STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. Pen-24-37

STATE OF MAINE

APPELLEE

v.

SCOTT HAVENS

APPELLANT

ON APPEAL FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL DOCKET, BANGOR, ME

APPELLEE'S BRIEF

R. Christopher Almy
District Attorney

Chelsea R. Lynds
Assistant District Attorney
Bar No. 6149

Prosecutorial District V
97 Hammond Street
Bangor, ME 04401
(207) 942-8552
chelsea.lynds@maineprosecutors.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE FACTS 5

STATEMENT OF THE ISSUES 9

I. A specific unanimity instruction is only required upon request.

ARGUMENT 9

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

State v. Pabon, 2011 ME 100, 28 A.3d 1147 9

State v. Russell, 2023 ME 64, 303 A.3d 640 10

State v. Miller, 2018 ME 112, 191 A.3d 356 10

People v. Jones, 51 Cal. 3d 294, 792 P.2d 643 (1990) 11-12

Comm. v. Kirkpatrick, 668 N.E.2d 790 (1996) 12

State v. Logan, 2014 ME 92, 97 A.3d 121 12

State v. Hanscom, 2016 ME 184, 152 A.3d 632 12

State v. Fortune, 2011 ME 125, 34 A.3d 1115 12

Statutes

17-A M.R.S. § 253(1)(C) 4

17-A M.R.S. § 255-A(1)(E-1) 4

Rules

M.R. Crim. P. 30 9

STATEMENT OF THE FACTS

A. Procedural History

On May 24, 2023, Scott Havens (hereinafter "Havens") was indicted by the grand jury on three counts of gross sexual assault 17-A M.R.S. § 253(1)(C) and seven counts of unlawful sexual contact 17-A M.R.S. § 255-A(1)(E-1). (A.18-19.) Each count of the indictment alleged a date range that, as a whole, spanned a period of two years, with each count alleging a range of months. *Id.* On November 17, 2023, a jury trial (*Roberts, J.*) commenced. (I Tr. 1.) The jury found Havens guilty on all counts. (II Tr. 245 – 49.)

B. Facts Presented at Trial

The victim in this case was Havens' granddaughter, M.F. (I Tr. 64 – 65.) M.F. was ten years old at the time of the trial. *Id.* M.F. testified that after she disclosed to her mother something that her grandfather had done to her, the police became involved, and she eventually had a conversation with a lady named Wendy. (I Tr. 65.) This conversation was a child advocacy center interview which was admitted at trial as State's Exhibit 1. (hereinafter SX 1); (I Tr. 68.)

In the interview M.F. disclosed that Havens taught her about sex when she was seven years old. (SX 1, Clip 1, 0:00 – 1:43.) M.F. said that Havens forced her to take her clothes off, touched her "down here" and "up here" (gesturing to

her vagina and chest), showed her his private part and would try to lick her private part. *Id*. M.F. said that when Havens would try to lick her private part she would make excuses as to why he couldn't, but that eventually he ended up doing it anyway. *Id.* M.F. also said that Havens would rub his "pp" on her private part. (SX 1, Clip 1, 8:36 – 11:12.) M.F. also said that Havens would make her lick his penis. (SX 1, Clip 3, 3:10 – 5:16.) M.F. said that this happened "a bunch". M.F. said she hadn't told her mother because she was afraid she would not be believed and that she would get in trouble (SX 1, Clip 1, 0:00 – 1:43.) M.F. testified at trial that she told her mother when she did because Havens had moved in with M.F. and her family and had started to touch her again. (I Tr. 72.)

M.F. did describe some specific instances of conduct. For example, M.F. described specifically that Havens taught her how to "rub his pp" by first rubbing it himself, and then by putting his hands on M.F.'s hands and placing them on Havens' penis, making her rub it up and down. (SX 1, Clip 2, 1:30 – 1:58.) M.F. also described a time when her brother was three-and-a-half years old and Havens made her lay down on the bed while he was sitting up on his knees and put his "pp" against M.F.'s private part. (SX 1, Clip 1, 8:36 – 11:12.) M.F. said Havens' "pp" felt wet when he rubbed it on her. M.F. described an occasion in which Havens was laying down on the bed with his legs spread open

and that M.F. was on her knees and that Havens made M.F. lick his penis by telling her to do so. (SX 1, Clip 3, 3:10 – 5:16.)

On the point of when this happened, M.F. had a clearly defined window of when this conduct occurred. M.F. said that this conduct started when she was six-and-a-half years old and ended when she was eight years old (SX 1, Clip 3, 0:00 – 1:36.) M.F. knew this time frame because the conduct occurred during a time when her mother was a single mom and had nobody else to watch M.F. and her brother except Havens. *Id.* M.F. said that the conduct stopped when M.F. was eight years old because they moved in with M.F.'s mother's fiancé. *Id*. At trial, M.F.'s mother, J.H., testified that she and her kids had moved into their current residence three years prior. (1 Tr. 122.) J.H. testified that prior to that move she would drop M.F. and M.F.'s brother off at Havens' residence so that he could watch them, and that this occurred about every other weekend. (1 Tr. 122 – 23.) J.H. testified that after the move J.H. stopped dropping the kids off at Havens' residence. (1 Tr. 123- 24.)

M.F. was consistent between the interview and trial testimony that this type of conduct happened many times. In her interview M.F. said that she had licked Haven's pp "at least eight times". (SX 1, Clip 3, 3:10 – 6:05.) At trial defense counsel asked M.F. how she picked the number eight. (I Tr. 111.)

Defense counsel said to M.F. that M.F. had said “it” happened 8 times. *Id.* Defense counsel did not specify that he was referencing how many times M.F. had said she had to lick Mr. Haven’s penis specifically as opposed to all of the other conduct. *Id.* M.F. then insisted that she said “it” happened a lot of times and that she had never said the number eight. *Id*. It is worth noting that M.F. did not watch the recorded interview of herself and was not present in the courtroom while the interview was played. (I Tr. 66, 69.) M.F. was asked on direct examination how many times she had to touch Havens’ private part with her hands and M.F. said “a lot.” (1 Tr. 70.) In M.F.’s interview, when discussing Havens’ rubbing his pp on her private part, M.F. asked how many times Havens rubbed “it” on her, and M.F. said “a bunch.” (SX 1, Clip 1, 8:36 – 11:12.) M.F. said he would do it every time she went over and that she went there almost every weekend. *Id.* Later in the interview M.F. did elaborate that she had said she had to lick Havens’ pp eight times because that was not something she had to do every time and that there were times she didn’t have to do anything, like if her mom stayed as well or her brother got toys out. (SX 1, Clip 3, 5:16 – 6:05.)

The theory of the defense was that M.F. fabricated the allegations. (I Tr. 75–87, 107–20; II Tr. 151–73, 201–11.) Defense counsel weaved suggestions throughout the trial that M.F. didn’t like Havens because he was a disciplinarian

in her life and that fueled the accusations. *Id*. Defense counsel indicated that M.F. would have the sexual knowledge to make the accusations from conversations with friends, video games, music videos, etc. *Id*.

The jury sent out a note during deliberation which read: "what are the date ranges for each count and what ages was she for each count?" (II Tr. 239.) 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.
>
> (II Tr. 242 – 43.)

The issue of a specific unanimity instruction was never raised by defense counsel and the jury instructions and re-instruction were given without objection. (II Tr. 233-44.)

STATEMENT OF THE ISSUE

I. A specific unanimity instruction is only required upon request.

ARGUMENT

I. A specific unanimity instruction is only required upon request.

A. Havens waived his right to appeal the lack of a specific unanimity instruction in the jury instructions given at trial.

The Maine Rules of Criminal Procedure state that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." M.R. Crim. P. 30. "For an error or defect to be obvious . . . there must be (1) an error, (2) that is plain, and (3) that affects substantial rights." *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. "If these conditions are met, [the court] will exercise [its] discretion to notice an unpreserved error only if [it] also concludes that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *Id.*

The rule that objection to a jury instruction must be preserved is born out in precedent time and time again. Even in *State v. Russell,* which overturned multiple counts based upon a lack of specific unanimity instruction, this Court explicitly noted that the State had conceded the issue and indicated that this

Court may not have considered the issue had the State not conceded. *State v. Russell,* 2023 ME 64, ¶ 27, 303 A.3d 640. This Court said: "Ordinarily, Russell's failure to affirmatively request a specific unanimity instruction would cause us to consider whether he waived his assertion on appeal that the instruction was required." *Id*. In footnote 6 of *State v. Miller*, this Court said that by affirmatively approving the jury instructions Miller had waived any challenge on that basis. *State v. Miller*, 2018 ME 112, 191 A.3d 356, 359.

Should this Court consider this issue on the merits under the obvious error standard of review, it is important to consider context. In the instant case it was the strategy of the defense to attack the character and truthfulness of M.F. and suggest that the allegations were a fabrication. (I Tr. 75–87 and 107-20, I Tr. 151-73 and 201-11.) Defense counsel poked at M.F.'s lack of emotion in her interview, her delay in disclosure, a child's inability to keep secrets, the fact that M.F. didn't like Havens and M.F.'s exposure to adult content. *Id.* Defense counsel was asked if the jury instructions were satisfactory and affirmatively approved the instructions given and the re-instruction after the note sent out by the jury. (I Tr. 238-43.) Given this defense, one can conclude that a specific unanimity instruction would not have assisted in the defense strategy. One could argue that a specific unanimity instruction may presuppose to the jury

that the conduct alleged happened and their analysis should be whether the State appropriately alleged *when* it happened. One could conclude that it may not benefit Havens to have the jury focusing on whether there were ten separate instances over the course of the alleged time frame instead of whether or not the conduct happened *at all*. Given these uncertainties, it cannot be said that the court committed obvious error in failing to give the instruction.

B. Generalized testimony regarding an ongoing pattern of sexual abuse is both permissible and appropriate.

Common sense, as well as this Court, dictates that victims may have no practical way of distinguishing specific incidents or dates among a number of assaults over a substantial period of time. *State v. Reynolds,* 2018 ME 124, ¶ 21, 193 A.3d 168; *People v. Jones,* 51 Cal. 3d 294, 792 P.2d 643 (1990). This is especially true in the instant case, where the victim was only ten years old at the time of her disclosure and was six-and-a-half to eight years old at the time of the abuse. In *Reynolds* this Court quoted the Washington Court of Appeals observing that "[t]he more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places." *State v. Reynolds*, 2018 ME 124, ¶ 21, 193 A.3d 168. This is on point for the instant case, in which M.F. disclosed that this conduct happened regularly when being watched by her grandfather, (SX 1, Clip 3, 0:00 – 1:36), which M.F.'s mother

testified occurred every other weekend. (I Tr. 122–23.) In *Reynolds* this Court plainly rejected the notion that jury unanimity is unattainable where evidence of abuse is supported by generic testimony and in fact stated, “a jury will either believe that a consistent and repetitive pattern of abuse has occurred, of necessity encompassing a number of discrete acts, or they will disbelieve it.” *State v. Reynolds*, 2018 ME 124, ¶ 24, 193 A.3d 16; *citing Comm. v. Kirkpatrick*, 668 N.E.2d 790, 794; *see State v. Logan*, 2014 ME 92, ¶ 17, 97 A.3d 121. The *Reynolds* court held that even if a jury is not able to “readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.” *State v. Reynolds*, 2018 ME 124, ¶ 24, 193 A.3d 168; *citing People v. Jones,* 51 Cal. 3d 294, 792 P.2d 643, 658 (1990).

C. “Proper instruction” on specific unanimity is instruction upon request when specific unanimity is generated.

The *Reynolds* Court concluded that the State is not required to present specific evidence of separate and discrete incidents as long as the jury is properly instructed on specific unanimity. *State v. Reynolds*, 2018 ME 124, ¶ 23, 193 A.3d 168. When it required “proper instruction” on specific unanimity the *Reynolds* Court directed the reader to *State vs. Hanscom*. *Hanscom* states that “**[o]n request**, the jury should be instructed on [specific unanimity], if the

evidence offered in support of one charge includes more than one incident of the charged offense." *State v. Hanscom*, 2016 ME 184, ¶ 16, 152 A.3d 632; *citing State v. Fortune*, 2011 ME 125, ¶ 31, 34 A.3d 1115 (emphasis added).

CONCLUSION

Based upon the robust body of case law, rules of criminal procedure and counsel's theory at trial, a "properly instructed" jury as it relates to specific unanimity means the specific unanimity instruction is given upon request so long as it is generated. Here, a specific unanimity instruction would have been appropriate if requested, but defense counsel employed the "the state failed to prove this happened at all" approach, which in many ways runs counter to the specific unanimity instruction. There is no basis for a finding of obvious error based upon a judge failing to give a specific unanimity instruction sua sponte. In any event, Havens has waived his right to appeal this issue by approving of the jury instructions given at trial.

Date: 7/31/24

____
Chelsea Lynds, Esq.
Assistant District Attorney
Bar No.: 6149

CERTIFICATE OF SERVICE

I certify that I have this 31st of July, 2024, served a copy of this brief on Attorney Rory McNamara by email in accordance with PMO-SJC-3(F) and caused two copies of the State's brief to be mailed by U.S. mail, postage prepaid, to Rory McNamara, Counsel for the Appellant, at P.O. Box 143 York, ME 03909.

____

Chelsea Lynds, Esq.
Assistant District Attorney
Maine Bar No. 6149