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

LAW COURT DOCKET NO. Sag-24-362

STATE OF MAINE
Appellee

v.

KENNETH M. CHASE Jr.
Appellant

ON APPEAL from the Sagadahoc County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

Defendant makes two arguments on appeal, one related to trial and the other to sentencing:

(I) The court plainly erred by omitting to instruct the jury in the constitutional requirement that, per each count, they deliberate about the same discrete criminal incident. In the circumstances – *e.g.*, evocative testimony about assaults allegedly occurring when the complainant was in second grade or earlier; comparatively weak evidence about two of the ostensibly charged assaults; and jurors' initial inability to reach unanimous verdicts – this omission constitutes obvious error.

(II) The sentencing court double-counted the fact that defendant committed multiple offenses. This impropriety – indeed, arguably *illegality* – yielded an increased sentence that is disproportionate to defendant's conduct.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of three counts of gross sexual assault, 17-A M.R.S. § 253(2)(H) (Class B) (Counts I-III); three counts of domestic violence assault, 17-A M.R.S. § 207-A(1)(A) (Class D) (Counts IV-VI); and three counts of endangering the welfare of a child, 17-A M.R.S. § 554(1)(C) (Class D) (Counts VII-IX). Thereafter, the Sagadahoc County Unified Criminal Docket (Hjelm, A.R.J.) imposed an aggregate sentence of 27 years' prison, suspending all but 17 years of that term for the duration of three years' probation. This appeal – a direct appeal consolidated with an M.R. App. P. 20 appeal – follows.

I. The trial

As he does not press an argument that the State's evidence was legally insufficient, defendant discusses the State's case in a "balanced" and "objective" manner. *See United States v. Rodriguez*, 115 F.4th 24, 33 n. 1 (1st Cir. 2024) (internal quotation marks omitted) (such is appropriate when no sufficiency-of-the-evidence argument is raised).

A. The complainant alleged sexual abuse.

G[redacted] is defendant's daughter. (1Tr. 52). She was 18 at the time of trial (late May 2024), between 15 and 16 at the time of the assaults at issue. (1Tr. 51-52). At the time of those assaults, G[redacted] lived with defendant, defendant's fiancé, G[redacted]'s two sisters, and – for a time – G[redacted]'s cousin. (1Tr. 53, 57).

Without objection or limiting instruction, G[redacted] told the jury that she was sexually assaulted by defendant more times than "[she] can count." (1Tr. 68-70). The earliest assault she remembers occurred when she was in second grade, having sex at a residence in Brunswick. (1Tr. 68-69). Perhaps, she testified, the abuse may have even begun when G[redacted] was in kindergarten. (1Tr. 137). Around that time, G[redacted] recalled a specific instance when she and defendant had sex in a Hannaford parking lot, defendant telling her afterwards to check her underwear for blood. (1Tr. 69-70). "It hurt," she told the jury. (1Tr. 69-70).

During these countless incidents, "It was pretty much the same each time." (1Tr. 81). G[redacted] would perform oral sex, then defendant would penetrate her vagina or anus. (1Tr. 81-82). Defendant generally ejaculated

in his daughter's mouth or on her buttocks. (1Tr. 81). G[redacted] cannot recall a time in her life when her relationship with her father was not sexual. (3Tr. 63).

The most recent, and final, occasion on which "this" happened was in late May 2022. (1Tr. 70-71). On that occasion, defendant text-messaged G[redacted] to come downstairs, according to her, to have sex. (1Tr. 72-73, 80). Defendant's fiancé and G[redacted]'s sister were asleep in nearby rooms. (1Tr. 82). Though G[redacted] did not identify the particular sexual activities they engaged in on this occasion, she both said, "we had sex," and agreed with the prosecutor's suggestion that she was sexually assaulted by defendant. (1Tr. 70, 86). She said they did so on the couch. (1Tr. 86).

In January 2022, defendant and G[redacted] had sex in defendant's work-truck on the side of a road at about 4 a.m. during a snowstorm. (1Tr. 93-94). Defendant attempted to insert a water-bottle into her vagina, and then they had sex doggy-style. (1Tr. 95-97).

Prior to that, defendant and G[redacted] had sex in late 2021, defendant placing his penis into her vagina. (1Tr. 88-90). Before doing so, defendant told G[redacted] to turn off a surveillance camera so that they wouldn't be recorded. (1Tr. 88-89). However, G[redacted] surreptitiously audio-recorded the encounter on her cellphone. (1Tr. 90). The State played the 14-minute-long clip for the jury. (1Tr. 105; SX 5). As this Court can hear for itself, the audio is less than crystal clear, even after a forensic analyst "remove[d] noise" from it. (1Tr. 238; SX 15). There was some question, at trial, whether G[redacted] might have fabricated or spliced together portions of the audio-file

to make it falsely appear incriminating, as G[redacted] was then using an audio-editing program at her high school. (*See*, *e.g.*, 1Tr. 48, 102; 2Tr. 16-17). A forensic analyst testified that, while there were three "splices" in the audio-file, (1Tr. 205-06), he believed that the recording was genuine, not the product of "monkey business." (1Tr. 194, 199, 208, 228).

The defense implied that G[redacted] had a motive to level false allegations against her father, especially after a heated argument in spring 2022. (1Tr. 139; 2Tr. 131-32). Defense counsel questioned whether G[redacted] learned from her cousin, who had herself been sexually assaulted as a teenager, how to level allegations as a way to get what she wanted. (1Tr. 144-45). Defendant's fiancé noted that G[redacted]'s testimony that defendant's penis "looks regular," (1Tr. 141-42), was inaccurate: Defendant has a "big" penis with two tattoos and other distinctive markings. (2Tr. 102-03). The defense presented testimony that, around the time G[redacted] claims to have audio-recorded a sexual encounter with defendant, defendant was shopping with his fiancé and the fiancé's friend. (2Tr. 148-49; 194-95). The fiancé also testified that G[redacted] never rode in defendant's work-truck but, instead, she (the fiancé) was in the truck on the night in question. (2Tr. 128-29). Indeed, a foreman for the town public works department testified that, during a snowstorm in January 2022, he had to pull defendant's truck out of a snowbank, and the fiancé was with defendant at the time. (2Tr. 222-23).

B. The court did not give a specific-unanimity instruction.

The court instructed the jury in the necessity of general unanimity. (3Tr. 103). However, it omitted to instruct the jury about the need for specific unanimity. (*See, generally,* A52-A67).

Defendant acknowledges that the court, in its instructions, informed the jurors which counts corresponded to which dates. (3Tr. 93, 94, 97). However, the court also instructed jurors,

> The specific[] date of a crime need not be proven. It is [] enough if the [S]tate proves beyond a reasonable doubt that the crime charged was committed and that it happened sometime within the dates suggested by the evidence in the case. So the question of whether the crime was committed and not when it happened must be the principal focus of your inquiry.

(A58-A59; 3Tr. 99-100). Neither party lodged any objection to the court's instructions. (A52-A53, A60; 3Tr. 75-76, 104).

After jurors reported they were unable to reach a consensus on all counts, the court instructed them to continue deliberating. (A61-A62; 3Tr. 169-75). About an hour and a half later, the jury returned its verdicts. (3Tr. 175-78).

II. Sentencing

The court began by announcing that it would impose three sets of sentences consecutive to each other:

> [I]n my view, the three sets of sentences that will result from consideration of the three sets of charges will be consecutive to each other. And I'm relying on the provisions of Section 1608 of the criminal code, and the Court is authorized to impose consecutive sentences – and I'm looking specifically at subsection 1, subsection D – when the seriousness of the criminal conduct involved in – in multiple criminal episodes

> requires a sentence of imprisonment in excess of the maximum available for the most serious offense.

(A26; 2STr. 70).

Turning to the basic sentence for the set of counts including Count I, the court found that it was "something close to the maximum." (A32-A34; 2STr. 76-78). After weighing aggravating and mitigating circumstances, the court set the maximum sentence for the first set of convictions at eight years' prison. (A36; 2STr. 80).

The court turned to the second set of convictions, which includes Count II as the lead count:

> The aggravating and mitigating factors, in turning to the second stage of Count – of the sentencing in Count II are the same, and I take all that into account.
>
> But there's one difference. And there's – the difference is that on Count II, as established by the jury's verdict, [defendant] had previously committed one act of gross sexual assault against G[redacted]. And so I take into account the fact that this was a repeat of what had happened before. And so there's not a single, isolated incident when we get to Count II. There's at least one prior act of gross sexual assault that [defendant] had inflicted on G[redacted].

(A38; 2STr. 82). Because of that prior "proven event," the court increased the sentence on the second set by a year, choosing a maximum sentence of 9 years' prison. (A39; 2STr. 83).

For the third set of convictions, of which Count III was the lead count, the court followed similar logic:

> [N]ow the difference is that with respect to Count III, there has been a – it's been established that Mr. Chase sexually assaulted G[redacted] at least twice previously. Once as reflected in Count I, the other as reflected in Count II. So again, the aggravating factors take on greater weight because of those prior acts. And

> so in the end, in my view, the maximum period of incarceration on Count III is the maximum, which would be ten years.

(A40; 2STr. 84).

At Step Three of the sentencing process, the court then suspended ten years of prison for the duration of three years' probation. (A41-A42; 2STr. 85-86).

Presented with a claim that the court improperly double-counted the fact that defendant committed multiple offenses, the Sentence Review Panel authorized an M.R. App. P. 20 appeal to the full Court. *Order Granting Leave to Appeal Sentence*, SRP-24-363 (Nov. 13, 2024).

ISSUES PRESENTED FOR REVIEW

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

II. Did the sentencing court improperly double-count the fact that defendant committed multiple gross sexual assaults?

ARGUMENT

First Assignment of Error

I. The court committed obvious error by omitting to give a specific-unanimity instruction.

Given the circumstances of this case, the court's omission to instruct jurors that they must ensure that, per each count, they unanimously agree about the same discrete incident constitutes obvious error.

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

Defendant hews closely to the obvious-error rubric:

1. The omission was error.

"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). As outlined in the **STATEMENT OF THE CASE**, G[redacted] testified that there were more instances of sexual abuse than she could count. They began when G[redacted] was in

second grade – perhaps even kindergarten – and they ended when she was 16. She cannot recall a time when her relationship with defendant was not marred by sexual abuse.

While the State may have been focused on three particular incidents, that is not dispositive. Rather, a specific-unanimity instruction is needed when the evidence suggests multiple incidents could support any one charge. *Hodgdon v. State*, 2021 ME 22, ¶ 14 n. 5, 249 A.3d 132 (need for specific-unanimity instruction depends on all the evidence, "not just the evidence on which the State or the defendant seemed most focused").

2. The need for such an instruction was plain.

With frequency in recent years, this Court has rightly held that it is plain error for a court to omit a specific-unanimity instruction when one is needed. *E.g., State v. Russell*, 2023 ME 64, ¶¶ 31-32, 303 A.3d 640; *see also State v. Villacci*, 2018 ME 80, ¶ 1 n. 1, 187 A.3d 576 (noting "obvious need" for specific-unanimity instruction). Such case-law indicates that the omission is plain. *Cf. United States v. Bowyer*, 117 F.4th 950, 953 (7th Cir. 2024) (case-law relevant to whether error is plain/obvious). The fact that specific unanimity is a constitutional right underscores the plainness of the error. *See State v. Hanscom*, 2016 ME 54, ¶ 16, 152 A.3d 632; ME. CONST. Art. I, § 7.

3. The omission affected substantial rights.

Defendant makes two arguments about the third prong.

First, there is a reasonable probability that the omitted instruction affected the outcome. In our case, the jury was initially deadlocked, unable

to reach a unanimous verdict on some or all of the counts. That means that the evidence was not overwhelming; there were doubts. Recall that each of the three gross sexual assaults yielded consecutive sentences; as a corollary, an acquittal on any one of those counts would have yielded a markedly different sentence.[1] And, in comparison to the evocative testimony about sex with her father when she was in second grade and in the Hannaford parking lot, there was relatively scant evidence about the assaults that were alleged to have occurred in January and May 2022. Some jurors might have been deliberating about those early incidents rather than those in 2022. This is especially true in light of the common but confounding jury instruction, given in this case, that dates essentially do not matter.

Second, with all due respect, Maine trial courts and attorneys are not heeding this Court's guidance about specific-unanimity instructions. In this case, as a prophylactic against future like omissions, this Court should reverse regardless of a demonstration of injury to substantial rights, sending a message to the bench and bar: *Give a specific-unanimity instruction as a matter of course*. *See State v. White*, 2022 ME 54, ¶ 35, 285 A.3d 262 ("[W]e are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to

[1] Defendant's point is that, regardless of the strength of the State's evidence about the ostensibly audio-recorded incident (*i.e.*, what the Court deemed to be Count I), the two other GSA-convictions (*i.e.*, Counts II and III) were far less supported in evidence. And because the sentences for those two counts were imposed consecutively to one another, any instructional error affecting those counts would be impactful, notwithstanding the conviction on Count I.

preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated.").

4. Vacatur is appropriate to uphold the fairness and integrity of the justice system.

Imagine a holding from this Court that, even though the other prongs of the obvious-error test are satisfied, it will not vacate. Observers would take from such a holding that, even when the violation of a constitutional right (*i.e.*, to specific unanimity) affects substantial rights, this Court might refrain from doing anything about it. Such a hypothetical refusal to enforce constitutional rights, as this Court no doubt recognizes, would only lead to their erosion in future cases. To avoid that specter, this Court should vacate and remand for further proceedings.

Second Assignment of Error

I. The sentencing court improperly double-counted the fact that defendant committed multiple gross sexual assaults.

How many times should a sentencing court count the fact that a defendant committed more than one offense? Doesn't repeatedly counting such multiplicity overstate the nature of the offense? Doesn't double-counting yield disproportionate sentences? Via this case, the Court has the opportunity to answer these questions, and it should do so by reversing.

A. Standard of review

This Court reviews a double-counting claim de novo. *State v. Plummer*, 2020 ME 143, ¶ 11, 243 A.3d 1184. Importantly, in this M.R. App. P. 20 sentencing appeal, the Court is to consider the *propriety* of the sentence and the manner in which it was imposed. 15 M.R.S. § 2155.

B. Analysis

Defendant arranges his analysis in three parts: (1) demonstrating that the court did, in fact, double-count the multiplicity of the assaults; (2) discussing why that is improper; and (3) identifying the appropriate remedy.

1. The court double-counted the fact that defendant committed multiple assaults.

By statute, a sentencing court may run sentences for multiple convictions consecutively if:

> The seriousness of the criminal conduct involved in either a single criminal episode or in multiple criminal episodes or the seriousness of the criminal record of the individual, or both, require a sentence of imprisonment in excess of the maximum available for the most serious offense.

17-A M.R.S. § 1608(1)(D). The court explicitly did so in our case. (*See* A26-A27; 2STr. 70-71) ("I'm looking specifically at subsection 1, subsection [sic] D – when the seriousness of the criminal conduct involved in – in multiple criminal episodes requires a sentence of imprisonment in excess of the maximum available for the most serious offense."). While § 1608(1)(D) does *also* refer to "a single criminal episode," the court's explanation of its rationale for imposing consecutive sentences omitted that language, focusing instead on "multiple criminal episodes." (A26-A27; 2STr. 70-71). In short, the court's decision to impose consecutive sentences depended on the fact that defendant committed multiple assaults.

That was not the only time the court considered the fact that defendant committed multiple offenses. The second time occurred at Step Two, *i.e.*, setting the maximum sentence. *See* 17-A M.R.S. § 1602(1)(B). Here, in addition to the eight-year basic-sentence for each of the three GSA-counts: "there's one difference," according to the court. (A38; 2STr. 82). For Count II, that difference was that defendant "had previously committed one act of gross sexual assault…" – a difference that resulted in a year longer maximum sentence (*i.e.*, nine years). (A38-A39; 2STr. 82-83). And, for Count III, "the difference is that" defendant had sexually assaulted the victim "at least twice previously" – cause, the court concluded, for a two-year increase in the maximum sentence (*i.e.*, ten years). (A40; 2STr. 84). This double-counting increased defendant's maximum sentence from 24 years' prison to 27 years' prison, and his final sentence from 16 years' prison to 17 years' prison.

2. The double-counting of the fact that defendant committed multiple assaults is improper.

Step Two – *i.e.*, weighing aggravating and mitigating factors – is limited to consideration of "all *other* factors." 17-A M.R.S. § 1602(1)(B) (emphasis added). "Other" excludes repeat consideration of the "seriousness" of a defendant's conduct. 17-A M.R.S. § 1602(1)(A). Yet, the statutory basis chosen by the court to impose consecutive sentences is itself premised on the "seriousness" of defendant's conduct. 17-A M.R.S. § 1608(1)(D) ("seriousness of the criminal conduct"). Certainly, there is no clear statutory authority to double-count; if anything, the legislature's prohibition on twice considering "seriousness" suggests that it does not authorize courts to do so in any form. All of this is to say, there is a good case to make that it is flat out *unlawful* for the court to double-count as it did. *Cf. State v. Murray-Burns*, 2023 ME 21, ¶ 16, 290 A.3d 542 (sentence appeal process "'is broad enough to include claims of facial illegality'"), quoting *State v. Tellier*, 580 A.2d 1333, 1333 n. 1 (Me. 1990).

That is more than defendant need show; in this sentencing appeal, the question, rather, is whether the court's double-counting is *proper*. 15 M.R.S. § 2155(1). It is not proper. Double-counting inflates the "nature of the offense." *See ibid.* It undermines fairness and the reduction of unwarranted inequalities. *See* 15 M.R.S. §§ 2154(1), (3); 17-A M.R.S. §§ 1501(5), (6). It certainly undermines the legislature's goal of minimizing "correctional experiences." 17-A M.R.S. § 1501(3).

In the 1980s, the Supreme Court of New Jersey published a seminal decision synthesizing national guidance about in which circumstances courts might properly impose consecutive sentences. *State v. Yarbough*, 498 A.2d 1239 (N.J. 1985). Among the handful of principles it announced, the New Jersey court declared, "there should be no double counting of aggravating factors." *Id.* at 1248. In an illustrative case, a sentencing court imposed sentences consecutively based on a statutory provision (*i.e.*, multiple victims); it then further enhanced the defendant's sentence because the offense involved more than one victim. *State v. Davis*, 2017 Minn. App. Unpub. LEXIS 594 * 12, 2017 WL 3013214 * 4 (Minn. App. 2017). The appellate court reversed, noting that same fact – "the existence of multiple victims" – had been utilized twice, thereby unfairly exaggerating the seriousness of defendant's conduct. *Ibid.*

The double-counting in our case twice punishes the same blameworthy feature of defendant's convictions: the fact that he committed more than one assault. In this way, double-counting renders a sentence disproportionate to defendant's conduct.

3. The remedy is remand for imposition of a lesser sentence.

This Court has statutory authority to remand for resentencing "provided that the sentence [imposed at resentencing] is not more severe than the sentence appealed." 15 M.R.S. § 2156. It should instruct the lower court to excise from its sentencing calculus the double-counting, either as a

factor justifying consecutive sentences or as an aggravating factor – at the court's discretion.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction and remand for further proceedings not inconsistent with its mandate, or, in the alternative, remand for resentencing.

Respectfully submitted,

January 17, 2025

/s/ Rory A. McNamara

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CERTIFICATE OF SERVICE

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara