b)(1). However, "the right of the accused to have a speedy trial may be waived by his own conduct." *State v. Kopelow*, 126 Me. 384, 386, 138 A. 625 (1927). Said another way, "[t]he right to a speedy trial is a personal privilege which the [defendant] may waive. Delays caused by acts of the [defendant] himself constitute such a waiver." *State v. Hale*, 157 Me. 361, 369, 172 A.2d 631, 636 (1961). Here, if the Defendant had not requested specially set dates, for his own benefit, this case would have gone to trial approximately six months earlier. Clearly, that delay should be held against the party who caused it – the Defendant.

a. <u>The Defendant's speedy trial rights were not violated pursuant to M.R.U. Crim P. 48(b)(1).</u>

While the State appreciates the Defendant's attempts to "trace the broad contours" of M.R.U. Crim. P. 48(b)(1), the rule is both clear and simple. (Blue Br. 20.) Specifically, the rule states "[i]f there is unnecessary delay in bringing a defendant to trial, the court may upon motion of the defendant or on the court's own motion dismiss the indictment, information, or complaint." *Id.* This Court has interpreted Rule 48 numerous times, starting in 1972 with the *O'Clair* case. *State v. O'Clair*, 292 A.2d 186 (Me. 1972). In *O'Clair*, this Court noted that Rule 48 focuses on the issue of "unnecessary delay" but made clear that a trial court may do additional analysis. *Id.* at 192–93. Specifically, a trial court may take into consideration the length of delay, reasons for delay, and any prejudice. *Id.*

Here, the trial court was given discretion whether to determine if unnecessary delay occurred. Justice Lipez did a more through analysis than necessary under Rule 48, which is analyzed in more detail below. Under both analyses, the trial court properly used its discretion to find that any delay did not rise to a dismissal. (A.28.)

b. <u>The Defendant's speedy trial rights were not violated under both the Maine and Federal Constitutions</u>

This Court has held that a "speedy trial analysis requires application of 'a delicate balancing test that takes into account all of the circumstances of the case at hand.'" *State v. Drewry*, 2008 ME 76, ¶ 12, 946 A.2d 981 (quoting *State v. Murphy*, 496 A.2d 623, 627 (Me. 1985)). The balancing test that has been adopted by this Court is based on United States Supreme Court jurisprudence, specifically *Barker v. Wingo*, 407 U.S. 514, 514 (1972). That test includes four factors which must be analyzed to determine if a violation of speedy trial right occurred: the length of the delay, the reasons for the delay, whether there was an assertion of the right, and prejudice. *Hofland*, 2012 ME 129, ¶ 11, 58 A.3d 1023; *see also Winchester v. State*, 2023 ME 23, ¶¶ 25-31, 291 A.3d 707. This Court has found that "each speedy trial claim is fact-sensitive." *Winchester*, 2023 ME 23, ¶ 35, 291 A.3d 707. Additionally, no factor is more determinative than the other; rather, the facts must be "weighed in light of all relevant circumstances." *Id.* ¶ 59. The trial court reviewed these four factors and correctly denied the Defendant's Motion.

i. Length of delay

As noted by this Court, "[t]he ordinary delay associated with the criminal justice process does not result in a speedy trial violation, and an accused cannot make a successful speedy trial claim where the delay is limited in duration unless they point to 'additional circumstances.'" *Winchester*, 2023 ME 23, ¶ 26, 291 A.3d 707 (*quoting State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984).). Additionally, there is no bright-line rule which triggers an automatic dismissal for speedy trial violations. *Id.* ¶ 27.

Here, the Defendant was indicted in March 2022 and went to verdict by jury trial in January 2024. (A. 4-11.) Approximately twenty-two months elapsed between the Defendant being charged and going to trial. However, as noted in the record, the Defendant waived his right to a speedy trial in April 2023 and did not reassert the right until June 2023. (A. 43-48.) Therefore, the Defendant has argued that the true delay he finds concerning is nineteen months. (Blue Br. 28, 31.) While that delay could be considered lengthy, reviewing length alone is not sufficient to dismiss this matter. *Winchester*, 2023 ME 23, ¶¶ 35, 59, 291 A.3d 707. This is especially true because it was the Defendant's own actions that delayed the trial.

ii. Reasons for the delay

Reasons for delay are case specific and must be attributed either to the accused or the State. *Winchester*, 2023 ME 23, ¶ 28, 291 A.3d 707. It is unmistakable in the

record that the State never sought any delay in this case. (A. 44, 66.) The Defendant, on the other hand, was not prepared for trial on numerous occasions. (A. 23-26; 45-46, 89.)

This matter was set for its first docket call in April 2023. The Defendant made clear on the record that he waived his right to a speedy trial to assist in his defense. (A. 43-44.) When the case returned for docket call in June 2023, the Defendant stated he needed a specially set date. (A. 45-46.) In October 2023, the trial court set this matter for jury selection in December 2023. (A. 89.) Again, the Defendant sought to delay the trial. As illustrated in his letter dated October 26, 2023, the Defendant stated trial in December would not work for him because he needed specific trial dates. (*Id.*) Due to the Defendant again not being ready for trial, the court reset the matter to January and made clear specially set dates could not be accommodated. (*Id.*)

As detailed in the record, the trial court found that some of the delay weighed against the State due to court scheduling issues and some of the delay weighed against the Defendant due to his need for certain dates. (A. 28.)Specifically, the court made the following findings:

> [I]t looked like both parties in June indicated they were ready to go forward[;] it was really the Court's schedule over the next couple of months that prevented the case from being reached, and that really continues until it was placed on a Docket Call list, and the defendant was noticed sometime in October that he was on for December.

> So I find that the period of time between June and October, although the State was ready to go, certainly didn't do anything itself to delay the trial. The way the analysis works is, even the Court delays are supposed to weigh against the State. I find that time does weigh against the State.
>
> But then in October the defendant did file a motion indicating he needed it to be specially set. The Court often is not in a position to specially set cases, the expectation is that parties will appear for jury selection ready to go, we have a trailing list, we certainly entertain requests to be specially set, but I find that the request, which then further delayed the trial, should be held against the defendant. So the period of time from October to now I find should be weighed against the defendant.
>
> So, in terms of the reasons for the delay, it is really split between some of it due to the defendant, some due to the Court's schedule, which has to weigh against the State. I will say that Court delays which weigh against the State, the case law indicates that sort of a – in weighing the factors given less weight because it is not anything the State did to try to delay.
>
> (*Id.*)

The trial court correctly stated that part of the delay was due to scheduling conflicts the court had – specifically a potential murder trial in September of 2023. (A. 26.) Per *Winchester*, "delays over which prosecutors and courts have little or no control are given less weight," although such delays do weigh against the State. *Winchester*, 2023 ME 23, ¶ 45, 291 A.3d 707. However, it cannot be minimized that the only reason this case lost priority, and was later impacted by the court's schedule, was the Defendant's own actions. The Defendant was a priority, had multiple opportunities to go to trial earlier than January 2024, but he was not ready because

he needed specially set dates. As noted by the trial court, the judicial system does its best to accommodate all parties, but that is not always possible. The Defendant continually delayed trial for the purposes of his strategy and need for specific dates. It is not fair, nor a basis for a dismissal, to seek dismissal due to the delay you requested on a regular and ongoing basis.

iii. Assertion of the Right

Case law makes clear a defendant must assert his right to a speedy trial to seek a dismissal if undue delay occurs. *Id.* ¶ 29. The State agrees the Defendant did eventually assert his right to speedy trial after the case had been pending for eleven months. (A.7.) However, despite the assertion, it should not be ignored by this Court that the Defendant did waive said right.

iv. Prejudice

This Court has frowned upon judicially created bright line rules as to speedy trial guidelines. *Id.* ¶ 27. However, it has found that "[t]he longer the delay, the greater the presumptive or actual prejudice to the [accused] in terms of [their] ability to prepare for trial and the restrictions on [their] liberty." *Id.* ¶ 54 (quoting *United States v. Taylor*, 487 U.S. 326, 340(1988)). Thus, when analyzing the prejudice factor, this Court has endorsed a balancing test. *Id.* ¶ 30.

Specifically, this Court has "identified three harms that the right to a speedy trial seeks to prevent: (1) undue and oppressive incarceration prior to trial; (2) the

accused's anxiety and concern accompanying public accusation, and (3) impairment of the accused's ability to mount a defense." *Id.* The most significant of the harms has been identified as pretrial incarceration. *Id.* ¶ 31. This is not an issue here as the Defendant was granted bail on March 2, 2022 when he was indicted. (A. 5.) As for the second prong, it is fair to say the Defendant would face anxiety and concerns accompanying public accusation as this case was pending. However, that is not unique to this Defendant. The Defendant has not adequately showcased a significant impediment other than the public being aware of his charges. As for step three, this Court should analyze whether the admittance of the CAC video impaired the Defendant's ability to mount a defense.

The Defendant argues the trial court failed to take into consideration that since the trial was held in January 2024, and 16 M.R.S. § 358 went into effect in October 2023, he was prejudiced by not having his trial before the new law went into effect.[3] (A. 71-74.) This assertion fails. The evidence and ability to mount a defense never changed for the Defendant. Since the inception of this case, the Defendant had a copy of the CAC video. There are numerous rules of evidence which could have led to the admissibility of that video regardless of 16 M.R.S. § 358. While the State agrees 16 M.R.S. § 358 allows the CAC to come into evidence in a new manner, it

[3] Defendant alleged that Justice Lipez handled only the motion to dismiss regarding speedy trial and did not decide as to the admittance of the CAC. (Blue Br. 29, n 6.) This is not completely accurate. Justice Lipez found the State had met three of the requirements of 16 M.R.S. § 358, but deferred to Justice Murphy as to issues of M.R. Evid. 403. (A. 29-35.)

could have been admitted in a number of different ways. The Defendant still had the necessary evidence to mount a defense against the CAC statement regardless of any alleged delay.

c. Under all of the relevant circumstances, the trial court properly denied the Defendant's motion to dismiss

In many ways, the State and Defendant agree on some foundational arguments made in his brief. Both the Court and the State are aware of backlogs resulting from the COVID-19 pandemic. However, what happened in this case is not that the Defendant demanded a speedy trial and he was not given the opportunity to have that trial. What occurred is the Defendant waived his right to a speedy trial, reasserted that right, and when given options for trial dates, those dates did not work for him and his trial strategy. That is not a constitutional speedy trial violation.

The Constitution guarantees a defendant the right to a speedy trial. The Constitution does not promise a trial that happens only on Mondays and Tuesdays because that is what works for your schedule. If the Defendant's arguments are to be accepted by this Court, trial courts in the State of Maine would lose all ability to manage their own schedules and would be beholden to the whim of every defendant as to when their trial should begin. The trailing docket is fast and ever moving. If a defendant removes himself from the trial list, it undoubtedly creates a delay due to logistical concerns. It is clear the Defendant was not prepared for trial on numerous

occasions – as the trial court correctly found when it denied the Defendant's Motion. (A. 28.)

II. The trial court did not violate the Defendant's right to confrontation by admitting the Victim's statement pursuant to 16 M.R.S. § 358 because the Victim was confronted through cross-examination.

A criminal defendant has the right to test the reliability of the government's evidence through confrontation of witnesses by conducting cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). The Maine Constitution, similar to its federal counterpart, protects the right of a criminal defendant "[t]o be confronted by the witnesses against" him. Me. Const. art. I, § 6; U.S. Const. amend. VI. However, both this Court and the Supreme Court have held that the right of confrontation may be balanced against the psychological protection of child sex victims. *Maryland v. Craig*, 497 U.S. 836 (1990); *State v. Adams*, 2019 ME 132, 214 A.3d 496.

a. <u>The Confrontation Clause is not absolute.</u>

In 1990, Justice O'Connor authored the majority opinion of *Maryland v. Craig*, wherein she held that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Craig*, 497 U.S. at 853-54. In that case, a child sex victim had been permitted to testify by one-way television. *Id.* at 840-41. The statute in Maryland allowed this only if a trial

judge found that forcing the child to testify in front of the defendant would "result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.* at 841-42. The Supreme Court found the allowance of the child victim to testify outside the presence of the defendant, by one-way video, was allowable despite the protections of the Confrontation Clause. *Id.* at 846-48. The Maryland statute required "[t]he child witness . . . be competent to testify and . . . testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Id. at* 851.

After reviewing the Maryland statute, the Supreme Court held "we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant . . . ." *Id.* at 847–48 (emphasis in the original). The Supreme Court compared this finding with other hearsay exceptions, like coconspirator statements being admissible at trial without any face-to-face confrontation. *Id.* at 847-48. The Supreme Court affirmed "the importance of face-to-face confrontation with witnesses appearing at trial, [but they could not find] that such confrontation is an indispensable element of the Sixth Amendment's guarantee." *Id.* at 849-50.

b. Hearsay exceptions do not infringe the Confrontation Clause

This Court has made similar findings in balancing the protections of the Confrontation Clause and the psychological wellbeing of child sex victims, specifically in *State v. Adams*. In *Adams*, the child sex victim was called to testify, but struggled to remember the abuse that was the subject of trial. *Adams*, 2019 ME 132, ¶ 7, 214 A.3d 496. After argument, the trial court found the prosecution could admit the CAC video as a past recollection recorded under M.R. Evid. 803(5). *Id.* ¶ 8. On appeal, the defendant argued his right to confrontation was violated because the child victim's lack of memory led to the admission of the CAC video, thus inhibiting his ability to effectively cross-examine the victim. *Id.* ¶ 19.

This Court found the right to confrontation does not equal a defendant's perfect witness for the purposes of cross-examination. *Id.* ¶ 21. Specifically, this Court held "[w]hen the declarant *is* available for cross-examination at trial . . . a defendant's Sixth Amendment right to confront the witness is *not* compromised, regardless of the strength of the declarant's memory." *Id.* (emphasis in original). Regardless of the reasons for the admission of the CAC video, when it came to the issue of confrontation, it did not matter how the child victim testified, what mattered was the fact that the child did in fact testify and cross-examination occurred. *Id.* ¶¶ 21-22.

The statute at issue here, 16 M.R.S. § 358, creates a hearsay exception regarding CAC forensic interviews of child victims. However, that exception can only be utilized if the State files a *motion in limine* seeking said admission and a hearing is held by the court. *Id.* At that *motion in limine* hearing, the court must ensure that the video meets the following criteria:

> A. The interview was conducted by a forensic interviewer;
> B. Statements made by the protected person during the forensic interview were not made in response to suggestive or leading questions;
> C. A relative of the protected person was not present in the room during the substantive phase of the interview;
> D. An attorney for any party in a proceeding with the protected person was not present in the room with the protected person during the interview;
> E. The recording is both visual and audio;
> F. The recording is a fair and accurate representation of the statements made by the protected person and has not been altered except for purposes of admissibility;
> G. In a criminal matter, the protected person is available to testify or be cross-examined by any party and is called as a witness by the party offering the recording in evidence immediately following the presentation of the recording to the trier of fact and made available for cross-examination, unless all other parties expressly waive the requirement that the witness testify; and,
> H. The portion of the interview to be admitted in evidence is relevant pursuant to the Maine Rules of Evidence, Rule 401, and is not otherwise inadmissible under the Maine Rules of Evidence.

Id.

In Defendant's brief, there is significant legislative interpretation regarding the words "with" and "by" when comparing the Maine and Federal Constitutional protections as to confrontation. (Blue Br. 34-35.) However, that issue is not relevant

to this case. The Defendant was both confronted "by" and "with" the child victim in this case through direct and cross-examination. (Trial Tr. 67-73 (Jan. 22, 2024).)

The Defendant's assertion that the State's direct examination was limited does not change the fact the Victim was called to testify and did so both directly and on cross. (Trial Tr. 67-73 (Jan. 22, 2024).) During that direct, the Victim identified the Defendant in person, stated that she had been to the CAC where she detailed the Defendant abused her, and that her statements at the CAC were true. (*Id.*) Thereafter, the Victim was open for a full confrontation by the Defendant and was in fact cross-examined. (*Id.*) Through that cross-examination, the Defendant was able to question the Victim regarding her ability to remember certain dates, events, and create reasonable doubt in front of the jury. (*Id.*) The Defendant's cross was not limited by the State's direct in any way.

The Defendant argues that robust direct testimony evidence is a must in all criminal cases. (Blue Br. 34-37.) That is simply not true. This Court found in *Adams* admission of a CAC video does not hinder the Confrontation Clause, if that testimony is admissible by a hearsay exception, like 16 M.R.S. § 358. *Adams*, 2019 ME 132, ¶¶ 7, 19-21, 214 A.3d 496. A robust direct was not required in *Adams*, and should not be required here. If the Defendant's argument is accepted it would require the State, on direct examination, to elicit all the testimony the Defendant requests;

regardless of numerous hearsay exceptions, just like 16 M.R.S. § 358.[4] It is not, and should not, be up to the defense how the State presents their case.

c. <u>16 M.R.S. § 358 is consistent with similar laws throughout the nation</u>

Focusing on 16 M.R.S. § 358 itself, the balance the Maine Legislature created in enacting this law takes into account both defendant rights and child victim protections. This is not a situation where a child sex victim is doing their full testimony by video, never stepping foot in a courtroom, and never directly facing their perpetrator. Rather, pursuant to 16 M.R.S. § 358, the child victim must come into the courtroom, sit before their abuser, and not only testify, but also be confronted by the accused. That is exactly what happened here.

The Defendant asserts that without intervention by this Court, where he asks for 16 M.R.S. § 358 to be deemed unconstitutional, the State of Maine will be faced with the evisceration of trials as we know it. (Blue Br. 33.) However, the State of Maine is far behind the rest of the country when it comes to statutory exceptions regarding child victim testimony and has been for decades. *See* Robert J. Peters, et al., *Child Statement and Forensic Interview Admissibility*, National Children's Alliance (2022), Zero Abuse Project (search for "Child Statement and Forensic Interview Admissibility 2022") (last visited Sep. 21, 2024)

[4] It cannot be ignored that if this Court finds that a hearsay exception, like the one established by 16 M.R.S. § 358, violates the Confrontation Clause, this Court would be overturning its conclusion in *Adams*.

(**Massachusetts** - statements of children under ten are admissible without child being available to testify; M.G.L.A. 233 § 83); (**New Hampshire** – permits videotape testimony of a child under sixteen if testifying will cause emotional strain; RSA § 517:13a); (**Connecticut** – allows for admission of statements made by children under twelve if certain factors are met; additionally, statutory law states CAC video interviews do not violate the Confrontation Clause so long as the child is available for cross-examination; Conn. Gen. § 54-861); (**California** – children under sixteen may have preliminary hearing testimony recorded and used as evidence at trial if the court finds further testimony will cause trauma; Cal. Penal Code § 1346; CAL EVID. § 1293; additionally, statements made by children under twelve are admissible, as a hearsay exception, if certain findings are made; CA. EVID. § 1228; CAL EVID. § 1360); (**Colorado** – hearsay statements by children under thirteen are admissible if found reliable; C.R.S.A. § 13-25-129); (**Florida** – enables prosecution to introduce videotaped testimony of child if defendant is permitted to view testimony at time of taping, but the child cannot see or hear the defendant; Fla. Stat. § 92-53); (**Texas –** allows for admission of child statements if child is available at trial to be cross-examined or defendant had a prior opportunity to conduct cross; Tex. Code Crim. Proc. Ann. Art. 38.071); (**Alabama -** allows child testimony by closed circuit television outside the courtroom and not in the presence of the defendant; Ala. Code § 15-25-2, 15-25-31, 15-25-32); (**Alaska -** permits child

testimony by closed circuit television or one-way mirrors; Alaska Stat. § 12.45.046; additionally allows admission of CAC video statements; AK R Rev. Rule 801(d)(3)); (**Missouri** – authorizes admissibility of child statements if child testifies at trial, is found to be unavailable, or the court finds testifying would cause significant emotional or psychological trauma; Mo. Rev. Stat. § 491-075).[5]

[5] *See also* similar statutory and evidentiary rules enacted by several other states: (**Arizona** - Ariz. Rev. Stat. Ann. § 13-1416; Ariz. Rev. Stat. § 13-4253); **Arkansas** – Ark. Code Ann. § 16-44-203; AR R REV Rule 803(25); AR R REV Rule 804(b)(7); **Delaware –** 11 Del. C. § 3511; 11 Del. C. § 3513; **Georgia –** O.C.G.A. § 17-8-55; O.C.G.A. § 24-8-820; **Guam –** 19 GCA § 13312; **Hawaii –** HRS chap. 626, HRS Rule 616; HRS §626-1, Rule 804(6); **Idaho –** Idaho Code § 19-3024; **Illinois –** 725 ILCS 5/106B-5; 725 ILCS 5/115-10; **Indiana** – Ind. Code Ann. § 35-37-4-6; Ind. Code Ann. § 31-34-13-2; Ind. Code Ann. § 31-34-13-4; **Iowa –** Iowa Code § 915.38; **Kansas –** Kan Stat. Ann. § 22-3434; KSA § 60-460(dd); **Kentucky –** KY. Rev. Stat. Ann. § 421.350; **Louisiana –** LA. Rev. Stat. Ann. § 15:440.2; **Maryland –** Md. Criminal Procedure Code Ann. § 11-303; Md. Criminal Procedure Code Ann. § 11-304(e); **Michigan –** Mich. Comp. Laws Serv. § 600.2163a; Mich. Comp. Laws Serv. § 712A.17b; MI R REV MRE 803A; **Minnesota –** Minn. Stat. § 611A.90; Minn. Stat. § 634-35; **Mississippi –** Miss. R. Evid. 617; Miss. Code. § 99-43-101; Miss. R. Evid. 803(25); **Montana** - § 46-16-227, MCA; § 16-16-228, MCA; § 46-16-229, MCA; § 46-16-22, MCA; **Nebraska –** R.R.S. Neb. § 29-1926; **Nevada –** Nev. Rev. Stat. Ann. § 174.227; Nev. Rev. Stat. Ann. § 51-385; **New Jersey –** N.J. Stat. § 2A:84A-32.4; NJ R. Evid. N.J.R.E. 803(27); **New Mexico –** N.M. Stat. Ann. § 30-9-17; **New York –** N.Y. Crim. Proc. Law. § 65.10; N.Y. Crim. Proc. Law. § 65.20; N.Y. Crim. Proc. Law. § 190.32; **North Carolina –** N.C. Gen. Stat. § 15A-1225.1.; **North Dakota –** N.D. Cent. Code § 31-04-04.1.; N.D. R. Rev. Rule 803(24); **Ohio –** Ohio Rev. Code Ann. § 2945.481; Ohio Rev. Code Ann. § 2945.49; OH. STAT. RV. Evid. R. Rule 807; **Oklahoma –** 10A Okla. Stat. Ann. § 1-4-505; 10A Okla. Stat. Ann. § 1-4-506; 12 Okla. Stat. Ann. § 2803.1; **Oregon –** ORS § 44.547; O.R.S. § 40.460 Rule 803(24); **Pennsylvania –** 42 PA. Cons. Stat. § 5985.1; **Puerto Rico –** 34A L.P.R.A. App. II, Rule 131.2; **Rhode Island –** R.I. Gen. Laws § 11-37-13.2; R.I. Gen. Laws § 14-1-68; **South Carolina –** S.C. Code Ann. § 17-23-175; **South Dakota –** S.D. Codified Laws § 23A-12-9; SD ST § 19-19-806.1; **Tennessee –** Tenn. Code Ann. § 24-7-117; Tenn. Code Ann. § 24-7-123; TN R REV Rule 803(25); **Utah –** Utah Code Ann. § 62A-4a-414; **Virgin Islands –** V.I. Code Abb. Tit. 5, § 3519; **Vermont –** V.R.E. Rule 804a; V.R.E. Rule 807; **Virginia –** VA R S CT Rule 2:803(23); VA R S CT Rule 2:803:1; **Washington –** Rev. Code Wash. (ARCW) § 9A.4.120; Rev. Code Wash. (ARCW) § 9A.44.150; **West Virginia –** W. Va. Code § 62-6B-3; W. Va. Code § 62-6B-4; **Wisconsin –** Wis. Stat. Ann. § 967.04; Wis. Stat. Ann. § 908.08; **Wyoming –** Wyo. Stat. Ann. § 7-11-408; and, **Federal Legislation** - 18 U.S.C.S. § 3509(b).) Robert J. Peters, et al., *Child Statement and Forensic Interview Admissibility*, National Children's Alliance (2022), Zero Abuse Project (search for "Child Statement and Forensic Interview Admissibility 2022") (last visited Sep. 21, 2024).

Statutory laws have been enacted in a majority of states to protect the psychological wellbeing of child sex victims. This is not a new legal concept. In fact, it is clear that the passing of laws like 16 M.R.S. § 358 has not "eviscerated" trials at the national level. Rather, what laws like 16 M.R.S. § 358 do is follow the guidance of this Court and the Supreme Court by creating a legal framework that properly balances the protections of the Confrontation Clause and the physiological wellbeing of child sex victims. Therefore, this Court should hold, as it has in the past and consistent with other courts, that the right to confrontation is not absolute, and 16 M.R.S. § 358 does not violate the Maine or Federal Constitutions.

III. The trial court did not violate Defendant's due process rights by admitting the Victim's statement pursuant to 16 M.R.S. § 358

Both the Maine and Federal constitutions uphold the foundational principal that "[n]o person shall be deprived of life, liberty, or property without due process of law. . . ." Me. Const. art. I, § 6-A; U.S. Const. amend. XIV, § 1. Due process violations are reviewed de novo. *State v. Williamson*, 2017 ME 108, ¶ 21, 163 A.3d 127. Due process requires that a defendant receive a fundamentally fair trial; wherein he is able to properly challenge the State's case and evidence by both pre-trial hearings and the trial itself. *See Williamson*, 2017 ME 108, ¶ 22, 163 A.3d 127 (holding a defendant's right to due process is violated if exculpatory evidence is

withheld from him); *State v. Farley*, 2024 ME 52, 319 A.3d 1080, n. 18 (finding that a defendant has the right to challenge admittance of involuntary statements as a due process right); *State v. Lipscombe*, 3 ME 70, ¶ 12, 304 A.3d 275 (determining that prosecutorial misconduct can violate a defendant's right to due process); and, *State v. Bennett*, 2015 ME 46, ¶ 22, 114 A.3d 994 (affirming that a defendant's right to due process can be violated if their sentencing is based on facts that are not inherently reliable.).

a. <u>The Defendant was afforded the right to challenge admissibility of the Victim's statement, through the framework of 16 M.R.S. § 358, thus protecting his right to due process</u>

In Defendant's brief, he argues his due process rights were violated because 16 M.R.S. § 358 violated his retroactive "vested rights." (Blue Br. 41-43.) The State agrees with the Defendant that this Court has never held that "vested rights" relate to anything other than property based rights. (*Id.* 42.) Rather, the issue of due process, as argued by trial counsel, was about the idea of fundamental fairness regarding the admissibility of the CAC video. (A. 31.)

The Defendant's due process rights were not violated because prior to admission of the CAC video a full evidentiary hearing was held. At that hearing, the CAC video was found to meet the factors outlined in 16 M.R.S. § 358. (A. 21, 29-35.) Additionally, the CAC video was further limited by the trial court reviewing the interview and applying the Maine Rules of Evidence, specifically rules 401 and 403.

(A. 21.) This led to the trial court restricting significant portions of the video that was ultimately shown to the jury. (*Id.*)

Unlike the examples outlined above, the admission of the CAC video did not come about by discovery being withheld, prosecutorial misconduct, nor any other basis relevant to a due process violation. Rather, the structure of 16 M.R.S. § 358 allowed for the Defendant to argue against the admission of the CAC video, thus ensuring his right to due process under both the Maine and Federal Constitution. By the Defendant having ample opportunity to make challenges to the admission of the CAC video, through the framework created by 16 M.R.S. § 358, no due process violation occurred.

b. <u>Title 16 M.R.S. § 358 does not infringe the principles of ex post facto jurisprudence.</u>

It is well known that criminal defendants have certain protections regarding ex post facto laws, otherwise known as retroactive legislation. *State v. Letalien*, 2009 ME 130, ¶ 19, 985 A.2d 4. "The United States Constitution directs: '[n]o State shall ... pass any ... ex post facto Law' . . . . Similarly, the Maine Constitution provides, '[t]he Legislature shall pass no ... ex post facto law.'" *Letalien*, 2009 ME 130, ¶ 16, 985 A.2d 4; *see also* U.S. Const. art. I, § 10, cl. 1; Me. Const. art. I, § 11. With that, this Court has created a test establishing that an ex post facto violation only exists:

> i) if the new statute punishes as a crime an act that was innocent when done, or ii) if it makes more burdensome the punishment for a crime after its commission, or iii) if it deprives one charged

> with crime of a defense available according to law at the time the act was committed.

Letalien, 2009 ME 130, ¶ 19, 985 A.2d 4.

As applied to this matter, use of 16 M.R.S. § 358 against the Defendant does not violate ex post facto case law. First, 16 M.R.S. § 358 does not make the acts conducted by the Defendant (unlawful sexual contact and unlawful sexual touching) illegal as they were already a crime prior to the passing of the law. *Id.* Next, the Defendant's sentencing or "punishment" is not impacted by 16 M.R.S. § 358 as the statute does not deal with punishment in any way. *Id.* Finally, 16 M.R.S. § 358 did not deprive the Defendant of any defense. The Defense argued that the Victim fabricated the assaults and the conduct never happened. This was a defense that existed before the passing of 16 M.R.S. § 358, existed once it was passed, and still exists now. *Id.*

Diving even deeper into the third prong, at trial and at times in Defendant's brief, the issue of the CAC being admitted as a hearsay exception was illustrated as an impediment to preparing a proper defense. (Blue Br. 29.) While the State agrees that 16 M.R.S. § 358 created a new method for the admissibility of the CAC video, there were already numerous ways for the video to be admitted into evidence. As noted in *State v. Adams*, depending on the facts, a CAC video can be admitted as past recollection recorded. 2019 ME 132, ¶¶ 19-22, 214 A.3d 496. This is not a situation where, but for 16 M.R.S. § 358, the CAC video would not have been

admissible. For example, the video could have been admissible pursuant to the following:

- M.R. Evid. 801(d)(1)(A) – Prior Inconsistent Statement;
- M.R. Evid. 801(d)(1)(B)(i)-(ii) – Prior Consistent Statement;
- M.R. Evid. 803(3) – Then-existing mental, emotional, or physical condition; and,
- M.R. Evid. 803(5) – Recorded Recollection.

The idea that 16 M.R.S. § 358 unfairly inhibited the Defendant from preparing a defense – under ex post facto laws or due process – is not accurate. Section 358 did not create a new crime, did not impact any sentence that could be imposed, and did not deprive the Defendant of any defenses. Therefore, the Defendant's right to due process was not infringed, rather it was taken into account in the language of 16 M.R.S. § 358.

IV. The trial court did not error by admitting the Victim's statement pursuant to 16 M.R.S. § 358 because the statute simply established a new exception to the hearsay rule. The procedural evidence rules in effect at the time of trial apply.

a. Justice Lipez correctly found the rules of evidence that existed at the time of trial are applicable

The trial court did not error when it admitted the CAC video pursuant to 16 M.R.S. § 358, because subsection three creates a hearsay exception, a procedural evidentiary rule. Procedural evidentiary rules that are in effect at the time of the trial control. M.R. Evid. 101(a) outlines the applicability of the rules, and clearly states that "these rules apply to all actions and proceedings . . . ." The rule goes on to detail

when the rules do not apply, and none of those exceptions indicate there is any restriction of certain rules being used at certain times. M.R. Evid. 101(b).

As detailed above, criminal defendants do have protections from being held responsible for crimes that are retroactive in nature. *Letalien*, 2009 ME 130, ¶ 19, 985 A.2d 4. However, the ex post facto analysis does not apply to changes in procedural or evidentiary rules. The Supreme Court faced this question in *Carmell v. Texas*, where a statute was passed changing the state's burden of proof in cases involving sex victims. *Carmell v. Texas*, 529 U.S. 513, 517-19 (2000). Specifically, Article 38.07 changed a previous burden of proof standard, allowing for a victim's testimony alone, without corroborating evidence, to be enough to attain a conviction. *Id.* The Supreme Court vacated the defendant's conviction because they were concerned by the "amended law [changing] the quantum of evidence necessary to sustain a conviction." *Id.* at 530.

This is distinctly different from the case at bar. The burden of proof was not lessened, testimonial requirements did not change, and no issues of punishment were altered. Rather, the trial court simply held "the Court shall apply the Rules of Evidence that are in effect at the time of trial." (A. 35.) It is improper to conflate the issues of retroactivity when it comes to evidentiary rules, because the law itself is not changing. Rather, the presentation of facts is all that changes. Therefore, the trial

court correctly admitted the CAC video by applying the rules of evidence that existed at the time of trial.

V. If this Court finds the trial court did error, the convictions should none the less be affirmed because any error was harmless

When a law substantively changes a criminal statute, the newly enacted legislation must note 1 M.R.S. § 302 in order to be applicable. *State v. Beeler*, 2022 ME 47, ¶ 1 n.1, 281 A.3d 637. Section 302 states that "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby." *Id.* However, "[t]his general rule may be overcome . . . if the new legislation expressly cites section 302 or explicitly states an intent to apply to pending proceedings." *Id.*

In the original version of 16 M.R.S. § 358, there was no citation to Section 302 indicating the statute would apply to pending matters. Once this became apparent, the legislature quickly amended 16 M.R.S. § 358 to include Section 302, showing the original intent was for 16 M.R.S. § 358 to apply to pending cases. *See* 16 M.R.S. 358(5) (2024), *amended by* H.P. 1478 – L.D. 2290 (emergency, effective Apr. 23, 2024). If this Court finds the trial court erred in admitting the CAC video pursuant to 16 M.R.S. § 358 prior to its amendment, this Court should apply a harmless error standard.

Pursuant to M.R. Crim. P. 52, there are two forms of error that can be addressed by this Court. Obvious errors affect "substantial rights" while harmless

errors do not. *Id.* "[O]bvious error [is] 'a seriously prejudicial error tending to produce manifest injustice.'" *State v. Pabon*, 2011 ME 100, ¶ 18, 28 A.3d 1147 (quoting *State v. Perry*, 2006 ME 76, ¶ 15, 899 A.2d 806). Harmless error is any other error that may have occurred that does not impact any "substantial rights." M.R. Crim. P. 52(a). If no substantial rights were affected, any error will be "disregarded" as harmless. *Id.* No substantial rights were impeded by the CAC video being admitted pursuant to 16 M.R.S. § 358; therefore, this Court should disregard any possible error as harmless.

a. <u>The trial court's admissibility of the CAC video is a nonstructural error</u>

When reviewing a matter under the harmless error standard, this Court must first determine if the error is structural or nonstructural. *State v. Judkins*, 2024 ME 45, ¶ 19, 319 A.3d 443. A structural error is one that impacts the framework of a trial, and not just the trial process itself. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Examples of a structural error include a defendant being completely deprived of trial counsel or having a bias judge. *See Gideon v. Wainwright*, 372 U.S. 335 (1963), *Tumey v. Ohio*, 273 U.S. 510 (1927). Nonstructural errors range from admission of involuntary confessions to hearsay statements of non-testifying co-defendants. *Fulminante*, 499 U.S. 279 at 311. The Supreme Court has even found that some nonstructural errors may have a "dramatic effect on the course of a trial." *Id.* at 312.

Here, the trial court admitting the CAC video pursuant to 16 M.R.S. § 358, prior to the amendment including 1 M.R.S. § 302, is nonstructural. This is not a situation where the Defendant did not have trial counsel, had a biased judge, or another fact that was so foundational it would be detrimental to the trial. Instead, the trial court admitted a hearsay statement, just as other nonstructural examples mentioned above. Said hearsay statement could have been admitted under 16 M.R.S. § 358, or another hearsay exception, and it would never rise to the level of dismantling the fundamental trial process. Therefore, just like the Supreme Court held for other hearsay statements, admission of the CAC video pursuant to 16 M.R.S. § 358 is a nonstructural error.

b. <u>This Court should conduct a general harmless error analysis</u>

"For nonstructural errors, there are two standards for determining whether a trial error is harmless—one applies generally, and the other applies to errors of constitutional magnitude." *Judkins*, 2024 ME 45, ¶ 20, 319 A.3d 443. In comparing the two tests, this Court has held:

> A constitutional harmless error analysis differs from a general harmless error analysis. Under a harmless error standard, reversal is required only if the error affects the substantial rights of the defendant. Under a constitutional harmless error standard, reversal is required unless a court is confident beyond a reasonable doubt that the error did not contribute to the guilty verdict. *Id.*

Furthermore, this Court has found that "[t]he less stringent general standard applies to evidentiary errors, incorrect jury instructions, and improper prosecutorial

comments that do not violate constitutional rights." *Id.* ¶ 21. Here, since the issue is admissibility of evidence, also know as "evidentiary errors," the general harmless error standard applies. *Id.* Applying that general standard here, reversal is not required because no substantial rights of the Defendant were impacted.

c. <u>The Defendant's substantial rights were not infringed</u>

"The Supreme Court has recognized that an error affects a criminal defendant's substantial rights if the error was sufficiently prejudicial to have affected the outcome of the proceeding." *Pabon*, 2011 ME 100, ¶ 34, 28 A.3d 1147. To determine if an error impacted the outcome, this Court must find there is a "reasonable probability" that but for the error, the trial would have ended differently. *Id.* ¶ 36.

Here, in order to find the Defendant's substantial rights were infringed, this Court must find that it is *reasonably probable* the outcome of the trial would have been different if the CAC video had not been admitted. That cannot be found on this record. The CAC video could have come in under another hearsay exception, the victim may have testified in more detail on direct, or additional corroborating evidence could have been admissible through other witnesses. There were numerous methods in which the evidence could have come in, making it impossible for this

Court to find that had 16 M.R.S. § 358 not been utilized, the outcome could have reasonably been different.[6]

It is important to note that if this Court were to reverse, the Defendant's next trial would not substantively change. Title 16 M.R.S. § 358 has been amended and applies to all pending cases. Unless this Court diverts from the nation and finds 16 M.R.S. § 358 to be unconstitutional, this Court would be forcing the Defendant and victim to have the exact same trial a second time, with the CAC video being admissible under the same provision the trial court applied in January 2024. That, in and of itself, shows how this error is harmless.

[6] The Defendant asserts that his substantial rights were infringed because there was a split verdict, there was disclosure of exculpatory information based on witness preparation prior to trial, and the Defendant was forced to waive his speedy trial rights or forfeit the opportunity to "fully vet the CAC interviewer." (Blue Br. 46.) None of these rise to reversal under the "reasonable probability" requirement. *Pabon*, 2011 ME 100, ¶ 36, 28 A.3d 1147. First, split verdicts are common, and there is no way to know that if the CAC video was not admitted, the verdict would have changed Second, as to the exculpatory information that came about in witness preparation, that information would have been discoverable regardless of the admittance of the CAC video. Finally, the Defendant had two opportunities to cross-examine the forensic interviewer and "vet" her as to her qualifications. At both the *motion in limine* hearing, and at trial, the forensic interviewer was available to be cross-examined, and was in fact confronted. (A. 28-35; Trial Tr. 65-67).) Additionally, the Defendant had the CAC video from the outset of this case, and as detailed above, the video could have come into evidence in a multitude of ways. None of these assertions infringed the Defendant's substantial rights.

CONCLUSION

For the aforementioned reasons, the State requests this Court to affirm the lower court's rulings and uphold the convictions against the Defendant.

Date:

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I, Shannon Flaherty, Assistant District Attorney, hereby certify that one (1) copies of the within Brief for Appellant were mailed to Appellant's Attorney addressed as follows:

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The State has sent a native .pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov).

Dated: _____

_____
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