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

LAW COURT DOCKET NO. Pen-24-37

STATE OF MAINE
Appellee

v.

SCOTT HAVENS
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

This is a simple, one-issue case. Defendant's granddaughter accused him of "sexual acts" and "sexual contact," mostly when she was seven years old. The allegations were mostly generalized, lacking definiteness. In fact, it was quite difficult to tell from the evidence even how many times these incidents were to have occurred. Amidst deliberations, the jury asked the court for clarity about the dates alleged in the indictment – an indication that jurors were struggling to distinguish separate incidents. The court's instruction – that the dates of the offense were not particularly important – implied to the jury that they need not agree about specific factual bases for each of the counts of the counts.

In the circumstances, the court's omission to give a specific-unanimity instruction was obvious error. Juror confusion was palpable, and the court's instruction about dates could have only encouraged jurors to deliberate without making sure they were focusing on one discrete factual incident per charge.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of three counts of gross sexual assault, 17-A M.R.S. § 253(1)(C) (Counts I-III) (Class A); and seven counts of unlawful sexual contact, 17-A M.R.S. § 255-A(1)(E-1) (Counts IV-X) (Class B). Thereafter, the Penobscot County Unified Criminal Docket (Roberts, J.) sentenced defendant to twenty-five years' prison followed by fifteen years' supervised release. Leave to present an M.R. App. P. 20 appeal was denied by order dated April 22, 2024.

I. The State's case

The day before trial, the State moved *in limine* to admit Mallorie's Children's Advocacy Center ("CAC") video pursuant to newly effective 16 M.R.S. § 358 (A6). As it turns out, the vast majority of the evidence supporting the elements of the offenses was introduced at trial through the CAC video. In comparison, Mallorie's trial testimony about the sexual incidents was rather minimal.

A. The CAC video

Mallorie first told the interviewer that, when she was seven years old, defendant "forced" her to remove her clothes. (SX 1, Clip 1 ca. 0:15 to 0:30). Defendant touched the girl's body-parts; he made her touch his, including once licking his penis. (*Id.* ca. 0:30 to 1:12; SX 1, Clip 3 ca. 3:05 to 3:30). At one point, defendant licked Mallorie's private part. (SX 1, clip 1 ca. 1:15 to 1:30). Defendant "tried" touching Mallorie with his penis and rubbing it against her privates. (*Id.* ca. 8:25 to 8:45, 9:55 to 10:20). Mallorie reported that defendant did this "a bunch," nearly every time she went to stay with him, which occurred most weekends. (*Id.* ca. 11:00 to 11:12).

One time, when she was seven or eight, Mallorie recalls being dropped off at defendant's apartment and defendant began to touch her chest. (*Id.* ca. 2:20 to 2:50). Mallorie believes this occurred in either 2020 or 2021, when the weather was snowy – perhaps in March or February. (*Id.* ca. 3:30 to 3:55).

Mallorie also reported that defendant showed her how to rub his penis and had Mallorie do so with her hand. (SX 1, Clip 2 ca. 1:10 to 1:55). She recalled that his penis felt "wet and slimy." (*Id.* ca. 1:55 to 2:00).

Later in the interview, Mallorie recalled that "when it first happened," she was six and a half. (SX 1, Clip 3 ca. 0:25 to 0:30). "It happened a lot more when I was seven years old," she clarified. (SX 1, Clip 3 ca. 0:30 to 0:33). She stopped going to defendant's apartment by the time she was eight. (*Id.* ca. 0:33 to 0:40). She told the interviewer, "[I]t stopped when I was eight." (*Id.* ca. 1:13 to 1:18). These incidents did not take place every time Mallorie stayed with defendant. (*Id.* ca. 5:44 to 6:10).

During the final few minutes of those portions of the interview played for the jury, Mallorie alleged that she licked defendant's penis eight times. (*Id.* ca. 5:20 to 5:30).

B. Mallorie's trial testimony

Asked by counsel how often "it" happened, Mallorie testified, "I said it happened a lot of times." (1Tr. 111). However, according to Mallorie, "I never once said number eight." (1Tr. 111).

Mallorie testified that after the incidents at defendant's apartment, there occurred a time in Mallorie's home when defendant sat on her and began "touching" her "down there." (1Tr. 72-73).

Mallorie delayed telling her mother all of this; however, she did tell her twelve-year-old (as of trial) aunt and her thirteen-year-old stepsister. (1Tr. 73-74, 111-12). She was nervous and worried that nobody would believe her. (1Tr. 110).

II. Legal issues

The jury had one note for the court, asking "what are the date ranges for each count and what ages was she for each count?" (2Tr. 239). Without objection, the court reinstructed:

> The indictment charges the crime was committed on or between specific date [sic]. However, the specific date of the crime need not be proven. It is enough that the State proves beyond a reasonable doubt that the crime charged was committed, that it happened sometime within the dates suggested by the evidence of this case. The question of whether the crime was committed, not when it happened, must be the principle [sic] focus of your inquiry.
>
> However, you may consider any evidence of uncertainty as to the date of the alleged crime in deciding whether the offense is proven beyond a reasonable doubt, in judging whether to believe witnesses and their ability to recall events, and in determining whether the defendant or others may have had opportunity to commit the crime alleged.

(2Tr. 242-43). Three or four minutes after receiving the reinstruction, the jury returned its verdict. (2Tr. 243-44).

Issue Presented for Review

I. Did the trial court commit obvious error by neglecting to give a specific-unanimity jury instruction?

Argument

I. The trial court committed obvious error by neglecting to give a specific-unanimity jury instruction.

A prosecutor whose case consists of vague, generalized allegations has a much easier job of it when jurors are not instructed that, for each count, they must unanimously agree on a specific instance of conduct. Without such

an instruction – indeed, when jurors are told that dates do *not* matter – the State's burden is effectively reduced. Instead of needing to convince twelve jurors of particular conduct underlying each count – *i.e.*, ten discrete events, in our case – a prosecutor may obtain convictions upon unspecific, patchwork evidence.

To guard against this practice, a specific-unanimity instruction requires jurors to ensure that, for each count, they must deliberate about one particular act. This Court has, with great frequency in recent years, opined on the need for a specific-unanimity instruction in cases like ours. Prejudice is apparent in our case, where jurors asked for more specificity in regards to dates, a clear indication that they were not able to deliberate about discrete incidents. *See, e.g., State v. Russell*, 2023 ME 64, ¶¶ 25-32, 303 A.3d 640. Upholding convictions in this situation would water down the requirement of proof beyond a reasonable doubt.

A. Preservation and standard of review

This issue is unpreserved. Therefore, this Court's review is for obvious error. *State v. Rosario*, 2022 ME 46, ¶ 29, 280 A.3d 199. Obvious error is error that is plain, affects substantial rights, and seriously affects the fairness and integrity of judicial proceedings. *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147.

B. Analysis

"[T]he State is not required to present specific evidence of separate and discrete incidents of abuse for the jury to convict a defendant of every charged offense, **so long as the jury is properly instructed on specific**

unanimity... ." *State v. Reynolds*, 2018 ME 124, ¶ 23, 193 A.3d 168 (emphasis added). To avoid a due process violation, "when separate but similar incidents 'are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred.'" *Id.* ¶ 15 (quoting *State v. Fortune*, 2011 ME 125, ¶ 31, 34 A.3d 1115). That did not happen here.

"A specific unanimity instruction explains to jurors that they are required to unanimously agree that a single incident of the alleged crime occurred that supports a finding of guilt on a given count. Thus, if the State alleges multiple instances of the charged offense, any one of which is independently sufficient for a guilty verdict as to that charge, specific unanimity instructions are proper." *State v. Osborn*, 2023 ME 19, ¶ 34, 290 A.3d 558 (quotation marks and internal citation omitted). Here, as outlined above in the Statement of the Case, jurors struggled to find some basis to distinguish one count from the rest, prompting their request for more particularity about dates. Once instructed that dates were not important – a pretty clear indication, under the circumstances, that specificity wasn't important – jurors deliberated for barely three more minutes before returning verdicts. *Cf. United States v. Damra*, 621 F.3d 474, 505 (6th Cir. 2010) ("The touchstone has been the presence of a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts.") (internal quotation marks omitted).

What's more, based on the generic evidence at trial, it is doubly difficult to imagine that jurors experienced a meeting of the minds when deliberating. Mallorie testified that "a bunch" of times, defendant rubbed his penis on her genitals. (SX 1, clip 1 ca. 11:00 to 11:12). Though she claimed, in the CAC interview, that she licked defendant's penis eight times, (SX 1, Clip 3 ca. 5:20 to 5:30), she denied that total on the stand: "I never once said number eight." (1Tr. 111). Under normal conditions – *i.e.*, *with* a specific-unanimity instruction – such generic evidence would have been a reason to doubt the allegations against defendant. Without the needed instruction, however, jurors were not required to reckon with the lack of concrete details.

Nor did the prosecution elect which count referred to which allegation. (*See*, *generally*, 2Tr. 186-201, 211-14) (State's closing argument). In other words, it left jurors to their own devices, a factor that compounds the prejudice mentioned thus far. *Cf. State v. Garcia-Lorenzo*, 517 P.3d 424, 433-34 (Utah Ct. App. 2022).

Defendants facing allegations of sexual abuse are confronted with the difficult task of disproving those allegations. Doing so is particularly difficult when the State does not offer more than vague, generic complaints that are untethered to time and place. Perhaps the last line of defense for defendants in such a tough spot is the specific-unanimity instruction's admonition to consider one incident per each charge. When jurors are not given much if anything to differentiate one "incident" from another "incident," it is natural that they might harbor doubts about the charges. The opposite it also true: Without a specific-unanimity instruction – particularly when the jury sought

something to distinguish each count from the others – jurors were unlikely to have unanimously agreed on the basis for each count.

Conclusion

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

Respectfully submitted,

June 15, 2024

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Certificate of Service

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
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CERTIFICATE OF SIGNATURE

Scott Havens

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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